SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 21, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

29-
30-
31 In re Maddock E.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Luis E.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

- - - - -

The Bronx Defenders, Brooklyn Defender Services, The Neighborhood Defender Service of Harlem, Child Welfare Organizing Project, Legal Momentum, Lansner & Kubitschek, The New York State Citizen Review Panels for Child Protective Services, New York University School of Law Family Defense Clinic, MFY Legal Services Inc., The Center for Reproductive Rights, National Advocates for Pregnant Women, National Perinatal Association, Boom!Health, Domestic Violence Project at The Urban Justice Center and New York Legal Assistance Group in Support of the Attorney for the Children,
Amici Curiae.

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Neal D. Futerfas, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Fay Ng of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the child.

Simpson Thacher & Barlett LLP, New York (David J. Woll of counsel), for amici curiae.

Appeal from order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about November 19, 2013, which denied respondent father's motion to dismiss the first amended petition, and appeal from order, same court and Judge, entered on or about February 14, 2014, which denied the father's motion to dismiss the second amended petition, unanimously dismissed, without costs, as moot, and the aforesaid orders vacated.

The first amended petition alleging neglect was superseded by the second amended petition (*see Nimkoff Rosenfeld & Schechter, LLP v O'Flaherty*, 71 AD3d 533, 533 [1st Dept 2010]). Thus, the father's appeal from the order entered on or about November 19, 2013 has been rendered moot (*Matter of Kirkpatrick v Kirkpatrick*, 117 AD3d 1575, 1576 [4th Dept 2014]). In addition, the second amended petition was dismissed on February 23, 2015, upon expiration of the period of adjournment in contemplation of dismissal of that petition. Accordingly, the father's appeal from the order entered on or about February 14, 2014 is also moot.

The exception to the mootness doctrine does not apply here, as the issue raised is not one that will typically evade review (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]; *Duane Reade Inc. v Local 338, Retail, Wholesale, Dept. Store Union, UFCW, AFL-CIO*, 11 AD3d 406, 406 [1st Dept 2004]). Nor will Family Court's orders carry a permanent and significant stigma "that may impact [the father's] standing in future proceedings" (*Matter of Joseph Benjamin P.* [*Allen P.*], 81 AD3d 415, 416 [1st Dept 2011], *lv denied* 16 NY3d 710 [2011]).

Nevertheless, the orders should be vacated in the exercise of discretion because, the orders, which are unreviewable because of mootness, may spawn legal consequences or be cited as precedent (*Funderburke v New York State Dept. of Civ. Serv.*, 49 AD3d 809, 811 [2d Dept 2008]; *see Matter of Ruskin v Safir*, 257 AD2d 268, 271 [1st Dept 1999]).

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

198 Abbey F. Goldstein, etc., Index 654007/12
Plaintiff-Appellant,

-against-

Robert Bass, et al.,
Defendants-Respondents,

Albert Osman, et al.,
Defendants.

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Leavitt & Kerson, Forest Hills (Paul E. Kerson of counsel), for appellant.

DeJesu Maio & Associates, PC, Huntington (Joseph C. DeJesu of counsel), for Robert Bass, Debra Vazquez, Brian McNamara, Antoine Marzouka, Michael Robert, Steve Osman, Metropolitan Pacific Properties Inc. and Meyer Lieber, respondents.

Ruskin Moscou Faltischek P.C., Uniondale (Mark S. Mulholland of counsel), for Michael Leifer, Astoria-Atlas LLC and Calix Realty Holdings LLC, respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered October 21, 2014, which granted defendants' motions to dismiss the complaint, affirmed, without costs.

We note at the outset that plaintiff's argument, made for the first time on appeal, that he did in fact satisfy the demand requirement imposed by Business Corporation Law § 626(c), will not be considered. Not only did plaintiff not raise this argument before the motion court, but, the argument expressly

contradicts the complaint, which alleges that plaintiff never made a demand on the board, because it would have been futile.

Business Corporation Law § 626(c) provides that in a shareholders' derivative suit, "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board *or the reasons for not making such effort*" (emphasis added) *(see Marx v Akers*, 88 NY2d 189, 193 [1996]). In New York, to overcome a motion to dismiss for failure to plead demand futility, a plaintiff must have alleged "with particularity that (1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgement in approving the transaction" (*Marx*, 88 NY2d at 198).

Here, the gravamen of plaintiff's complaint is that many units in the subject cooperative corporation were sold at below market rates and that the managing agent was given a contract at an above market rate. However, the complaint does not allege that any member of the board was interested in the various challenged transactions, and the allegations that the directors failed to inform themselves fully about the transactions and

merely rubber-stamped them are wholly conclusory. Although the complaint does list the various transactions that plaintiff claims were "rubber-stamped," there are no particularized allegations as to what the board members should have considered or investigated to properly inform themselves about the challenged transactions. The complaint also fails to allege facts, such as self-dealing, fraud or bad faith, that would establish that the sale of units at below-market prices could not have been the product of sound business judgment.

The motion court also properly considered the materials annexed to the complaint, including those that were damaging to plaintiff (*see Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]).

We reject the request of defendants other than Michael Leifer, Astoria-Atlas LLC and Calix Realty Holdings LLC, made for the first time in their responding brief, for a "sua sponte" injunction prohibiting plaintiff from bringing any further actions against them without leave of court. This request is

procedurally improper. Moreover, plaintiff prevailed in his books and records action (*see Matter of Goldstein v Acropolis Gardens Realty Corp.*, 116 AD3d 776 [2d Dept 2014]), and the dismissal of this action is not on the merits.

All concur except Manzanet-Daniels, J. who dissents in part in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting in part)

This is an appeal from the dismissal of a shareholder derivative action brought by plaintiff shareholder on behalf of Acropolis Gardens Realty Corp., a residential cooperative corporation. In or about 1995, the sponsor of the conversion defaulted and the co-op became the owner of more than 300 units (the co-op is comprised of 617 units altogether). Plaintiff alleges that in approving the sales of units at prices far below market rate – i.e., ranging from $25,000 to $50,000 per unit – defendant board members, managing agent, accountant, and purchasers, committed fraud and corporate waste, and breached their fiduciary duties or aided and abetted such breaches.

The motion court granted defendants' motions to dismiss the complaint upon a finding that plaintiff failed to plead demand futility (*see* Business Corporation Law § 626[c]). The court did not reach the additional grounds raised by defendants that the claims failed to state a cause of action or should be dismissed based on documentary evidence.

Plaintiff argues for the first time on appeal that his various communications with the board in the year or so preceding this action constituted sufficient demand for action to satisfy Business Corporation Law § 626(c). Plaintiff's argument

contradicts the complaint, which states that plaintiff never made any such demand, and I agree with the majority that we should decline to consider it on appeal.

Plaintiff, however, has adequately alleged that any such demand on the board would have been futile (*see Marx v Akers*, 88 NY2d 189, 200-201 [1996]). A shareholder claiming demand would be futile is required to allege "with particularity that (1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction" (*id.* at 198).

Plaintiff has adequately alleged that the directors "rubber stamped" decisions and that certain of the challenged transactions were "so egregious on [their] face that [they] could not have been the product of sound business judgment of the directors" (*id.* at 201). Plaintiff alleges, inter alia, that the board approved below-market sales of 43 units to the Leifer defendants, 27 units to Monarch (an entity owned by Steven Osman, a principal of the managing agent, Metropolitan), as well as the sale of a unit for $25,000 to defendant board member Marzouka. Plaintiff also alleges that the board approved a 10-year non-

cancellable contract with the managing agent at an above-market rate of $288,000 per year.

Under these circumstances, it would be reasonable to conclude that making a demand on the board would have been futile. The determination of whether the apartment sales were at a grossly inadequate price and contrary to the best interests of the corporations should await a later date (*see Greenbaum v American Metal Climax*, 27 AD2d 225 [1st Dept 1967] [defendant entitled to summary judgment where there was no evidentiary support for the contention that a sale occurred at a grossly inadequate price or that the directors failed to act in the best interests of the corporation]).

Although demand was excused, I agree that the third cause of action (for aiding and abetting breach of fiduciary duty) and the seventh cause of action (for unjust enrichment) were properly dismissed as against defendants Leifer, Astoria-Atlas and Calix Realty Holdings. A claim for aiding and abetting a breach of fiduciary duty requires "(1) a breach by a fiduciary of obligations to another; (2) that the defendant knowingly induced or participated in the breach; and (3) that plaintiff suffered damage as a result of the breach" (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). Plaintiff fails to adequately allege that

the Leifer defendants had actual, i.e., not constructive, knowledge of alleged breaches of fiduciary duty or furnished substantial assistance to the primary violators (*see id.*) Similarly, the complaint fails to adequately allege that the Leifer defendants were unjustly enriched (*cf. Merrill Lynch, Pierce, Fenner & Smith v Chipetine*, 221 AD2d 284 [1st Dept 1995]).

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

485 Errol Morgan, Index 22726/14E
Plaintiff-Appellant,

-against-

Scott Browner, et al.,
Defendants-Respondents.

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The Sullivan Law Firm, New York (James A. Domini of counsel), for appellant.

Hurwitz & Fine, P.C., Melville (Elizabeth A. Fitzpatrick of counsel), for respondents.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered December 29, 2014, which denied plaintiff's motion for summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the rear vehicle to "come forward with an adequate nonnegligent explanation for the accident" (*Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]; *see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Joplin v City of New York*, 116 AD3d 443 [1st Dept 2014]).

