SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 22, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

13994 The People of the State of New York, Respondent, Ind. 2513/09

-against-

Daniel Phillips,
Defendant-Appellant.

_____

Stanley Neustadter, Cardozo Appeals Clinic, New York (Joshua S. Moskovitz of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 31, 2012, convicting defendant, after a jury trial, of arson in the second degree, criminal mischief in the second degree and reckless endangerment in the second degree, and sentencing him to an aggregate term of 10 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence for the arson conviction to a term of 7 years, resulting in a new aggregate term of 7 years, and otherwise affirmed.

The verdict was not against the weight of the evidence (*see*

People v Danielson, 9 NY3d 342, 348 [2007]). The circumstantial evidence, including a videotape of defendant's actions at the time of the fire and evidence of his motive, supported the conclusion that he set the fire.

Defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). The record establishes that counsel advised defendant against testifying, but also advised him that the ultimate decision to testify was a decision to be made by defendant personally (*see People v Perry*, 266 AD2d 151, 152 [1st Dept 1999], *lv denied* 95 NY2d 856 [2000]).

We find the sentence excessive to the extent indicated.

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

ENTERED: JANUARY 22, 2015

CLERK

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

13996 Cheikh Seck, Index 17611/07
Plaintiff-Appellant,

-against-

Steven Serrano, et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Gallagher, Walker, Bianco & Plastaras, Mineola (Michael R. Walker of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about July 8, 2013, which, upon effectively granting renewal/reargument, adhered to its prior order granting defendants' cross motion to dismiss the complaint and denying plaintiff's motion to restore the matter to the trial calendar, unanimously reversed, on the law, the facts, and in the interest of justice, without costs, the complaint reinstated, and the matter restored to the trial calendar.

In exercising our interest of justice jurisdiction, we find that plaintiff was in substantial compliance with the court's September 2012 discovery order (*see Commerce & Indus. Ins. Co. v Lib-Com, Ltd.*, 266 AD2d 142, 145 [1st Dept 1999]). The majority of the authorizations identified in that order were provided to defendants on October 5, 2012, i.e., within eight days of the

court's order, and only two authorizations were untimely, but had been provided to defendants within less than one week after the 20-day court imposed deadline for such discovery (*see Carlos v 395 E. 151st St., LLC*, 41 AD3d 193 [1st Dept 2007]).

We note that the order was not a conditional, "self-executing" order, which required discovery to be complied with by a specific date, that becomes "absolute" on the specified date if the condition has not been met (*see Wilson v Galacia Contr. & Restoration Corp.*, 10 NY3d 827, 830 [2008]). Rather, defendants were authorized to renew their application for dismissal if plaintiff failed to comply with the discovery demands by the 20-day deadline. Defendants did not so move, and months later, when they finally did, they were already in receipt of all discovery demanded pursuant to the order.

We have considered the remaining contentions and find them unavailing.

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

ENTERED: JANUARY 22, 2015

CLERK

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

13997 The People of the State of New York, Respondent, Ind. 1787/10

-against-

Angel Bonano, Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Laura Boyd of counsel) for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered May 12, 2011, convicting defendant, upon his plea of guilty, of two counts of auto stripping in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 1½ to 3 years, unanimously affirmed.

After sufficient inquiry, the court properly found that defendant had violated his plea agreement and had thus forfeited the opportunity for a more lenient disposition (*see People v Fiammegta*, 14 NY3d 90, 98 [2010]). Before imposing the promised sentence, the court reviewed the latest drug treatment program's report and heard defendant's version of the events. It was undisputed that defendant had absconded from one drug treatment program and had been discharged by another program as a result of his confrontational behavior and refusal to follow

staff instructions. Under the circumstances, there was no need for a hearing or a further inquiry into defendant's claims regarding his claimed excuses for his belligerent behavior at the latter program (*see People v Valencia*, 3 NY3d 714 [2004]; *People v Redwood*, 41 AD3d 275 [1st Dept 2007], *lv denied* 9 NY3d 880 [2007]).

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

ENTERED: JANUARY 22, 2015

CLERK

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

13998 The People of the State of New York, Respondent, Ind. 11410/88

-against-

Larry Johnson,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Robert M. Mandelbaum, J.), entered September 30, 2013, which denied defendant's Correction Law § 168-o(2) petition to modify his sex offender classification from level three to level one, unanimously affirmed, without costs.

The court providently exercised its discretion in denying any modification (*see People v McFarland*, 120 AD3d 1121 [1st Dept 2014]). Defendant cites his good behavior in the years since his release from prison on the underlying conviction, and the fact that he has reached his early 60s. However, these factors are outweighed by the extreme seriousness and nature of the underlying sex crime, described in detail in this Court's decision on defendant's appeal from that conviction (196 AD2d 449 [1st Dept 1993], *lv denied* 82 NY2d 850 [1993]), as well as the

other negative background factors that contributed to defendant's level three adjudication. Moreover, defendant's continuing, baseless refusal to accept responsibility is another factor weighing against any modification at this time.

We have considered and rejected defendant's procedural claims. Contrary to defendant's argument, the record reflects that in reaching its determination to deny the petition, the court considered all of defendant's submissions, in addition to the Board of Examiners' recommendation. Under the circumstances, there was no need to return the case to the Board for an updated recommendation.