Defendant asserts that the lead vehicle driven by plaintiff

signaled to go left, but then continued driving through the intersection, and "abruptly stopped in the middle of the intersection." However, a claim that "the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence" on the part of the rear driver (*see Cabrera*, 72 AD3d at 553; *Joplin*, 116 AD3d at 443). We have repeatedly so held, particularly when the defendant driver fails to explain why he or she did not maintain a safe following distance (*see Corrigan v Porter Cab Corp.*, 101 AD3d 471, 472 [1st Dept 2012]; *Santos v Booth*, 126 AD3d 506 [1st Dept 2015]; *Santana v Tic-Tak Limo Corp.*, 106 AD3d 572 [1st Dept 2013]; *see e.g. Chowdhury v Matos*, 118 AD3d 488 [1st Dept 2014] [allegation that the plaintiff stopped suddenly in intersection insufficient to rebut presumption]). Plaintiff did not change lanes, but rather continued straight through the intersection after initially signaling left, distinguishing this case from others where the lead vehicle suddenly changes lanes and decelerates (*see Tutrani*, 10 NY3d at 908 [jury properly allocated 50% fault to front-most driver, a police officer who suddenly changed lanes

and decelerated on a highway, causing the plaintiff's vehicle to brake suddenly, after which it was struck in the rear by the co-defendant's vehicle]). Plaintiff is accordingly entitled to summary judgment on the issue of liability.

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

ENTERED: APRIL 21, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

654 Victor Levy, Index 156336/12
Plaintiff-Appellant,

-against-

Arbor Commercial Funding, LLC,
et al.,
Defendants-Respondents.

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The Graber Law Firm, New York (Daniel A. Graber of counsel), for appellant.

Cullen and Dykman, LLP, Garden City (Thomas S. Baylis of counsel), for respondents.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered December 19, 2014, which granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion to amend the complaint, unanimously modified, on the law, to the extent of reinstating plaintiff's second cause of action for breach of contract and remanding for further consideration of this claim on the merits, and otherwise affirmed, without costs.

The motion court incorrectly determined that an alleged conversation between the parties' counsel during a federal forfeiture proceeding involving the condominium unit at issue in this action is rendered inadmissible by the common-interest

privilege. The common interest privilege serves as an exception to the general rule that the presence of a third party at a communication between counsel and client will waive a claim that a communication is confidential (*see Matter of San Diego Gas & Elec. Co. v Morgan Stanley Senior Funding, Inc.*, 136 AD3d 547 [1st Dept 2016]. "Under this doctrine, a third party may be present at the communication between an attorney and a client without destroying the privilege if the communication is for the purpose of furthering a nearly identical legal interest shared by the client and the third party" *(Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 124 AD3d 129, 130 [1st Dept 2014]). Here, while it may be the case that during the federal action, plaintiff and defendants sought to establish the validity of their mortgage interests in the condominium, as well as to expedite the sale of the condominium to limit potential investment losses, this is of no moment, because the common interest doctrine does not create a privilege. Rather, it operates only to prevent waiver of the attorney client privilege and is, therefore, inapplicable in this case.

Moreover, we decline to expand the doctrine to cover this unusual scenario where communications between two attorneys, who do not allege that they were operating under any confidentiality

agreement, or otherwise had some expectation of confidentiality, can prevent their discussions from being disclosed or used as evidence in a later litigation between the same two parties who are now adversaries in a separate litigation. Indeed, as plaintiff aptly notes, *Ambac Assur. Corp.* (124 AD3d 129 [1st Dept 2014]) does not hold that communications subject to the common interest privilege are considered privileged as between the parties themselves in a later dispute; rather, the communications between the parties are privileged with respect to third parties. This interpretation of the common interest privilege makes perfect sense, as the attorney client privilege is meant to operate as a shield or a sword, but not both at once (*see United States v Bilzerian*, 926 F2d 1285, 1292 [2d Cir 1991] *cert denied* 502 US 813 [1991]; *cf. People v Osorio*, 75 NY2d 80 [1989]).

We further note, not incidentally, that the allegedly privileged communications were openly stated in plaintiff's motion papers and are recited again on appeal; there is no indication in the record of any efforts defendants took to seek a protective order, strike them from the record, or otherwise protect against waiver. Therefore, this evidence may be used by plaintiff and the court in its consideration of plaintiff's claims on their merits.

The motion court properly denied plaintiff's cross motion for leave to amend his complaint to assert causes of action demanding a return of nearly $2 million transferred to defendants. Plaintiff's alleged damages cannot be reasonably inferred, given the documentary evidence submitted on defendants' motion showing that plaintiff recovered the full amount of the funds transferred to defendants (*see Risk Control Assoc. Ins. Group v Maloof, Lebowitz, Connahan & Oleske, P.C.*, 127 AD3d 500 [1st Dept 2015]).

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

871 The People of the State of New York, Ind. 281/11
Respondent,

-against-

Jamal Adamson,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Anita Aboagye-Agyeman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered July 17, 2013, convicting defendant, upon his plea of guilty, of two counts of attempted murder in the second degree, and sentencing him to concurrent terms of seven years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for a youthful offender determination, and otherwise affirmed.

As the People concede, based on *People v Rudolph* (21 NY3d 497 [2013]), defendant is entitled to resentencing for an express youthful offender determination.

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

872 Yorkson Legal Inc., Index 152509/15
Plaintiff-Respondent,

-against-

Mitchell C. Shapiro,
Defendant-Appellant,

Shapiro Tamir Law Group, PLLC,
Defendant.

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Carter Lendyard & Milburn LLP, New York (Mitchell C. Shapiro of counsel), for appellant.

Wimpfheimer & Wimpfheimer, New York (Michael C. Wimpfheimer of counsel), for respondent.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered November 30, 2015, which, to the extent appealed from, denied defendant Shapiro's motion to dismiss the complaint as against him, unanimously reversed, on the law, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff's claim that Shapiro agreed to personally

guarantee the obligations of and payments due from the defendant Law Group, the only ground for personal liability asserted against him in the complaint, was refuted by the documentary evidence (*see Leon v Martinez*, 84 NY2d 83, 88 [1994).

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

873 In re Anthony B.,

A Child Under Eighteen
Years of Age, etc.,

Nicole B.,
Respondent-Appellant,

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

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Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jason Anton of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about April 9, 2015, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about August 1, 2014, which found that respondent mother had neglected the subject child, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]). The unemployed mother moved out of her parents' stable home to live in a shelter with her child, then two years old, because she did not want to

abide by house rules. She was only able to qualify for shelter placement by obtaining an order of protection against her mother on false grounds, but the shelter later discharged her due to her failure to comply with its rules. For at least a week thereafter, instead of returning to her parents' home, she spent nights with the child riding on subway trains and at the home of a friend, whose last name and address she could not provide. Upon the mother and the child's return to her parents' home, the child's maternal grandfather observed that the child looked "pale," not "well taken care of," and "hungry." Under the circumstances, the child's physical and mental condition was in imminent danger of becoming impaired as a result of his mother's failure to provide adequate shelter (*see* Family Ct Act § 1012[f][i][A]; *Matter of Alexander L. [Andrea L.]*, 99 AD3d 599, 599 [1st Dept 2012], *lv denied* 20 NY3d 856 [2013]).

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

874 Volko Kerzhner, Index 161313/13
Plaintiff-Appellant,

-against-

G4S Government Solutions, Inc., et al.,
Defendants-Respondents,

Elliot Ray,
Defendant.

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Law Offices of William Pager, Brooklyn (William Pager of counsel), for appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 11, 2014, which, to the extent appealed from as limited by the briefs, granted the motion of defendants G4S Government Solutions, Inc. (G4S) and Wackenhut Services, Incorporated (Wackenhut) to dismiss the negligence causes of action in the complaint, unanimously modified, on the law, to deny the motion as to the claim for negligent hiring, supervision and training, and otherwise affirmed, without costs.

Plaintiff alleges that, while visiting a Social Security Administration office concerning his benefits, he was assaulted and thrown to the ground by a security guard, defendant Elliot

Ray, who was employed by defendants G4S and Wackenhut (the employer defendants). On appeal, plaintiff does not challenge the dismissal of his intentional tort and vicarious liability claims as barred by the one-year statute of limitations, but asserts that he adequately pleaded claims sounding in negligence.

Plaintiff cannot avoid the statute of limitations by reframing his intentional tort claims as a claim based on breach of the duty to keep the premises safe (*see Palker v MacDougal Rest. Inc.*, 96 AD3d 629, 630 [1st Dept 2012]), especially in this case, in which the employer defendants did not own or lease the premises. The motion court also properly dismissed the negligent infliction of emotional distress claim, since it does not differ from the intentional emotional distress claim, and did not adequately allege extreme and outrageous conduct (*see Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]).

However, when construing the pleadings liberally, as we must on a motion to dismiss pursuant to CPLR 3211 (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we find that the complaint sufficiently states a cognizable claim that the employer defendants were negligent in hiring, training and supervising their employees, including defendant Ray (*see Pickering v State of New York*, 30 AD3d 393, 394 [2d Dept 2006]). Plaintiff alleged

that the employer defendants were negligent in screening, supervising, and training employees, that Ray committed assault and battery and used excessive force, and that the employer defendants knew or should have known that their employee's improper or illegal behavior was foreseeable. Although plaintiff did not expressly plead that the employer defendants knew of Ray's "propensity" to commit "the sort of conduct" that caused plaintiff's injury (*Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dept 2004]), the pleadings may be amplified in a bill of particulars (*see Jarvis v Nation of Islam*, 251 AD2d 116, 117 [1st Dept 1998]). Further, while plaintiff's allegation that Ray was acting "within the scope of his employment" and other allegations of vicarious liability are incompatible with plaintiff's negligent hiring, supervision and training claim, dismissal is not required, because a plaintiff may plead alternative, inconsistent theories (CPLR 3014; *see Pickering*, 30 AD3d at 394). Lastly, plaintiff's claim is governed by a three-year limitations period, even if the underlying wrongful conduct by Ray was intentional (*see Green v Emmanuel African M.E. Church*, 278 AD2d

132, 132-133 [1st Dept 2000]; *Smith v Conway Stores, Inc.*, 131 AD3d 1040, 1040 [2d Dept 2015]). Accordingly, the claim, brought in 2013 based on an incident that occurred in 2011, is not time-barred.

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

875 Shateema S. Farris, as Executor of the Estate of Frances Hilton, deceased, Plaintiff-Appellant, Index 302742/07

-against-

Heidi Dupret, Defendant-Respondent,

Bronx-Lebanon Hospital Center, et al., Defendants.

[And Other Third-Party Actions]

Law Office of Brian Schochet, PLLC, New York (Brian Schochet of counsel), for appellant.

McAloon & Friedman, P.C., New York (Gina Di Folco of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered on or about April 16, 2004, dismissing the complaint as against defendant Dupret, unanimously affirmed, without costs. Notice of appeal from order, same court and Justice, entered on or about April 8, 2004, which granted Dupret's motion for summary judgment, and denied plaintiff's motion to direct Dupret to accept her amended bill of particulars, deemed timely notice of appeal from the judgment (CPLR 5520[c]).

Plaintiff's decedent was referred to defendant by another

physician, who, following the decedent's complaints of irregular menses, had performed an endometrial biopsy but had been unable to obtain a sufficient cell sample for testing. Although the decedent was referred for a surgical biopsy via dilation and curettage (D&C), defendant decided to try to obtain a sample non-surgically. She succeeded in obtaining a sample of sufficient size for testing, and the sample was found to be negative for cancer.

In opposition to defendant's prima facie showing, via three expert affirmations, that the testing she did to rule out cancer was appropriate and did not deviate from the applicable standard of care, plaintiff failed to raise an issue of fact since she submitted only conclusory assertions and speculation by experts, such as her gynecological expert's claim that had defendant obtained the sample cells via D&C, rather than collecting them cervically, she would have found endometrial cancer (*see Coronel v New York City Health & Hosps. Corp.*, 47 AD3d 456 [1st Dept 2008]; *Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [1st Dept 2006]). Moreover, the gynecological expert conceded that an endometrial biopsy is an appropriate diagnostic procedure in cases of suspected endometrial cancer, and plaintiff's expert pathologist did not deny that the sample obtained by defendant

was adequate. That the decedent's fibroids made collecting a sample difficult, as the expert gynecologist said, is irrelevant in light of defendant's success in collecting a sufficient sample size.

Nor is malpractice established by defendant's alleged failure to pursue a more aggressive course in treating plaintiff's anemia, by performing blood work and ultimately a D&C, which would have led to the incidental discovery of plaintiff's cancer at an earlier time (assuming the cancer was present at that time) (*see David v Hutchinson*, 114 AD3d 412 [1st Dept 2014]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 928-929 [1st Dept 2010).

Plaintiff's motion to direct defendant to accept her amended bill of particulars, which added a new theory of the case, was inappropriately asserted for the first time in opposition to

defendant's motion (*see Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]), and is, in any event, without merit.

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: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

876 The People of the State of New York, Ind. 2380/12
Respondent,

-against-

Luis Rosario,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J. at plea; Charles H. Solomon, J. at sentencing), rendered September 13, 2012, convicting defendant of attempted burglary in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The sentencing court properly found that it had no discretion to defer defendant's mandatory surcharge (*see People v Jones* __ NY3d __, 2016 NY Slip Op 01208 [2016]).

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Gische, Kahn, JJ.

877 Seth R. Rotter, Index 600609/06
Plaintiff-Appellant,

-against-

Alan S. Ripka, et al.,
Defendants-Respondents.

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Pavlounis & Sfouggatakis, LLP, Brooklyn (Andrew Sfouggatakis of counsel), for appellant.

Rubin Law, PLLC, New York (Denise A. Rubin of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered April 28, 2015, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion to enforce a stipulation of settlement, and granted defendant Napoli Bern Ripka, LLP's cross motion to dismiss plaintiff's motion without consideration of the merits for failure to commence a plenary action pursuant to court order, unanimously affirmed, with costs.

This is the latest in a series of disputes between the parties regarding a stipulation of settlement that was so-ordered by Supreme Court in May 2006. The instant motion by plaintiff to enforce the stipulation of settlement was correctly dismissed, because the stipulation contained an express and unconditional stipulation of discontinuance of the action, which was sufficient

to terminate the action (*see Teitelbaum Holdings v Gold*, 48 NY2d 51 [1979]; *Salvador v Town of Lake George Zoning Bd.*, 130 AD3d 1334 [3d Dept 2015]; *DiBella v Martz*, 58 AD3d 935 [3d Dept 2009]; *Cooley v CNYE Realty Corp., Inc.*, 16 AD3d 871 [3d Dept 2005]). Indeed, in connection with an earlier fee dispute, the motion court warned that the action had been terminated and any future disputes would require commencement of a plenary action.

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

878 Katherine L., Mother and Natural Guardian of Justin M., etc., Plaintiff-Appellant, -against- Ehriquee Segura, et al., Defendants-Respondents. Index 21188/12E

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Colin F. Morissey of counsel), for respondents.

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered January 8, 2015, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury to plaintiff Katherine L.'s cervical spine, lumbar spine, knees, and wrists, within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to the claim of serious injury to the cervical and lumbar spine, and otherwise affirmed, without costs.

Defendants established prima facie that plaintiff's injuries were not causally related to the motor vehicle accident, through affirmed reports by a radiologist and an orthopedic surgeon who opined that the conditions in plaintiff's cervical spine, lumbar

spine, knees, and wrists were degenerative in nature and unrelated to any trauma associated with the accident, and plaintiff's own medical records, including MRI reports that contained similar findings concerning her knees (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *see also Galarza v J.N. Eaglet Publ. Group, Inc.*, 117 AD3d 488 [1st Dept 2014]).

In opposition, plaintiff raised an issue of fact as to her cervical and lumbar spine injuries by submitting affirmed reports by her radiologist, who found bulging and herniated discs and did not note any degeneration, and her treating doctor, who measured continuing range of motion limitations and opined that the spinal injuries were caused by the accident, in light of the 27-year-old plaintiff's lack of history of injuries or complaints and the MRI findings (*see James v Perez*, 95 AD3d 788, 789 [1st Dept 2012]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]). Although plaintiff did not submit reports by the doctor who treated her shortly after the accident, her current doctor averred that plaintiff had been examined and treated at the same facility by another doctor, who referred her for MRIs, which were taken one month after the accident and revealed her disc injuries. This evidence of contemporaneous treatment and

symptoms is sufficient to "reliably connect" plaintiff's spinal injuries to the accident (*Perl v Meher*, 18 NY3d 208, 217-218 [2011]; *see Swift v New York Tr. Auth.*, 115 AD3d 507, 508 [1st Dept 2014]).

In contrast, plaintiff's medical evidence was insufficient to causally relate her claimed knee injuries to the accident, because her own MRIs showed evidence of degeneration, and her doctor did not address those findings and explain why they were not a cause of the injury (*see Alvarez*, 120 AD3d at 1044; *Ocean v Hossain*, 127 AD3d 402 [1st Dept 2015]). Plaintiff failed to provide any medical evidence rebutting defendants' prima facie showing that the injuries to her wrists were degenerative.

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

879 Centech LLC, Index 107802/09
Plaintiff-Respondent,

-against-

Yippie Holdings, LLC, et al.,
Defendants,

9 Bleecker LLC,
Defendant-Appellant.

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Steptoe & Johnson LLP, New York (Jeffrey A. Novack of counsel), for appellant.

Einig & Bush, LLP, New York (Dan M. Rice of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered August 27, 2015, which, to the extent appealed from, adjudging that the sum of $3,905,282.23 in principal and interest was due on the mortgage prior to foreclosure sale, unanimously affirmed, with costs.

The record amply supports the IAS court's conclusion that the mortgage on the property remained valid, and continued to accrue interest, following the placement of the deed in escrow and the subsequent transfer of the deed to the mortgage lender's designee (*Patmos Fifth Real Estate Inc. v Mazl Bldg., LLC*, 124 AD3d 422, 426 [1st Dept 2015]). Defendant-appellant, 9 Bleecker

LLC (9 Bleecker), has failed to establish that the escrow agreement, to which it was not a party, was a "'deed in lieu of foreclosure' . . . an absolute conveyance or sale of the property – "despite the language in the agreement stating that, should [the property owner] breach, the deed may be released from escrow and recorded" (*id.*). The deed was given as security for the debt to plaintiff Centech LLC, and not as an absolute transfer of property rights (*id.*).

Further, 9 Bleecker, in an effort to protect its rights of first refusal, previously obtained rulings in the IAS Court to the effect that the ultimate transfer of the deed to the lender's designee pursuant to the escrow agreement was null and void, thus having no legal effect. 9 Bleecker is judicially estopped from now contesting such nullification simply because it suits its current litigation posture, to wit, that the mortgage was extinguished and ceased to accrue interest upon the delivery of

the deed (*D&L Holdings v Goldman Co.*, 287 AD2d 65 [1st Dept 2001], *lv denied* 97 NY2d 611 [2002].

We have considered 9 Bleecker's remaining contentions, and find them unavailing.