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

ENTERED: JANUARY 22, 2015

CLERK

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

13999-
13999A-
13999B In re Charles Jahmel M., Jr., and Others,

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

Charles E. M.,
Respondent-Appellant,

Graham-Windham Services to Families
and Children,
Petitioner-Respondent.

_____

Carol L. Kahn, New York, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

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

_____

Orders, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about September 10, 2013, which, inter alia, upon findings of permanent neglect (November 26, 2012, same court, Rhoda Cohen, J.), terminated respondent father's parental rights to the subject children and committed the custody and guardianship of the children to petitioner agency and the Commissioner of Social 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 expended diligent efforts to strengthen the parental relationship between respondent and the three subject children. The agency scheduled regular visitation between the children and respondent, and provided respondent with drug referrals, referrals for domestic violence programs and parenting skills classes and conducted meetings and case conferences with respondent (*see Matter of Julian Raul S. [Oscar S.]*, 111 AD3d 456, 457 [1st Dept 2013]; *Matter of Jeovonni G. [Victoria V.]*, 101 AD3d 449, 450 [1st Dept 2012]). While respondent contends that the agency failed to offer him financial support, furniture allotments, housekeeping services, or assistance in establishing a public assistance budget, the record demonstrates that the Administration for Children's Services and respondent's shelter caseworkers attempted to work with him to help him secure permanent housing, a public assistance budget, and employment so that he could care for the subject children as well as the three children then in his custody.

However, the record demonstrates that respondent permanently neglected the children by failing for over a year after they entered foster care to plan for their return by securing steady employment or appropriate permanent housing before the petition was filed (*see* Social Services Law § 384-b[7]; *Matter of Aisha T.*, 55 AD3d 435, 436 [1st Dept 2008], *lv denied* 11 NY3d 716

[2009]). Moreover, respondent's failure to comply with random drug testing on a consistent basis, abide by an order of protection, complete a domestic violence program in a timely manner, and to visit the children regularly and in compliance with the established schedule supports the finding that he failed to plan for the children's future (*see Matter of Elijah Jose S. [Jose Angel S.]*, 79 AD3d 533, 533-534 [1st Dept 2010], *lv denied* 16 NY3d 708 [2011]).

A preponderance of the evidence shows that termination of respondent's parental rights was in the best interests of the children, who had been in foster care for approximately seven years and required permanency (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). A suspended judgment was not warranted under the circumstances, because there was no evidence that respondent had a realistic and feasible plan to provide an adequate and stable home for the subject children, two of whom

have special needs (*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: JANUARY 22, 2015

CLERK

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

14001 The People of the State of New York, Respondent, Ind. 1190/10

-against-

Eric Hood,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Elizabeth B. Emmons of counsel) for appellant.

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

_____

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about February 7, 2012, which adjudicated defendant a level two predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record, including defendant's admissions, supports the court's assessment of points under the risk factor for drug or alcohol abuse. In any event, regardless of whether the points at issue should have been assessed, defendant remains a level two

offender, and we find no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the guidelines.

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

ENTERED: JANUARY 22, 2015

CLERK

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

14002 The People of the State of New York, Ind. 3893/12
Respondent,

-against-

Twanda Deckard,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about March 4, 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: JANUARY 22, 2015

CLERK

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

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

14003 The People of the State of New York, Ind. 3778/12
Respondent,

-against-

Stevon Harris,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about January 30, 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: JANUARY 22, 2015

CLERK

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

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

14004 S Bros. Inc., Index 650328/13
Plaintiff-Appellant,

-against-

Leading Insurance Services, Inc.,
Defendant-Respondent.

_____

Allegaert Berger & Vogel LLP, New York (Robert E. Malchman of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Abraham E. Havkins of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 18, 2013, which granted defendant's motion to dismiss the complaint, pending a hearing on the reasonable amount of legal fees incurred by plaintiff during the period that the initial disclaimer was in effect, unanimously affirmed, with costs.

Plaintiff commenced this declaratory action approximately one month after asking defendant to reconsider its disclaimer of coverage in connection with the underlying action. Just over a month later, defendant rescinded its disclaimer of coverage and agreed to provide plaintiff with a defense in that action and to reimburse it for the reasonable legal fees it had already incurred therein.

We reject plaintiff's contention that defendant's initial

refusal to defend it was an act of bad faith. The record does not evince a "conscious campaign calculated to delay and avoid payment on [plaintiff's] claims" (*see Acquista v New York Life Ins. Co.*, 285 AD2d 73, 78 [1st Dept 2001]). Moreover, defendant had an arguable basis for disclaiming coverage (*see Dawn Frosted Meats v Insurance Co. of N. Am.*, 99 AD2d 448 [1st Dept 1984], *affd* 62 NY2d 895 [1984]). Although the plaintiff in the underlying action asserted a claim styled "breach of fiduciary duty and negligence," her factual allegations of the knowing release of private medical information to an unauthorized third party, could fall within the policy's exclusion for injury caused by the insured with the knowledge that the act would cause the injury.

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

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

ENTERED: JANUARY 22, 2015

CLERK

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

14006 The People of the State of New York, Respondent, Ind. 1780/02

-against-

Venus Harrison, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered July 11, 2007, convicting defendant, after a jury trial, of attempted robbery in the first degree, and sentencing her, as a second violent felony offender, to a term of nine years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]. There is no basis for disturbing the jury's credibility determinations. The jury had ample grounds on which to reject defendant's claim-of-right defense. The evidence supported the inference that defendant was well aware that the backpack at issue belonged to the victim and not defendant, and that defendant's assertions of ownership were the product of fabrication rather than good faith mistake.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the peremptory challenge in question were not pretextual. This finding is entitled to great deference (*see Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). The prosecutor provided a demeanor-related explanation, which the court accepted, and such a finding is entitled to particular deference (*see People v Hinds*, 93 AD3d 536, 536 [1st Dept 2012] *lv denied* 19 NY3d 974 [2012]). The court also accepted the prosecutor's explanation that the juror's background might render him sympathetic to the defense. That concern was not required to be related to the facts of the case (*see People v Hecker*, 15 NY3d 625, 656, 663-665 [2010]; *see also People v Mancini*, 219 AD2d 456, 457 [1st Dept 1995], *lv denied* 86 NY2d 844 [1995]), and we

do not find any disparate treatment by the prosecutor of similarly situated panelists. We find it unnecessary to reach any other *Batson*-related issues on this appeal.

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

ENTERED: JANUARY 22, 2015

CLERK

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

14007-
14008 Index 111424/11

One Ten West Fortieth Associates,
Plaintiff-Respondent,

-against-

Isabel Ardee, Inc., et al.,
Defendants-Appellants.

_____

Douglas L. Fromme, P.C., New York (Douglas L. Fromme of counsel), for appellants.

Thomas R. Kleinberger, PLLC, New York (Thomas R. Kleinberger of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 3, 2014, awarding plaintiff landlord the total sum of $46,437.23 against both defendants and further awarding plaintiff the total sum of $19,671.72 against defendant tenant Isabel Ardee, Inc., unanimously affirmed, without costs. Appeal from order (same court and Justice), entered February 24, 2014, which granted plaintiff's motion for summary judgment, and denied defendants' cross motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The parties' actions, which included tenant taking possession, landlord cashing the security deposit, and tenant making authorized renovations to the premises, all sufficiently

evidenced the parties' intent to convey an interest in the real estate sufficient to constitute "delivery" (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 511-512 [1979]). Given that the lease was valid, tenant was liable for the unpaid rent sought. Further, pursuant to the express terms of the guaranty, guarantor was liable for attorney's fees for this action.

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

ENTERED: JANUARY 22, 2015

CLERK

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

14011 The People of the State of New York, Respondent, Ind. 1548/09

-against-

Jeffery Acevedo, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about June 16, 2011, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 20 points under the risk factor for the victim's physical helplessness because contrary to defendant's contention, the victim unambiguously testified before the grand jury that she was asleep at the time of defendant's initial touching and she only woke up after he started fondling her breast (*see People v Sene*, 66 AD3d 427, 428 [1st Dept 2009], *lv denied* 13 NY3d 941 [2010]; *see also People v Teicher*, 52 NY2d 638, 646, 649 [1981]).

The court properly assessed 15 points under the risk factor

for drug abuse, based on defendant's extensive involvement with marijuana. Even without those points, defendant would remain a level two offender, given the court's uncontested assessment of 20 additional points not assessed under the risk assessment instrument.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Although defendant requested a departure, he did so on different grounds from those asserted on appeal. Accordingly, his present argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

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

ENTERED: JANUARY 22, 2015

CLERK

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

14012 The People of the State of New York, Ind. 5515/10
Respondent,

-against-

Tremaine Belton,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Adrienne M. Gantt of counsel) for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about May 23, 2012,

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

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

ENTERED: JANUARY 22, 2015

CLERK

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

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

14016	In re Washington Davis, et al.,	Index 106770/11
[M-5720]	Petitioners,	400538/12
		101625/13
	-against-	401249/13
		250516/14
	Hon. Julia L. Rodriguez, et al.,	250021/14
	Respondents.	

_____

Washington Davis, petitioner pro se.

Mageedah Akhtab, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Julia L. Rodriguez, Hon. Kathryn Freed and Hon. Joan M. Kenny, respondents.

_____

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

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

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

ENTERED: JANUARY 22, 2015

CLERK

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

14017 In re Washington Davis, Index 250675/14
[M-3934] Petitioner,

-against-

Hon. Kenneth L. Thompson, et al.,
Respondents.

_____

Washington Davis, petitioner pro se.

John W. McConnell, Office of Court Administration, New York (Shawn Kerby of counsel) and Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Kenneth L. Thompson and Frank Cupak, respondents.

_____

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

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

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

ENTERED: JANUARY 22, 2015

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13432 The People of the State of New York, Respondent, Ind. 1544/10

-against-

Daviel McCummings, Defendant-Appellant.

_____

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

Cyrus R. Vance Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered December 20, 2010, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 20 years, reversed, on the law, and the matter remanded for a new trial.

Defendant is entitled to a new trial because the court improperly denied his request for substitution of counsel without conducting any inquiry whatsoever, and without permitting defendant to explain, either orally or in writing, why such an inquiry might be necessary (*see People v Rodriguez*, 46 AD3d 396 [1st Dept 2007], *lv denied* 10 NY3d 844 [2008]). At the beginning of the fourth day of trial, defendant asked to speak to the

court. In denying his request, the court clearly assumed that he wanted to make a statement pertaining to his defense, even after defendant indicated that the subject matter was "my attorney and advice" and that the attorney was not "doing his proper work." Defendant then asked to hand up papers that defense counsel immediately identified as "a notice of motion for reassignment of counsel," but the court refused to look at the papers, and stated, "I will not reassign counsel. The motion is denied."