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

881 In re Mya Anaya M.,

A Dependent Child Under
Eighteen Years of Age, etc.,

The Children's Aid Society, et al.,
Petitioner-Respondent,

-against-

Barry M.,
Respondent-Appellant.

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child.

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Order, Family Court, New York County (Susan Knipps, J.), entered on or about May 5, 2015, which, among other things, found that respondent father had abandoned the subject child and that his consent to the child's adoption is not required, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that the father's consent to adoption is not required under Domestic Relations Law § 111(1)(d) (*see Matter of Isaac Ansimeon F. [Mark P.]*, 128 AD3d 486, 486 [1st Dept 2015]). The father's admission

that he failed to provide financial support for the child is fatal to his claim (*id.*). Petitioner agency had no obligation to inform him of his parental obligations (*Matter of Tiara J. [Anthony Lamont A.]*, 118 AD3d 545, 546 [1st Dept 2014]).

The finding of abandonment is also supported by clear and convincing evidence (*see* Social Services Law § 384-b[3][g][i]; [4][b]). The father's two visits to the child at the beginning of the relevant period are insufficient to preclude a finding of abandonment (*Matter of Jaylen Derrick Jermaine A. [Samuel K.]*, 125 AD3d 535, 535-536 [1st Dept 2015]; *Matter of Mariah A. [Hugo A.]*, 109 AD3d 751, 752 [1st Dept 2013], *lv dismissed* 22 NY3d 994 [2013]). The father failed to show that he was unable to visit or communicate with the child or the agency, or that the agency prevented or discouraged him from doing so (Social Services Law § 384-b[5][a]; *Matter of Toteanna M. [Keyshana M.]*, 129 AD3d 529, 529-530 [1st Dept 2015], *lv denied* 26 NY3d 906 [2015]). The

agency was under no obligation to make diligent efforts to encourage the father to visit or communicate with the child (Social Services Law § 384-b[5][b]; *Toteanna*, 129 AD3d at 530).

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

882 Parker Waichman LLP, Index 650838/14
Plaintiff-Appellant,

-against-

Squier, Knapp & Dunn Communications, Inc., individually and doing business as Knickerbocker/SKD, et al.,
Defendants-Respondents.

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Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellant.

Perkins Coie LLP, New York (Dennis C. Hopkins of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered September 4, 2014, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

The complaint's boilerplate allegations that defendants disclosed confidential information, thereby causing harm, are too vague and conclusory to sustain a breach of contract cause of action (*see Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]). Moreover, the complaint failed to allege how the alleged breach caused any injury (*id.*). Dismissal of the cause of action alleging breach of fiduciary duty was also warranted since plaintiff failed to plead it with particularity, as required by CPLR 3016(b) (*see Berardi v Berardi*, 108 AD3d 406,

407 [1st Dept 2013], *lv denied* 22 NY3d 861 [2014]), and the claim was duplicative of the breach of contract claim (*see Kaminsky v FSP, Inc.*, 5 AD3d 251, 252 [1st Dept 2004]).

The court properly denied plaintiff's request for leave to replead, as plaintiff failed to submit a proposed amended pleading accompanied by an affidavit of merit (*see Fletcher v Boies, Schiller & Flexnor LLP*, 75 AD3d 469, 470 [1st Dept 2010]).

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

883 Wilfredo Almodovar, Index 100631/12
Plaintiff-Appellant,

-against-

The Port Authority of New York
and New Jersey, et al.,
Defendants-Respondents,

Turner Construction Company,
Defendant.

_____

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for appellant.

Goldberg Segalla, LLP, Garden City (Brendan T. Fitzpatrick of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 28, 2014, which granted defendants' motion for summary judgment dismissing the Labor Law § 240(1) claim, and denied plaintiff's cross motion for partial summary judgment on that claim, unanimously affirmed, without costs.

Plaintiff, a sheet metal apprentice performing duct work, was injured when, while descending a ladder, his pant leg became caught on an unmarked rebar protruding from the concrete floor, causing him to step down from the third rung of the ladder, lose his balance, and fall to the ground. Under these circumstances, dismissal of the Labor Law § 240 claim was proper, as there is no

dispute that the ladder was free from defects, and the record shows that plaintiff's fall was not attributable to the kind of extraordinary elevation-related risk that the statute was designed to prevent. Rather, plaintiff's injuries "were the result of the usual and ordinary dangers at a construction site" (*Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 916 [1999]; *see Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 99 [2015]; *Cohen v Memorial Sloan-Kettering Cancer Ctr.*, 11 NY3d 823 [2008]).

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

885 The People of the State of New York, Ind. 1841/11
Respondent,

-against-

Tiron Singleton,
Defendant-Appellant.

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Scott A. Rosenberg, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered November 9, 2011, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The sentencing court properly found that it had no discretion to waive or defer defendant's mandatory surcharge (*see People v Jones* __ NY3d __, 2016 NY Slip Op 01208 [2016]).

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

886 Rafael Batista, Index 301184/07
Plaintiff-Respondent,

-against-

Manhattanville College, et al.,
Defendants-Appellants,

The Female Academy of the
Sacred Heart,
Defendant.

[And Other Third-Party Actions]

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Lewis Johs Avallone Aviles, LLP, Islandia (Robert A. Lifson of counsel), for Manhattanville College, appellant.

Burke, Conway, Loccisano & Dillon, White Plains (Martin Galvin of counsel), for TJR, Inc., appellant.

Goraybe & Associates, P.C., New York (John M. Shaw of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 7, 2014, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240(1) claim, denied the part of defendants Manhattanville College's and TJR, Inc.'s motions for summary judgment seeking dismissal of the Labor Law § 240(1) claim as against them and deemed the part of their motions seeking dismissal of the Labor Law § 241(6) claim

to be moot, unanimously modified, on the law, to deny plaintiff's motion, and to grant the part of defendants' motions seeking dismissal of plaintiff's Labor Law § 241(6) claim except insofar as the claim is predicated on violations of Industrial Code (12 NYCRR) § 23-5.1(e), (g) and (h), and otherwise affirmed, without costs.

The record precludes summary judgment on the Labor Law § 240(1) claim. Specifically, issues of fact exist whether plaintiff disregarded instructions to use only pine planks for flooring on the scaffold he was constructing (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]), or otherwise knew that only pine planks were to be used for flooring (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550 [2006]), and whether more pine planks were readily available to him either at the site, as his supervisor testified (*see id.*), or at his employer's yard, as a coworker testified (*see Miro v Plaza Constr. Corp.*, 9 NY3d 948 [2007]). Issues of fact also exist whether plaintiff was responsible for checking the planks at the site for knots and whether he used one with a knot in it, which he should not have used, for flooring (*see Silvia v Bow Tie Partners, LLC*, 77 AD3d 1143 [3d Dept 2010).

The Labor Law § 241(6) cause of action must be dismissed

except insofar as it is predicated upon alleged violations of Industrial Code (12 NYCRR) § 23-5.1(e), (g), and (h). The other Industrial Code provisions that plaintiff cited in the bill of particulars and addresses on appeal are either insufficiently specific to sustain a Labor Law § 241(6) claim inapplicable to the facts of this case.

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

887 The People of the State of New York, Ind. 4119/12
Respondent,

-against-

Rita Crawford,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered June 11, 2013, convicting defendant, upon her plea of guilty, of attempted robbery in the second degree, and sentencing her, as a second felony offender, to a term of three years, unanimously affirmed.

The sentencing court properly found that it had no discretion to defer defendant's mandatory surcharge (*see People v Jones* __ NY3d __, 2016 NY Slip Op 01208 [2016]).

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

888 7001 East 71st Street, LLC, Index 151387/13
Plaintiff-Appellant,

-against-

Millennium Health Services, et al.,
Defendants-Respondents,

Maimonides Medical Center, et al.,
Defendants.

- - - - -

Millennium Health Services, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Lori Falco-Greenberg,
Third-Party Defendant-Appellant.

_____

Wrobel Markham Schatz Kaye & Fox LLP, New York (Luisa M. Kaye of counsel), for appellants.

Gutman & Gutman, LLP, Mineola (Lawrence C. Gutman and Andrew E. Gutman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 8, 2015, which, to the extent appealed from, denied plaintiff and third-party defendant's motion to dismiss the counterclaim and third-party claim of defendants/third-party plaintiffs Millennium Health Services, Millennium Pediatrics, and Jordan Meyers, M.D. (collectively, Millennium) for constructive eviction, unanimously reversed, on the law, without costs, the

motion granted, and the counterclaim and third-party claim dismissed.

Millennium alleges that they were constructively evicted from the premises they sublet for use as a medical practice. To be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises (*see Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82-83 [1970]). However, the tenant must abandon the premises in order to claim a constructive eviction *(id.* at 83).

It is undisputed that respondents did not abandon the premises until the prime lease was terminated due to the extensive damage from Super Storm Sandy. Moreover, as subtenants, they had no landlord-tenant relationship with appellants, another necessary element to a constructive eviction claim (*see 905 5th Assoc., Inc. v 907 Corp.*, 47 AD3d 401, 403 [1st Dept 2008]).

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

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

889-
890 The People of the State of New York,
Respondent,

-against-

Kenneth J. Ivey, also known as
Kenneth Kelly,
Defendant-Appellant.

Ind. 6058/10

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

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

Judgment of Supreme Court, New York County (Daniel P. Conviser, J. at suppression hearing; Charles H. Solomon, J. at plea and sentencing), rendered May 8, 2012, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of five years, and order (same court, Charles H. Solomon, J.), entered on or about June 3, 2014, which denied defendant's CPL 440.20 motion to set aside the sentence, unanimously affirmed.

The hearing court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The record supports all of the court's findings of fact and

conclusions of law, including those relating to the plain view and inventory search doctrines.

Defendant was properly sentenced as a second felony offender based on a Pennsylvania drug conviction, and the court properly denied defendant's CPL 440.20 motion challenging that adjudication. The court properly examined the accusatory instrument because the Pennsylvania statute criminalizes several discrete acts, not all of which would constitute felonies in New York (*see generally People v Jurgins*, 26 NY3d 607, 613-614 [2015]). That document reveals that the Pennsylvania conviction involved cocaine and was the equivalent of a New York felony (*see People v Diaz*, 115 AD3d 483 [1st Dept 2014], *lv denied* 23 NY3d 1036 [2014]).

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

891 The People of the State of New York, Ind. 1950/12
Respondent,

-against-

Rosalba Ortiz,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Jeffrey Dellheim of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Rene K. Uviller, J.), rendered March 27, 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 21, 2016

CLERK

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

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

892N Gabriel Inchauspe, et al., Index 114275/10
Plaintiffs-Respondents,

-against-

Take One LLC,
Defendant-Appellant,

Board of Managers of the 491-497
Greenwich Street Condominium,
Defendant.

_____

Rosenberg Feldman Smith, LLP, New York (Michael H. Smith of counsel), for appellant.

Law Offices of Ronald Hollander, New York (Ronald Hollander of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered November 21, 2014, which denied defendant Take One LLC's motion to preclude plaintiffs from offering into evidence at trial any expert report or expert testimony, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying the motion to preclude, since defendant did not show that plaintiffs' delay in disclosing their expert and the expert's appraisal reports was willful or prejudicial (*see Martin v Triborough Bridge & Tunnel Auth.*, 73 AD3d 481, 482 [1st Dept 2010], *lv denied* 15 NY3d 713 [2010]; *Gallow v Linkow*, 255 AD2d

113, 117 [1st Dept 1998]). Plaintiffs explained that while they had obtained three expert appraisal reports, the last one completed in December 2013, they had considered obtaining appraisals for additional dates, which they ultimately decided not to do. Their intent was to submit one comprehensive expert appraisal report upon its completion. Defendant makes no claim of prejudice, nor do we perceive any, given that disclosure was made more than 1½ years ago and a date for the damages trial has not been scheduled.

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

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

ENTERED: APRIL 21, 2016

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, Kahn, JJ.

893N Lauren Appel Gottlieb, Index 314079/10
Plaintiff-Respondent,

-against-

Michael Gottlieb,
Defendant.
- - - - -
Mallow, Konstam, et al.,
Nonparty Appellants.

_____

Paul T. Gentile, P.C., New York (Paul T. Gentile of counsel), for appellants.

Bender & Rosenthal LLP, New York (Karen B. Rosenthal of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen F. Gesmer, J.), entered August 26, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff wife's motions for sanctions to the extent of directing nonparties Mallow, Konstam, Mazur, Bocketti & Nisonoff, P.C., Abe Konstam, Esq., and Madeleine Nisonoff, Esq. (collectively the Attorneys), to pay the wife $317,480.67, representing the attorneys' fees incurred by her as a result of the Attorneys' misconduct, unanimously modified, on the law and the facts, to vacate the award of $25,412.50 for pursuing a special proceeding after October 11, 2011 and in lieu thereof award $10,000 in sanctions; to vacate

the awards of $78,812 for continuing the visitation trial after December 17, 2012, and $75,935 for preparation of the posttrial memorandum; to vacate the award of $28,135.35 for preparation of the addendum to the posttrial memorandum, and in lieu thereof impose $10,000 in sanctions; and to vacate the awards of $28,675 for bringing motion sequence four, $18,510.82, for bringing motion sequence five, and $62,000 for the sanctions hearing, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

The Attorneys' conduct in pursuing the special proceeding after October 11, 2011 and until November 7, 2011, even though they had notice that defendant husband's claim had no merit, was "frivolous" within the meaning of 22 NYCRR 130-1.1(c) (*see Gottlieb v Gottlieb*, __ AD3d __, __, 2016 Slip Op 02135 [1st Dept 2016]). Although the Attorneys faxed a letter to the motion court on October 27, 2011 advising that the husband would withdraw the petition in the special proceeding, they did not formally withdraw the petition until November 7, 2011.

Nevertheless, the award of $25,412.50 in attorneys' fees, for the Attorneys' frivolous conduct, should be vacated. In an order entered December 23, 2013, the same court and Justice awarded the wife attorneys' fees of $68,587.50 against defendant

husband for the entire special proceeding, and this Court affirmed that award on appeal (*see Gottlieb*, __ AD3d at __, 2016 Slip Op 02135). Although 22 NYCRR 130-1.1 allows an award of costs in the form of "reasonable attorney's fees" (22 NYCRR 130-1.1[a]) against an attorney or a party to the litigation or "against both" (22 NYCRR 130-1.1[b]), it does not authorize a double recovery, nor is an award of twice the amount of attorneys' fees "reasonable." Accordingly, the award of $25,412.50 should be vacated, and in lieu thereof sanctions in the amount of $10,000 should be imposed on the Attorneys for their frivolous conduct (22 NYCRR 130-1.1[a]; 130-1.2).

The Attorneys did not act frivolously in continuing to litigate the visitation trial on the husband's behalf even after his parents had advised the Attorneys in emails dated as early as December 17, 2012 that the husband did not want visitation with the parties' child, and did not want to proceed with the visitation trial. The grandparents' representation was not dispositive of whether the visitation trial should have continued, as the husband "steadfastly maintained" that he wanted visitation (*Gottlieb*, __ AD3d at __, 2016 NY Slip Op 02135, *4). If he did not want visitation, he could have simply withdrawn his request, and his failure to do so is of greater significance than

the emails (*id.*), as is the fact that he testified at length in that trial regarding his desire for visitation. Accordingly, the award of $78,812 in attorneys' fees, for continuing the visitation trial after December 17, 2012, and $75,935 for preparation of the related posttrial memorandum, should be vacated.

The motion court properly determined that the Attorneys had acted frivolously in making and pursuing their untimely and meritless motion to quash subpoenas served on the grandparents before the visitation trial, and in directing the grandparents not to produce the subpoenaed records even after the motion was denied (*see Gottlieb*, __ AD3d at __, 2016 NY Slip Op 02135, *2). However, the statements in Nisonoff's affirmation alone do not sufficiently support the motion court's finding that the Attorneys had acted frivolously by misrepresenting the extent of the grandparents' compliance with the subpoenas. The motion court does not elaborate on other misrepresentations that might support that conclusion.

As this Court previously noted, the attorneys' fees incurred in preparing the addendum to the posttrial memorandum, to address the significance of the belatedly produced subpoenaed documents, would have been incurred even if the documents had been timely

produced (*Gottlieb*, __ AD3d at __, 2016 NY Slip Op 02135, *4). Accordingly, the award of $28,135.35 should be vacated, but in lieu of those costs, a sanction of $10,000 should be imposed on the Attorneys for their frivolous conduct.

Lastly, the award of attorneys' fees incurred in making and pursuing the motions for sanctions (motion sequences four and five), and in participating in the sanctions hearing, should be vacated as impermissible "fees on fees" (*Sage Realty Corp. v Proskauer Rose*, 288 AD2d 14, 15 [1st Dept 2001], *lv denied* 97 NY2d 608 [2002]; *Henriques v Boitano*, 304 AD2d 467, 468 [1st Dept 2003]).

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

894 The People of the State of New York, Ind. 3842/09
Respondent,

-against-

Marc Rowley,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Eric Washer of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Edgar G. Walker, J.), rendered August 24, 2011, convicting defendant, after a jury trial, of manslaughter in the first degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 25 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the manslaughter conviction and remanding for a new trial on that charge, and otherwise affirmed.

As in *People v Velez* (131 AD3d 129 [1st Dept 2015]), reversal in the interest of justice is warranted by the court's failure to convey to the jury, either directly or indirectly, in any part of its charge, that an acquittal on the top count of murder in the second degree based on a finding of justification

would preclude consideration of the two lesser homicide charges. While the jury may have acquitted on the top charge without relying on defendant's justification defense, it is nevertheless "impossible to discern whether acquittal of the top count . . . was based on the jurors' finding of justification so as to mandate acquittal on the two lesser counts" (*id.* at 133; *see also People v Colasuonno*, 135 AD3d 418 [1st Dept 2016]).

However, the charging error relating to the homicide counts does not affect the weapon possession conviction, and we do not find that any of defendant's remaining claims warrant reversal of that conviction, or a reduction of the sentence.

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

896 In re Baby Boy B., also known as Isaiah B.,

A Dependent Child under Eighteen Years of Age, etc.,

Eddie M.,
Respondent-Appellant,

The Children's Aid Society, et al.,
Petitioners-Respondents.

_____

Law Office of Cabelly & Calderon, Jamaica (Luis S. Calderon of counsel), for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondents.

Neal D. Futerfas, White Plains, attorney for the child.

_____

Order, Family Court, Bronx County (Erik S. Pitchal, J.), entered on or about February 20, 2015, which, inter alia, determined that respondent father's consent for the adoption of the subject child was not required, and directed that the adoption of the child proceed, unanimously affirmed, without costs.

We find the father failed to preserve his due process arguments, and we decline to consider them. As an alternative holding, we reject his arguments on the merits. Given that the father's own misconduct toward his multiple assigned attorneys

resulted in their being relieved as counsel, the court properly determined that he effectively exhausted his right to assigned counsel (*see Matter of Rodney W. v Josephine F.*, 126 AD3d 605 [1st Dept 2015], *lv dismissed* 25 NY3d 1187 [2015]), by whom he had been represented throughout most of the proceedings. Moreover, as a result of the court's repeated warnings, the father was aware that his tactics would result in him representing himself.