Contrary to the dissent's characterization, it is not exalting form over substance to expect the trial court to allow a defendant seeking to substitute counsel the opportunity to make specific factual allegations in support of his or her application. In *People v Sides* (75 NY2d 822 [1990]), for instance, the trial court was found to have erred in failing to ask "even a single question" about the nature of the disagreement after both the defendant and his counsel spoke of a breakdown in communications and trust (*id.* at 825; see also *People v Branham*, 59 AD3d 244 [1st Dept 2009]). Here, the court did not even learn the nature of the disagreement, let alone ask any questions about it. While not all requests for new counsel contain the specific factual allegations to show that the complaints and request are "serious," which then triggers the court's obligation to make a "minimal inquiry" into the nature of the disagreement and its

potential for resolution (*see People v Porto*, 16 NY3d 93, 100 [2010]), here defendant was not given an opportunity to make any allegations. This is not a situation where a defendant rested on unelaborated claims; the court expressly declined to listen to defendant or read his submissions (*see People v Sides*, 75 NY2d at 824; *cf. People v Nelson*, 7 NY3d 883, 884 [2006] [there was no abuse of the court's discretion in denying the application for substitution of counsel where the court initially rejected the application without inquiry, made just prior to jury selection, but "thereafter allowed defendant to voice his concerns about defense counsel" and heard defense counsel]).

The dissent's position is based on assumptions, rather than the actual record. First, the dissent assumes that defendant's application had no merit and was made solely as a "disruptive, dilatory tactic," because it was raised so late in the trial and directly followed the court's comment that defense counsel had had plenty of time to subpoena a particular surveillance tape, and could cross-examine the detective about its contents. Whether defendant's application was a dilatory tactic is unknowable from this record because the court failed to ascertain the basis for defendant's motion before denying it. Second, the dissent assumes that defendant's motion was based solely on the manner in which the trial had been conducted until then.

However, according to the record, defendant's initial request was based on "my attorney *and advice*" (emphasis added). A claim alleging incorrect or improper advice is a very different type of complaint from a claim based on an attorney's trial performance. The court could not have known about the specifics of the claim as to advice. We cannot know that the "advice" at issue pertained, as the dissent assumes, to defendant's testifying or any other defense strategy. Third, the dissent assumes that defendant's motion was nothing more substantive than a "preprinted form motion[]" such as is often prepared by defendants in advance for possible use (*see e.g. People v Porto,* 16 NY3d at 96). There is no evidence indicating what the motion papers consisted of, given that the court declined to accept them and they are not in the record. It is speculation to conclude that defendant's motion was pro forma. Even if he had used a printed form, we have no idea what defendant may have added to supplement the printed category of complaints. It would have taken, at most, a quick colloquy to discern whether defendant's application was "seemingly serious," based on its inclusion of "serious complaints" about his counsel (*see id.* at 99-100). The court, had it briefly engaged defendant and reviewed his papers, would then have had a basis on which to decide whether a minimal inquiry should be undertaken as to the nature of the disagreement

or its potential for resolution. Absent a properly developed record, we cannot be as sanguine as the dissent is in finding the application disingenuous (*see id.* at 100). Alternatively, given that the jury was ready to enter the courtroom, it would have been proper and justified for the court to indicate that the application had been made at an inopportune time and that it would consider defendant's papers at some other point in the day. We are mindful that had the court considered the application, only the most compelling circumstances would have justified granting it (*see People v Arroyave*, 49 NY2d 264, 271 [1980]). Nevertheless, we conclude that a new trial is unavoidable under the circumstances presented.

However, defendant has not established that he is entitled to suppression of his statements on the ground that they were the product of an unlawful arrest. The People had no burden to come forward with evidence supporting the arrest, because, notwithstanding the motion court's erroneous description of the hearing as a "*Dunaway/Huntley*" hearing, defendant only moved to suppress on voluntariness-related grounds and never litigated any Fourth Amendment issue regarding the statements (*see People v Wells*, 298 AD2d 142 [1st Dept 2002], *lv denied* 99 NY2d 586 [2003]). Defendant's argument that his counsel rendered ineffective assistance by failing to raise a Fourth Amendment

claim may not be addressed on direct appeal because it involves matters outside the record requiring a CPL 440.10 motion. In the alternative, to the extent the existing record permits review, we find that defendant has not shown that counsel's failure to litigate the legality of his arrest was objectively unreasonable, or that it caused him any prejudice under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

In light of the foregoing, we do not reach defendant's remaining contentions.

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

SAXE, J. (dissenting)

I would affirm the judgment convicting defendant of attempted murder in the second degree, assault in the first degree, and criminal possession of a weapon. In my view, the trial court acted properly in denying, without further inquiry, defendant's request to be assigned new counsel. The application was made on the fourth day of trial, the court was fully aware of the aspect of counsel's conduct with which defendant took issue, and that conduct did not warrant the assignment of new counsel. Under the circumstances, no inquiry of defendant was warranted before the application was denied.