We find the record supports the determination that the father did not meet the statutory criteria of Domestic Relations Law § 111(1), and the court properly found that he was only entitled to notice of the adoption proceeding, which he received.

We have considered the father's remaining arguments and find them unpreserved and unavailing.

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

897 Daphne E. Lee, Index 111124/08
Plaintiff-Appellant, 105908/10

-against-

New York City Transit Authority,
Defendant-Respondent.

[And A Third-Party Action]

_____

Levine & Slavit, New York (Leonard S. Slavit of counsel), for appellant.

Lawrence Heisler, Brooklyn (Anna J. Ervolina of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered October 30, 2014, dismissing the complaint, and bringing up for review an order, same court and Justice, entered June 25, 2014, which granted defendant's motion for summary judgment, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Plaintiff seeks damages for injuries she sustained when she slipped and fell on a banana peel as she was descending the stairway to a subway station. She alleges that the stairway was not properly maintained and was inadequately lit.

Defendant's failure to address the claim of inadequate lighting is fatal to its motion (*see Amador v City of New York*,

96 AD3d 475 [1st Dept 2012]). Notwithstanding proof of defendant's lack of notice of the banana peel, the inadequate lighting condition could still be a proximate cause of plaintiff's accident (*see Amador*, 96 AD3d 475; *Santiago v New York City Hous. Auth.*, 268 AD2d 203 [1st Dept 2000]). Further, defendant's accident reports indicating that the area was dark and the testimonial evidence that the area was dark and had been dark since at least the day before the accident raise an issue of fact as to whether defendant had actual or constructive notice of the lighting condition (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008]).

Notwithstanding defendant's contention that it neither controlled nor had legal responsibility for the stairway, since the stairway was primarily used by defendant's passengers as a means of approaching the subway, defendant owed a nondelegable duty to maintain the stairway or to warn passengers of any

dangerous condition (*Bingham v New York City Tr. Auth.*, 8 NY3d 176 [2007]). Moreover, the testimony of defendant's own employees raises a question of fact as to its duty to maintain the stairway.

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

898 The People of the State of New York, Ind. 5714/12
Respondent,

-against-

Jeffrey Davis,
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 (Alan Gadl1n of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered June 20, 2013, convicting defendant, upon his plea of guilty, of burglary in the second degree, and sentencing him, as a second felony offender, to a term of 5 years, unanimously affirmed.

The sentencing court properly found that it had no discretion to waive or defer defendant's mandatory surcharge (*see People v Jones* __ NY3d __, 2016 NY Slip Op 01208 [2016]).

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

900 Michael A. Brion, etc., et al., Index 155815/14
Plaintiffs-Respondents,

-against-

Jorge W. Moreira, et al.,
Defendants-Appellants.

_____

Moreira and Associates PLLC, Jackson Heights (Sheila Moreira of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered February 4, 2015, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint alleging legal malpractice, unanimously modified, on the law, to grant the motion to dismiss the claims of plaintiff Basonas Construction Corp., and otherwise affirmed, without costs.

The individual plaintiff (Michael) has adequately alleged a privity relationship between him and defendants, an attorney and his law firm, and the documentary evidence does not conclusively refute those allegations (*see generally AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 595 [2005]). In particular, the complaint adequately alleges that

defendants, who handled estate matters for Michael's father, now deceased, also agreed to represent both Michael and his father in formalizing an alleged oral agreement between them, which was largely to Michael's benefit, and which involved transfer of the father's ownership interests in corporations owned by both of them to Michael (*see Nuzum v Field*, 106 AD3d 541, 541 [1st Dept 2013], *and Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282 [1st Dept 1999]). Although Basonas also adequately alleged a privity relationship that was not conclusively refuted by the documentary evidence, the vague allegation that it suffered unspecified lost profits as a result of defendants' malpractice was insufficient to support a malpractice claim. Basonas failed to set forth factual allegations from which one could reasonably infer that lost profits were attributable to defendants' alleged negligent conduct (*see Leggiadro, Ltd. v Winston & Strawn, LLP*, 119 AD3d 442, 442 [1st Dept 2014]).

The documentary evidence does not conclusively refute Michael's allegation that the "Acknowledgment of Debt" drafted by

defendants failed to memorialize the terms of the oral agreement between him and his father.

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

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

901 The People of the State of New York Ind. 2279/10
Respondent,

-against-

Jahmari Wilkins,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered September 24, 2013, convicting defendant, after a jury trial, of gang assault in the first degree, and sentencing him to a term of five years, unanimously affirmed.

The conviction 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 element of serious physical injury (Penal Law § 10.00[10]) was established by the victim's testimony, coupled with a physician's testimony, demonstrating that the victim's broken jaw caused a protracted impairment of his health, or of the function of a bodily organ. The victim's fractured jaw required surgical intervention,

resulting in his jaw being wired shut. For several months thereafter, the injury caused significant pain, restricted the victim to a liquid diet and prevented him from working. We note that nothing in the statute limits "protracted" impairments to those that are permanent or measured in years; in any event, at the time of trial, years after the crime, the injury still prevented the victim's jaw from closing properly and affected his speech (*see e.g. People v Messam*, 101 AD3d 407, 407-408 [1st Dept 2012], *lv denied* 20 NY3d 1102 [2013]; *People v Martinez*, 224 AD2d 254, 255 [1st Dept 1996], *lv denied* 88 NY2d 989 [1996]).

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

905 The People of the State of New York, Ind. 4305/12
Respondent,

-against-

Alberto Hernandez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered January 17, 2013, convicting defendant, upon his plea of guilty, of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously affirmed.

The sentencing court properly found that it had no discretion to defer defendant's mandatory surcharge (*see People v Jones* __ NY3d __, 2016 NY Slip Op 01208 [2016]).

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

907 Wilton Casiano, Index 300973/09
Plaintiff-Respondent, 83915/10

-against-

Start Elevator,
Defendant-Appellant,

Tuck It Away, Inc.,
Defendant.

- - - - -

Start Elevator, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Tuck-It-Away Associates, L.P.,
Third-Party Defendant-Respondent.

_____

Gallo Vitucci Klar LLP, New York (Kimberly A. Ricciardi of counsel), for appellant.

Dubow, Smith & Marothy, Bronx (Steven J. Mines of counsel), for Wilton Casiano, respondent.

Carroll McNulty & Kull LLC, New York (Sean Burns of counsel), for Tuck-It-Away Associates, L.P., respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about February 25, 2015, which, to the extent appealed from as limited by the briefs, denied defendant/third-party plaintiff Start Elevator, Inc.'s motion for summary judgment dismissing the complaint and all cross claims against it, and granted third-party defendant's cross motion for summary

judgment dismissing the third-party claim for contractual indemnification, unanimously modified, on the law, to grant Start's motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendant Start Elevator established prima facie that it owed no duty of care to plaintiff by demonstrating that plaintiff was not a party to its maintenance agreement with third-party defendant, the lessor of the premises. In opposition, plaintiff failed to raise an issue of fact as to the applicability of any of the exceptions to the general rule that a contractual obligation does not impose a duty in favor of a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]; *All Am. Moving & Stor., Inc. v Andrews*, 96 AD3d 674 [1st Dept 2012]). He pointed to no evidence that Start "launched a force or instrument of harm" (*Espinal*, 98 NY2d at 140); he does not claim that he

detrimentally relied on Start's performance of its contract with third-party defendant; and the record demonstrates that Start did not have complete control over the maintenance of the elevator, displacing third-party defendant (*id.*).

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

908 The People of the State of New York, Ind. 988/09
Respondent,

-against-

Kirkland Smith,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Samuel J. Mendez of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (William Mogulescu, J.), rendered December 9, 2011, convicting defendant, after a nonjury trial, of two counts of kidnapping in the second degree, and sentencing him to concurrent terms of nine years, unanimously affirmed.

Defendant's argument that the kidnapping charges merged with the assault and harassment charges is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. Here, the six-hour

restraint of two women was far more extensive and egregious than necessary to accomplish the other offenses (*see People v Gonzalez*, 80 NY2d 146, 153 [1992]*; People v Leiva,* 59 AD3d 161, 161 [1st Dept 2009] *lv denied* 12 NY3d 818 [2009]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

909-
910-
910A Index 381994/10

VNB New York Corp.,
Plaintiff-Respondent,

-against-

Pisces Properties, Inc., et al.,
Defendants-Appellants,

New York State Department of Taxation
and Finance, et al.,
Defendants.

_____

McCallion & Associates LLP, New York (Kenneth F. McCallion of counsel), for appellants.

Zeichner Ellman & Krause LLP, New York (Steven S. Rand of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered June 4, 2015, in favor of plaintiff and against defendants Pisces Properties, Inc. and Elizabeth Raghoo in the amount of $656,253.21 plus fees, costs and disbursements, unanimously affirmed, without costs. Appeal from orders, same court and Justice, entered January 15, 2014, which, inter alia, granted plaintiff summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In this commercial foreclosure action, plaintiff met its prima facie burden by producing the mortgage documents and

undisputed evidence of default (*see Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]). In opposition, defendants failed to raise a triable issue of fact regarding their affirmative defenses to foreclosure. Defendants' reliance on statutes governing pleading and notice requirements and mandating settlement conferences in foreclosure actions on certain home loans was misplaced as those statutes were not applicable to this action (*see Raia v Pototschnig*, 127 AD3d 574 [1st Dept 2015]).