At the beginning of the fourth day of trial, before the jury was brought in, defense counsel remarked that although in one of the DD5s he had been given less than a week earlier, a detective mentioned the existence of two surveillance camera DVDs, he, counsel, had only been given one tape. The court inquired of the prosecutor, who indicated that she had only been given one tape and that she had inquired of the detective, who said he had no knowledge of a second tape. The court then upbraided defense counsel for failing to subpoena the second tape, but said counsel could cross-examine the detective about such a tape. Immediately thereafter, defendant asked to speak, and when the court responded that he would have an opportunity if he wished to

testify, defendant clarified, "I'm not talking about testifying. It is about my attorney and advice," continuing, "It's about him doing his proper work." When the court said, "Sir, I will not discuss it with you at this time," defendant asked to hand up papers that counsel identified as a notice of motion for reassignment of counsel. The court stated, "I will not reassign counsel. The motion is denied," and the jury was called in.

The majority holds that the trial court had an obligation to make a "minimal inquiry" by accepting and perusing defendant's prepared motion papers, and that its failure to do so requires reversal. In my view, however, the court here had no reason to make such an inquiry, and its failure to accept and peruse the pro se motion papers was not reversible error.

In considering an application for new assigned counsel, the court is required to carefully evaluate "seemingly serious requests in order to ascertain whether there is indeed good cause for substitution" (*People v Sides*, 75 NY2d 822, 824 [1990]). However, when such a motion is made during trial, only the most compelling circumstances will justify granting it (*see People v Arroyave*, 49 NY2d 264, 271 [1980]). Importantly, not all requests for new counsel trigger a court's obligation to make a "minimal inquiry" of the defendant (*see People v Porto*, 16 NY3d 93, 100 [2010]).

Grounds for the assignment of a new attorney are established where there is a genuine conflict of interest or a complete breakdown in communication between defendant and the attorney (*see People v Sawyer*, 57 NY2d 12, 19 [1982], *cert denied* 459 US 1178 [1983]); indications that assigned counsel is lacking in the requisite "ability and integrity" will also warrant action by the court (*see People v Porto*, 16 NY3d at 100). When the court has little or no first-hand knowledge of the level of counsel's performance or the interplay between counsel and the defendant, it will likely be necessary to make some inquiry to determine whether grounds for the assignment of new counsel exist. For example, in *People v Sides* (75 NY2d at 822), the defendant was assigned counsel at his arraignment, appeared with counsel on the next court date, at which a plea offer was made, and the matter was adjourned for defendant's response. On the adjourn date, the defendant asked for the assignment of new counsel. The court, appropriately, heard from counsel regarding a breakdown in communication between himself and the defendant, but then "fail[ed] to ask even a single question about the nature of the disagreement or its potential for resolution" (*id.* at 825). It was due to the court's lack of first-hand information regarding the lawyer-client interactions, and the information provided by assigned counsel, that further inquiry by the court was

necessary.

Here, in contrast, the application was made on the fourth day of trial. The trial judge had more than ample first-hand knowledge of counsel's highly competent work and efforts, and there had been no indications of a conflict of interest or a breakdown in communications up to that point. The most likely basis for defendant's sudden pro se application for new counsel was the interchange that immediately preceded the application, which concerned the possibility that a second surveillance camera DVD existed that was not provided, but counsel's conduct in this respect did not provide grounds to replace him.

Given what it had already seen up to that point, the court had every reason to conclude that there was no valid basis for defendant's application beyond the court's own remark regarding counsel's failure to subpoena the referred-to second tape. Even accepting the court's position that defense counsel should have subpoenaed the second DVD, it was apparent that cross-examination of the detective could shed sufficient light on the existence and content of any second tape, so counsel's "failure" was very far from establishing ineffective assistance warranting replacement of counsel at that point.

While the majority emphasizes defendant's reference to "my attorney and advice" in his first interjection, suggesting that

the court had an obligation to ascertain the nature of defendant's presumed complaint that counsel gave incorrect or improper advice, it is hard to imagine the kind of "advice" that counsel might have given defendant at that point in time, on the fourth day of trial, that would have justified defendant's motion for new counsel. The advice that counsel would be giving defendant at that point in the case would relate to defendant's testifying or some other defense strategy. These are areas where differences of opinion between counsel and client often arise; however, their resolution does not involve replacing counsel.

By reversing based on the trial court's rejection of the pro se application without asking defendant to elaborate or reading through his papers, the majority is exalting form over substance. The timing of defendant's application, after days of damning testimony against him, had all the hallmarks of a disruptive, dilatory tactic, and there was no indication that the application was meritorious. Reversing defendant's conviction on this ground forces future trial courts to take part in a charade of seeming to peruse and consider meritless, often preprinted form motions that defendants prepare in advance for potential use should the opportunity arise (*see e.g. People v Porto*, 16 NY3d at 96).

Undoubtedly, it would have made this Court's task easier had the trial court simply engaged in that charade before denying the

motion; going through those motions would have eliminated the issue here. However, a trial court should not be required to put on such a show where, as here, the defendant's application is not a "seemingly serious request" warranting "minimal inquiry" as contemplated by *People v Sides* (75 NY2d at 822).

Moreover, it should be acknowledged that as a practical matter, a substitution of counsel at that point would have necessitated a mistrial. It is simply disingenuous to suggest that a short continuance would have sufficed for a new attorney to pick up the trial in midstream within a few days, and a delay of anything beyond a few days normally necessitates releasing the jurors and commencing the trial anew. Surely, so drastic a result was not appropriate or necessary here.

To be clear, I fully recognize the critical importance of ensuring and protecting a defendant's right to competent, conflict-free representation. I do not mean to imply that it should be taken lightly. Nevertheless, in the present case nothing happened during the course of the trial to indicate that counsel was anything other than highly competent and conflict-free.