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

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

911 The People of the State of New York, Ind. 2154/13
Respondent,

-against-

Robert Haugeton,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered April 3, 2014,

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 21, 2016

CLERK

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

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

912 Kathleen Bednark, Index 111553/10
Plaintiff-Respondent,

-against-

New York City Transit Authority,
et al.,
Defendants,

Heron Real Estate Corp., et al.,
Defendants-Appellants.

- - - - -

Heron Real Estate Corp., et al.,
Third-Party Plaintiffs-Appellants,

-against-

The City of New York,
Third-Party Defendant-Respondent.

_____

Carman, Callahan & Ingham, LLP, Farmingdale (James Carman of counsel), for appellants.

Rheingold, Valet, Rheingold, McCartney & Giuffra LLP, New York (Jeremy A. Hellman of counsel), for Kathleen Bednark, respondent.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for City of New York, respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered December 3, 2014, which denied the motion of defendants Heron Real Estate Corp. (Heron), BP America, Inc. (BP) and Accede Inc. for summary judgment dismissing the complaint as against them, granted plaintiff's motion for partial summary

judgment to the extent of dismissing Heron's eighth affirmative defense that it is not a proper party to the action, and granted the motion of third-party defendant City of New York for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to grant defendants' motion to the extent of dismissing the complaint as against BP and Accede Inc., and to deny the City's motion, and otherwise affirmed, without costs.

Plaintiff alleges that she was injured when she fell while disembarking from a bus at the same location where she was previously injured in the same manner as alleged in a prior action. In that action, this Court found that there was a triable issue of fact as to whether the location was part of a City designated bus stop (*Bednark v City of New York*, 127 AD3d 403 [1st Dept 2015]). The parties have not presented evidence here sufficient to resolve this issue as a matter of law.

Furthermore, dismissal of the action as against BP and Accede Inc. is warranted since they were tenants, not property owners, and no evidence was presented that they had any role in

the creation of the defective condition on the sidewalk. Accordingly, they had no obligation to maintain the area where plaintiff allegedly fell (*see O'Brien v Prestige Bay Plaza Dev. Corp.*, 101 AD3d 428 [1st Dept 2013]).

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

913 The People of the State of New York, Ind. 429/10
Respondent,

-against-

Alex Zapata,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joshua Norkin of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (James Wen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered November 29, 2012, as amended April 10, 2013, convicting defendant, upon his plea of guilty, of three counts of attempted robbery in the second degree, and sentencing him to concurrent terms of six years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for a youthful offender determination, and otherwise affirmed.

As the People concede, based on *People v Rudolph* (21 NY3d 497 [2013]), defendant is entitled to an express youthful offender determination.

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

914N-
915 Index 602335/09

Alexander Gliklad,
Plaintiff-Respondent,

-against-

Michael Chernoi,
Defendant.

- - - - -

Arik Kislin,
Nonparty Appellant.

_____

Schindler Cohen & Hochman LLP, New York (Lisa C. Cohen of counsel), for appellant.

Winston & Strawn LLP, New York (Thomas J. Quigley of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered December 17, 2014, which, to the extent appealed from as limited by the briefs, denied nonparty Arik Kislin's motion for a protective order, unanimously affirmed, with costs. Appeal from order, same court (Anil C. Singh, J.), entered June 23, 2015, which effectively granted reargument of the motion for a protective order, and, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

The motion court (Schweitzer, J.) providently exercised its discretion in denying Kislin's motion for a protective order limiting plaintiff's use of a restraining notice (*see Fiore v*

Oakwood Plaza Shopping Ctr., 178 AD2d 311, 312 [1st Dept 1991], *appeal dismissed* 80 NY2d 826 [1992]). The restraining notice states that Kislin is restrained from making "any sale, assignment or transfer of . . . all property in which the judgment debtor [defendant] has an interest." Although the notice would be ineffective if the judgment debtor defendant does not have any interest in property in Kislin's possession or custody (*see* CPLR 5222[b]; *Gallant v Kanterman*, 198 AD2D 76, 78 [1st Dept 1993]), postjudgment discovery is incomplete and there is evidence of an extensive and entwined business relationship between Kislin, the judgment debtor, and a nonparty, Iskander Makhmudov, involving their interests in various entities, including the Hotel Gansevoort. Accordingly, there is no basis for a protective order at this time.

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

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

916N Lassina Diarra, Index 114010/05
Plaintiff-Respondent,

-against-

NJS Carpentry, et al.,
Defendants-Appellants.

- - - - -

NJS Carpentry, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Richard Radna, M.D.,
Third-Party Defendant.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (Edward J. Guardaro, Jr. of counsel), for appellants.

The Flomenhaft Law Firm, PLLC, New York (Benedene Cannata of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered November 12, 2014, which granted plaintiff's motion for leave to amend the complaint to include a claim for punitive damages, unanimously affirmed, without costs.

According to a police report, at the time defendant Peter Ferentinos's vehicle rear-ended plaintiff's vehicle at an intersection, defendant had a blood alcohol level of 0.27% and was visibly intoxicated. In addition, Ferentinos testified during his deposition that on the evening of the accident, he

consumed alcohol in New Jersey and then drove to Manhattan, where he collided with plaintiff's vehicle. Defendant claims to have no recollection of the color or model of the car he struck, or anything the police asked or said to him at the time of the accident. Under these circumstances, plaintiff's proposed claim for punitive damages is not devoid of merit (*see Silvin v Karwoski*, 242 AD2d 945 [4th Dept 1997]; *see also Bondi v Bambrick*, 308 AD2d 330 [1st Dept 2003]; *Chiara v Dernago*, 128 AD3d 999, 1003 [2d Dept 2015]). Furthermore, plaintiff's delay in seeking leave to amend does not warrant denial of the motion inasmuch as there is no indication that defendants are prejudiced (*see Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]).

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

ENTERED: APRIL 21, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

976 Carol Hollman, Index 160160861/13
Plaintiff-Appellant-Respondent,

-against-

480 Associates, Inc.,
Defendant-Respondent-Appellant,

The City of New York,
Defendant-Respondent.

_____

A cross appeal having been taken to this Court by defendant 480 Associates, Inc., from order of the Supreme Court, New York County (Frank P. Nervo, J.), entered on or about February 25, 2015,

And said cross appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated April 8, 2016,

It is unanimously ordered that said cross appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: APRIL 21, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

104-
105 Index 651746/12

St. George Tower, et al.,
Plaintiffs-Appellants,

-against-

Insurance Company of
Greater New York,
Defendant-Respondent.

_____

Montgomery McCracken Walker & Rhoads LLP, New York (Charles Palella of counsel), for appellants.

Gartner & Bloom P.C., New York (Susan P. Mahon of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 27, 2015, affirmed, without costs. Appeal from order, same court and Justice, entered June 3, 2014, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Saxe, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
Karla Moskowitz
Rosalyn H, Richter
Paul G. Feinman, JJ.

104-105
Index 651746/12

_____x

St. George Tower, et al.,
Plaintiff-Appellant,

-against-

Insurance Company of
Greater New York,
Defendant-Respondent.

_____x

Plaintiff appeals from the judgment of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 27, 2015, inter alia, declaring that defendant is not obligated to reimburse plaintiff for the cost of repairing certain concrete floor slabs, and bringing up for review the orders of the same court and Justice, entered June 3, 2014, and February 20, 2013, which granted defendant's motions, respectively, for a declaratory judgment and to dismiss the claim for attorney fees. Plaintiff also appeals from the June 3, 2014 order.

Montgomery McCracken Walker & Rhoads LLP, New York (Charles Palella and Rimma Tsvasman of counsel), for appellants.

Gartner & Bloom P.C., New York (Susan P. Mahon and Kenneth A. Bloom of counsel), for respondent.

SAXE, J.

This appeal raises the issue of what is and is not covered by a property insurance policy's "Blanket Ordinance or Law Coverage Endorsement." Plaintiff cooperative corporation, the owner of the subject building located on Hicks Street in Brooklyn Heights, relies on such an endorsement in asking that its insurer be required to pay for the cost of certain structural repairs that are necessary to bring the building into compliance with the Building Code, because the need for those repairs was uncovered in the course of performing water damage remediation covered by the policy. We conclude that under circumstances such as those presented here, where it is fortuitously discovered in the course of performing remediation of covered property damage, that structural repairs or modifications are needed in order to bring the building into compliance with applicable codes, the "Ordinance or Law" endorsement is not brought into play.

Facts

Plaintiff St. George Tower and Grill Owners Corp. is a cooperative apartment corporation and owner of the building located at 101-121 Hicks Street, Brooklyn, New York. Defendant Insurance Company of Greater New York (GNY) issued a commercial package policy insuring plaintiff's building for the policy period commencing October 20, 2009 through October 19, 2010.

On May 26, 2010, pressure testing of a pump related to the building's fire suppression system resulted in a flood that damaged the ceilings and floors in certain apartments on the upper floors. GNY did not dispute that the damage to the floors and ceilings caused by the flood was a covered loss under the policy, and reimbursed plaintiff for water damage and lost maintenance incurred as a result of that covered loss.

The flooding of the building caused mold to develop within some units, which made it necessary to remove internal finishes in those areas. During the course of remediation, an architect retained by St. George inspected various apartments on the 24th through 28th floors, and filed an application for a permit to perform the work to repair the damage caused by the flood, pursuant to Directive 14 of the New York City Department of Buildings. Under Directive 14, the building's architect or engineer stands in the position of a DOB inspector: "[w]here any work is found not in compliance with plans or not in compliance with applicable laws, it shall be corrected and if not corrected, the department shall be notified by the architect or engineer and a violation requiring elimination of the defective work shall be filed." During the architect's inspection and repair, it was discovered that the concrete slabs under the flooring were in a distressed and deteriorated condition, including some open cracks

and penetrations through the slabs. This condition of the concrete slabs constituted a violation of the New York City Building Code (Administrative Code of City of NY §§ 27-597, 27-345), and required repair before the water damage remediation could be completed. It was stipulated that the condition of the concrete slabs was not caused by the flooding.

On or about December 15, 2010, St. George notified GNY of the need to remediate the concrete slabs, and in January 2011, GNY hired an engineering firm, WJE Engineers & Architects, P.C., to perform a physical inspection of the concrete floor slabs. The firm issued a report dated February 4, 2011 asserting that the observed distress to the concrete slabs predated the flooding of the apartments on May 26, 2010, and was

> "primarily due to very poor original construction practices and from subsequent renovation work to place or abandon plumbing lines. Additionally, some spalling of the concrete encasement around steel beams may have been the result of improper installation of the concrete and long term corrosion of underlying steel due to moisture and humidity in the building."

After GNY rejected the claim for the costs of repairing the concrete slabs, plaintiff brought this declaratory judgment action, asserting a cause of action for breach of contract based on GNY's failure to provide coverage, and seeking attorney's fees. GNY's pre-answer motion to dismiss the attorney's fees claim was granted. The parties subsequently moved and cross-

moved for summary judgment on the breach of contract claim. The motion court granted GNY's motion and dismissed the complaint, holding that under the policy GNY is not obligated to reimburse plaintiff for the cost of repairing the concrete slabs. For the reasons that follow, we affirm.

Discussion

The "Blanket Ordinance or Law Coverage Endorsement" at issue here provides coverage in the event the building "sustains direct physical damage that is covered under this policy and *such damage results in* the enforcement of the ordinance or law" (emphasis added). Another provision of the endorsement, covering "Increased Cost of Construction," applies when an insured building sustains covered direct physical damage, and "when the increased cost [of construction] *is a consequence of* enforcement of the minimum requirements of the ordinance or law" (emphasis added). Plaintiff reasons that the covered water damage remediation resulted in the enforcement of the Building Code regarding the condition of the concrete slabs, and that the cost of the extra work needed to repair the concrete slabs was a consequence of enforcement of the Building Code. In other words, the need to comply with the Building Code resulted from the performance of covered remediation.

The motion court based its decision on its view that a

causal link was necessary between the direct physical damage that is covered and the enforcement of the ordinance or law. It held that since the covered loss -- the water damage -- did not cause the need to repair the deterioration of the concrete slabs, the water damage to the ceilings and floors in plaintiff's building could not be said to have "result[ed] in" the enforcement of the Building Code to correct damage to the concrete slabs underlying the flooring. Rather, the damage to the concrete slabs predated the water damage and seemed to have been the result of, among other things, faulty construction and renovation.

Plaintiff argues that situations such as the one presented here are the very purpose of a "Law or Ordinance" endorsement. It reasons that since the endorsement is a modification of the standard policy, for which the insured pays an increased premium to cover the extra cost, and since the "Increased Cost of Construction Coverage" provision covers "the increased cost to . . . reconstruct or remodel *undamaged* portions of that building . . . when the increased cost is a consequence of enforcement of the minimum requirements of the ordinance or law," the endorsement must necessarily extend coverage beyond damage proximately caused by the insured peril, to include any resulting increased cost arising due to the enforcement of an ordinance or law affecting an undamaged portion of the building. Plaintiff

argues that the motion court in effect imported into the policy's endorsement a requirement not present in the policy, namely, that the need to enforce the ordinance or law must be a proximate cause of the covered damage.

Exactly the same GNY policy provisions were at issue in *DEB Assoc. v Greater New York Mut. Ins. Co.* (407 NJ Super 287, 970 A2d 1074 [App Div 2009], *cert denied* 200 NJ 473, 983 A2d 199 [2009]). There, a windstorm caused damage to the brick façade, concrete block perimeter wall, and windows on the north side of the seventh floor of an eight story office building. An inspection of the building by municipal officials revealed that the walls were secured to the concrete flooring using mortar, rather than steel angle irons, and that this code violation was present throughout the building; indeed, it was determined that the walls were no longer securely attached to the building. The building was therefore deemed unsafe, and it was ordered that the building be vacated until it could be brought up to current code standards.

In considering the increased cost of construction policy provision, the New Jersey Appellate Division stated:

> "We need not decide here the precise outer reaches of coverage under the clause at issue... [T]his was not a case in which the local inspector happened to be in the building because of the wall collapse and fortuitously discovered one or more unrelated code problems. There was a direct

> connection between the covered damage and the additional work required to the building.
>
> . . .
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> [T]he prior nonconforming condition was considered legally acceptable before the disaster occurred. But after one wall collapsed, the condition of the other walls was reasonably perceived as posing a danger to human life and safety... It was the wall collapse that proximately caused the authorities to specifically look for similar problems elsewhere in the building and to designate the building as an "unsafe structure" when they found them. Further, the required upgrades concerned the same structural part of the building (the walls), the same building code provision, and the same type of repair (installation of angle irons)"

(407 NJ Super at 300-301, 970 A2d at 1082-1083). So, while it explicitly declined to address the type of factual situation presented here, the Court in *DEB Associates* concluded that the Ordinance or Law endorsement covered the cost of replacing the mortar with steel angle irons throughout the building, because there was a direct connection between the covered damage and the additional required work.

City of Elmira v Selective Ins. Co. of N.Y. (83 AD3d 1262 [3d Dept 2011]), a case on which St. George relies, is similar to *DEB Associates*. There, a three-story historic building sustained damage when a portion of the southern wall collapsed during a windstorm (*id.*). A post-collapse investigation revealed the collapse was caused by hidden deterioration of mortar, a condition which existed in other walls, which resulted in the building being found to be in violation of several sections of

the New York State Property Maintenance Code, which required all of the deteriorated mortars to be repaired or the building to be demolished (*id.* at 1262-1263). The Third Department found that coverage was triggered based on the provision of the plaintiff's insurance policy that provided coverage for certain losses resulting from the enforcement of any "ordinance or law," reasoning that the subject ordinance or law provision contained no requirement that the windstorm itself be the direct cause of the enforcement of a law or ordinance, only that the resulting damage trigger the enforcement (*id.* at 1264). The Third Department found that the defendant insurer could have included language in the policy if it wished to limit its coverage to only those situations where the enforcement of an ordinance or law was directly caused by a covered cause of loss, such as a windstorm, yet did not do so (*id.*).

However, the ordinance at issue in *Elmira* was triggered by mortar conditions throughout the building that led to the collapse of the wall; as in *DEB Associates*, there was a direct connection between the covered loss and the enforcement of the applicable law or ordinance.

Here, in contrast to those situations, the latent problem that was uncovered by inspection necessitated by the covered damage was not a problem related to the covered damage; rather,

the inspection discovered a latent, unrelated problem with the building's infrastructure. The condition of the concrete slabs in plaintiff's building, which had to be repaired to bring the building into compliance with the Building Code, bore no relationship to the covered loss -- the water damage -- in the way that the collapsed wall in *DEB Associates* was related to the code violation and the resultant requirement that the mortar be replaced with steel angle irons.

This distinction leads us to the opposite result from that reached in *DEB Associates*. The Ordinance or Law endorsement cannot be triggered simply by the discovery, in the course of an inspection necessitated by a covered event, of structural problems that amount to code violations. That is so whether the discovered condition could have been discerned earlier (*see e.g. 61 Jane St. Tenants Corp. v Great Am. Ins. Co.*, 2001 US Dist LEXIS 265, 2001 WL 40774 [SD NY 2001]), or where, as here, it could not have been discovered absent the covered damage.

If the rule were otherwise, even an inspector's discovery of code violations resulting from shoddy original construction, such as beams or pipes made of sub-par materials, would leave the insurance company liable for the necessary replacement of those materials any time the problem happened to be uncovered in the course of damage remediation. We therefore agree with the motion

court; there must be some direct connection between the covered damage and the enforcement of the ordinance, and the necessity of a relationship between the damage and the code enforcement work is not satisfied by the fact that the covered work cannot be completed until the code-compliant repairs are performed. On this record, no evidence was presented that the code-compliant repairs resulted from, or were even related to, the water damage.

We are aware of decisions of other jurisdictions holding to the contrary, and decline to adopt their reasoning (*see e.g. Davidson Hotel Co. v St. Paul Fire & Marine Ins. Co.*, 136 F Supp 2d 901, 910-911 [WD Tenn 2001]). In our view, it is not sufficient that the chain of events beginning with the covered event led to the inspection that uncovered otherwise unrelated code violations.

Finally, while our affirmance of the award of summary judgment to defendant conclusively establishes the propriety of the dismissal of plaintiff's attorney's fees claim, we note that in any event, plaintiff's allegations that defendant's denial of coverage was not in good faith were insufficient to entitle plaintiff to reimbursement of its attorney's fees (*see Sukup v State of New York*, 19 NY2d 519, 522 [1967]).

Accordingly, the judgment of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 27, 2015, inter

alia, declaring that defendant is not obligated to reimburse plaintiff for the cost of repairing certain concrete floor slabs, and bringing up for review the orders of the same court and Justice, entered June 3, 2014, and February 20, 2013, which granted defendant's motions, respectively, for a declaratory judgment and to dismiss the claim for attorney fees, should be affirmed, without costs. The appeal from the June 3, 2014 order should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

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

ENTERED: APRIL 21, 2016

CLERK