In my view, on the particular facts presented here, there was no reversible error at trial. Since I agree with the majority that defendant's motion to suppress his statements was properly denied, his conviction should be affirmed.

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

ENTERED: JANUARY 22, 2015

CLERK

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

13492 Ruben Jimenez, Index 101739/12
Plaintiff-Appellant,

-against-

Metropolitan Transportation Authority, et al.,
Defendants-Respondents,

Midtown Trackage Ventures, LLC, et al.,
Defendants.

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Pollack, Pollack, Isaac & De Cicco, LLP, New York (Jillian Rosen of counsel), for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for respondents.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered July 2, 2013, which denied plaintiff's motion for summary judgment on the issue of liability on his Labor Law §§ 240(1) and 241(6) claims without prejudice to renew after discovery is completed, unanimously modified, on the law, to grant plaintiff's motion as to liability on his Labor Law § 240(1) claim, and otherwise affirmed, without costs.

Plaintiff testified at his 50-h hearing that while working as a driller in a shaft at the 50th Street ventilation facility for the Long Island Railroad extension construction project, a "rock anchor" weighing approximately 500 pounds, fell about ten feet off the four-foot ledge surrounding the perimeter of the

shaft and struck him. When he regained consciousness, he was on the ground, his hard hat was off and he saw a coil of rock anchor strand swinging from the ledge. A coworker stated in an affidavit submitted in support of plaintiff's motion that he saw the rock anchor hanging down in the area where plaintiff had been drilling, that the rock anchor was hanging from a ledge along the south wall, dangling from a rope, and that it fell approximately 7-8 feet from its position on the ledge before striking plaintiff. Moreover, the Injury Report Form, prepared by defendant MTA Capital Construction, stated that "[w]hile drilling . . ., [employee] was struck by a 'stranded anchor' length that was not secured properly. It was disturbed by a passing [employee]. A section of the anchor slipped off the south ledge, striking Mr. Jimenez' hard hat and knocking his hat and him to the ground." Under the "Investigation Information" section of the Form, the site safety company retained by defendants indicated that the "root cause" of plaintiff's accident was "IN proper [sic] staging of material and equipment."

Based on the testimony and affidavits submitted by plaintiff, and the incident reports exchanged by defendants during discovery, plaintiff, a protected worker engaged in a protected activity, namely demolition and excavation work, made out his prima facie case that he was struck by a falling object

that should have been secured, that this violation was a proximate cause of his injuries, and thus that he is entitled to summary judgment on liability as to his 240(1) claim (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]).

Defendants did not make a showing that the motion should be denied as premature or that any other facts essential to justify a denial of the motion might exist but required additional discovery (*see Aburto v City of New York*, 94 AD3d 640 [1st Dept 2012]). Nor have defendants pointed to any testimony which supports their conclusory claim that plaintiff's conduct was the "sole proximate cause" of his accident.

We thus need not address plaintiff's claims under Labor Law § 241(6).

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

ENTERED: JANUARY 22, 2015

CLERK

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

13684 In re Rockwood Pigments NA, Inc., Index 651617/14
Petitioner-Respondent,

-against-

Elementis Chromium LP,
Respondent-Appellant.

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Morgan, Lewis & Bockius LLP, New York (David A. Luttinger, Jr., of counsel), for appellant.

Trachtenberg Rodes & Friedberg LLP, New York (Barry J. Friedberg of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered August 15, 2014, which granted the petition for a preliminary injunction in aid of arbitration, unanimously modified, on the law, to remit the matter for fixing of an adequate undertaking, and otherwise affirmed, without costs.

Petitioner is a subsidiary of a large, multi-national company that makes and sells specialty chemicals and advanced materials. Respondent is a subsidiary of a large, multi-national company that makes various chemical products. On August 31, 2007, the parties entered into a distribution agreement whereby petitioner agreed to market and sell certain products manufactured by respondent.

Section 2.1 of the agreement appoints petitioner the exclusive distributor of the products, while section 2.4 directs

petitioner to "promote the sale and Use of the Products throughout the Territory in a commercially reasonable manner generally consistent with past practices of the Business." Section 2.5 provides that if, during any 12-month period after the 3-year anniversary of the agreement's effective date (August 31, 2007), petitioner purchases less than 4 million pounds of the product, then its appointment as the exclusive distributor "shall automatically (without any action required by either party) be converted to an appointment as a non-exclusive distributor."

Section 6.1 provides that the agreement will be in effect through at least the eighth anniversary of the effective date (August 31, 2015), and will be automatically renewed for successive 12-month terms unless either party gives written notice of termination to the other at least 12 months prior to the expiration of the initial term or any subsequent twelve-month renewal term. Section 6.2 provides that the agreement may be terminated as follows: by written agreement between the parties; by respondent if petitioner ceases to function as a business or takes advantage of any insolvency laws; or if either party materially breaches the agreement, where the other party provides

> "written notice of termination sent to the party in breach or default, not less than forty-five (45) days before such termination is to become effective, and such termination shall become effective on the date specified

> in said notice unless such breach or default, if capable of being cured or corrected, is cured or corrected within forty-five (45) days of the giving of such notice of termination."

Section 6.5 provides that by reason of the agreement's termination, expiration, or non-renewal, neither party "shall be liable to the other . . . for compensation, reimbursement or damages on account of the loss of prospective profits on anticipated sales or on account of expenditures, investments, leases or commitments in connection with the business or goodwill of [either party] or otherwise."

Section 15 provides that all disputes arising out of or relating to the agreement, or the breach thereof, shall be submitted to arbitration before the American Arbitration Association (AAA).

By notice dated May 31, 2014, respondent informed petitioner that it was terminating its distributorship because of petitioner's poor sales performance over an extended period, which evidenced a failure to use commercially reasonable means consistent with past business practices, in breach of section 2.4 of the agreement. Shortly thereafter, petitioner commenced this proceeding to enjoin respondent from terminating the agreement pending arbitration (CPLR 7502[c]).

Supreme Court properly granted the petition. Petitioner

showed a substantial likelihood of success on the merits of its claim of wrongful termination of the agreement (*see Four Times Sq. Assoc. v Cigna Invs.*, 306 AD2d 4 [1st Dept 2003]). Respondent purported to terminate the agreement on the ground of petitioner's alleged "failure to use commercially reasonable efforts generally consistent with past practices," resulting in "forecasting and sales performance that ha[d] not met expectations." In essence, respondent was dissatisfied because it was "losing customers and market share."

However, the distribution agreement provides that if annual sales of respondent's product fall below 4 million pounds, the agreement is automatically converted from an exclusive agreement to a non-exclusive agreement. It does not make decreased sales a basis for termination. Thus, when sales fell below the 4 million pound threshold in 2012, petitioner's distribution rights became non-exclusive. The decrease in sales was not a material breach warranting termination. To the extent respondent claims it terminated the agreement because of petitioner's practice of "bundling" its products rather than marketing them individually, we find this argument disingenuous, the real complaint being decreased sales and market share.

Moreover, the agreement requires respondent to provide 45 days' notice of termination and an opportunity to cure. However,

11 days after informing petitioner of its purported termination, respondent email "blasted" petitioner's customers, informing them that petitioner's distribution rights had been terminated and that new orders should be placed with a subsidiary of respondent's. To the extent respondent argues that any attempt to cure would have been futile, petitioner's correspondence after the termination suggested a partial cure. The testimony of respondent's commercial director, Francis Murphy, that petitioner could not remedy the problem with a price adjustment within 45 days, due to its internal operating procedure, does not avail respondent since Murphy was not qualified to render an opinion as to petitioner's ability to adjust its pricing.

Petitioner also showed that it would suffer irreparable injury in the absence of preliminary injunctive relief. The distribution agreement prohibits the recovery of damages for lost profits on anticipated sales and for lost business damages due to diminished goodwill. Thus, absent preliminary relief, petitioner's ability to be made whole after a wrongful termination would be seriously jeopardized. Further, respondent's email "blast" to respondent's customer base threatened petitioner's business operations and its creditworthiness (*see e.g. Bell & Co., P.C. v Rosen*, 114 AD3d 411 [1st Dept 2014]).

The balance of equities supports preliminary injunctive relief. Petitioner has only a month's supply of respondent's product in reserve; losing the product will cause its customers to seek other distributors, and maintaining the status quo pending arbitration (which petitioner seeks to expedite) will not cause significant harm to respondent.

Absent preliminary injunctive relief, an arbitration award in petitioner's favor would be ineffectual, since petitioner seeks specific performance of the parties' contract, and if respondent is allowed to terminate at this juncture, petitioner's customer base will be seriously disrupted. As Supreme Court observed, "[T]here will be nothing left for the arbitrators to resolve."

Inasmuch as petitioner should have been required to post an undertaking, the matter must be remitted to Supreme Court to fix the amount of the undertaking (CPLR 6312[b]*; see e.g. Karabatos v Hagopian*, 39 AD3d 930 [3d Dept 2007]).

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

ENTERED: JANUARY 22, 2015

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13769-
13770 The People of the State of New York, Respondent,

-against-

Anthony Lindsey,
Defendant-Appellant.

Ind. 6201/08
5968/09

_____

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

Anthony Lindsey, appellant pro se.

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

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered October 19, 2011, convicting defendant, after a jury trial, of burglary in the first degree, robbery in the first degree (two counts), robbery in the second degree (two counts), attempted robbery in the first degree, attempted robbery in the second degree (two counts), criminal possession of a weapon in the second degree (two counts) and assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 65 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences be served concurrently, resulting in a new aggregate term of 25 years, and otherwise affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's guilt was established through identification testimony, confessions and persuasive circumstantial evidence.

We have considered and rejected defendant's pro se claims.

We find the sentence excessive to the extent indicated.

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

ENTERED: JANUARY 22, 2015

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13799 Keybank National Association, et al., Plaintiffs-Appellants, Index 104125/10

-against-

National Union Fire Insurance Company of Pittsburgh, PA, Defendant-Respondent.

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Bleakley Platt & Schmidt, LLP, White Plains (Robert D. Meade of counsel), for appellants.

Torre, Lentz, Gamell, Gary & Rittmaster LLP, Jericho (Benjamin D. Lentz of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about July 10, 2013, which denied plaintiffs' motion for summary judgment, unanimously affirmed, without costs.

Plaintiff bank loaned a developer more than $20 million for a condominium project. The loan was secured by mortgage liens on the condominium units and two New Jersey properties, and personal guarantees.

As individual condominium units were sold, a percentage of the proceeds was to be used to pay down the loan and release the lien on those units. Plaintiff's employee permitted the liens on 20 units to be released without the paydown amounts, diverting more than $5 million to the developer, which the employee concealed by falsely representing to plaintiff that the units had

not closed. Plaintiff's "Suspicious Activity Report" states that the employee's actions were in contravention of its normal practices and the loan documents, and that plaintiff "presently ha[d] no evidence of financial benefit or gain to [the employee] by reason of his actions."

Plaintiff now seeks to recover its losses under the fidelity bond issued by defendant, which provided coverage for:

> "(A) Loss resulting directly from dishonest or fraudulent acts committed by an Employee acting alone or in collusion with others.
>
> Such dishonest or fraudulent acts must be committed by the Employee with the *manifest intent*:
>
> (a) to cause the Insured to sustain such loss; or
>
> (b) to obtain financial benefit for the Employee or another person or entity.
>
> "Notwithstanding the foregoing, however, it is agreed that *with regards to Loans* and/or Trading this bond covers only loss resulting directly from dishonest or fraudulent acts committed by an Employee with the intent to cause the Insured to sustain such loss and which results in a financial benefit for the Employee" (emphasis added).

Supreme Court erred when it found that issues of fact exist as to whether the release of the liens on the 20 units, without receipt of the paydown amount, fell within the policy's more stringent "with regards to Loans" standard, which requires both an intent to cause plaintiff harm and a financial benefit for the offending employee. The bond defines a loan as: "all extensions

of credit by the Insured and all transactions creating a creditor relationship in favor of the Insured and all transactions by which the Insured assumes an existing creditor relationship." The losses that were caused by the employee's conduct do not fall within the scope of this definition.

The purpose of the more stringent standard for losses with regards to loans "is to exclude from coverage credit risks that are within the expertise of the financial institution, while still protecting the financial institution from insurable risks. In other words, insurance companies use these provisions to exclude losses that are the result of bad loans that a financial institution should have known better than to enter into" (*Bank of Ann Arbor v Everest Natl Ins. Co.*, 563 Fed Appx 473, 478 [6th Cir 2014]; *Hudson United Bank v Progressive Cas. Ins. Co.*, 152 F Supp 2d 751, 754 [ED Pa 2001] [loan loss exclusion in financial institution bond did not apply where bank's damages were allegedly caused by concealment of data, not the default itself]; *see also* 11 Couch on Ins. § 167:54). Here, the risk had nothing to do with plaintiff's making a poor credit decision. Rather, the risk related to the employee's alleged misconduct in failing to follow bank procedures and diverting funds to the developer. Although this may have prevented the reduction of the loan balance, it did not create a new extension of credit, i.e. it was

not a new loan.

However, summary judgment must be denied because material issues of fact exist as to whether the employee had the "manifest intent" to cause plaintiff to sustain a loss or to obtain a financial benefit for himself or the developer.

Manifest intent involves a continuum of conduct, ranging from embezzlement, where the employee necessarily intends to cause the employer the loss, to the other end of the continuum, which does not trigger fidelity coverage, where "the employee's dishonesty at the expense of a third party is intended to benefit the employer, since the employee's gain results from the employer's gain" (*Aetna Cas. & Sur. Co. v Kidder, Peabody & Co.*, 246 AD2d 202, 209 [1st Dept 1998], *lv denied* 93 NY2d 805 [1999]).

Manifest intent to injure an employer exists as a matter of law where an employee acts with substantial certainty that his employer will ultimately bear the loss occasioned by his dishonesty and misconduct (*National Bank of Pakistan v Basham*, 142 AD2d 532, 534 [1st Dept 1988]), *affd* 73 NY2d 1000 [1989]). Defendant argues that this standard is not met because its submissions demonstrate that the employee's intent was to allow the borrower to retain funds needed to complete the construction of the project in order to prevent the bank from sustaining a loss. Defendant contends that this is corroborated by the

findings of a New Jersey court in related proceedings to which plaintiff was a party that the employee's "sole motivation was to further the interest of [the lender] to get paid in full with interest on the loan," and that plaintiffs are collaterally estopped from arguing that the employee's intent was to harm the bank or to benefit the borrower.

Although a New Jersey court found that the employee acted solely to further his employer's interest in getting the loans paid in full, which constituted an impairment of collateral with respect to the New Jersey mortgages warranting the extinguishment of plaintiff's rights to foreclose, that finding was not made within the context of an analysis of the term manifest intent with respect to a fidelity bond, and is not conclusive. An issue of fact remains as to whether the employee's diversion of checks to the developer that should have been deposited with his employer manifests an intent to harm his employer within the meaning of the fidelity bond.

Even if the employee did not intend to injure his employer, a second and alternate showing of manifest intent under the bond may be demonstrated if the diversion of checks to the project development company manifested an intention to obtain a financial benefit for another person or entity. Conflicting expert opinions as to whether the cash flow from the free releases was

used to pay construction costs, in addition to the fact that no forensic accounting has been completed in this case, precludes summary judgment as to this issue.

For this reason, summary judgment was also properly denied as to whether plaintiffs actually suffered a direct loss as a result of the employee's allegedly dishonest actions. In addition, the record is not conclusive as to whether the mortgages that were the subject of the New Jersey action secured only one $3 million obligation, as opposed to the $6 million calculated by plaintiffs.

Issues of fact as to the amount of direct loss preclude the determination of attorneys' fees at this time.

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

ENTERED: JANUARY 22, 2015

CLERK