SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 12, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

16737 TYT East Corp., et al., Index 601029/10
Plaintiffs, 590415/12

Hui Sheng Lin, etc.,
Plaintiff-Appellant,

-against-

Michael Lam, et al.,
Defendants,

David Gao, et al.,
Defendants-Respondents.

- - - - -

David Gao, et al.,
Third-Party Plaintiffs-Respondents,

Jin Hua Restaurant, Inc.,
Third-Party Plaintiff,

-against-

Ji Xiong Ni, etc., et al.,
Third-Party Defendants,

Yan Zhuang, etc., et al.,
Third-Party Defendants-Appellants.

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Jones Morrison, LLP, Scarsdale (Daniel W. Morrison of counsel), for Hui Sheng Lin, appellant.

Kaufman Borgeest & Ryan LLP, Valhalla (Edward J. Guardaro, Jr. of

counsel), for Yan Zhuang and Park Regent 88628 LLC, appellants.

Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel), for David Gao, respondent.

Anthony Y. Cheh, New York, for Chen Hua, respondent.

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 22, 2014, to the extent appealed from as limited by the briefs, awarding defendants/third-party plaintiffs David Gao and Chen Hua a/k/a Hua Chen (Chen) money damages against third-party defendants Yan Zhuang a/k/a Zhuang Yan and Park Regent 88628 LLC (Park Regent parties) and plaintiff Hui Sheng Lin (Lin), jointly and severally, and bringing up for review an order, same court and Justice, entered on or about August 5, 2014, which, inter alia, granted Gao's and Chen's motions for summary judgment against the Park Regent parties and a default judgment against Lin, granted Chen's motion for summary judgment on its counterclaims against Lin, and denied the Park Regent parties' and Lin's motions for summary judgment dismissing the third-party claims against them, unanimously reversed, on the law, the judgment as against the Park Regent parties and Lin vacated, Gao's and Chen's motions denied, and the Park Regent parties' motion for summary judgment dismissing the third-party claims against them granted except for

the claim related to the $200,000 in payments from plaintiff TYT East Corp. (TYT) to Park Regent, and otherwise affirmed, without costs.

Gao and Chen allege that they were defrauded into investing in plaintiff TYT, an entity that has since filed for bankruptcy. TYT operated businesses, including plaintiff Jin Hua Restaurant, Inc. (JHR), in a net-leased building at 35-37 East Broadway, in Chinatown. The building was subsequently forfeited to the federal government due to illegal gambling activity. Plaintiff Fen Zheng, and third-party defendants Ji Xiong Ni and Lili Ni, are alleged to have looted TYT and JHR and to have operated the companies for their own personal and illegal purposes without regard to corporate formalities.

In 2010, TYT sued Gao and Chen, who had invested over $800,000 in the companies. Gao and Chen answered and interposed counterclaims alleging, inter alia, that the "individual plaintiffs" (including plaintiff Hui Sheng Lin) conducted the businesses of TYT and JHR solely for their own benefit and conveyed assets of TYT and JHR to themselves or entities under their control.

On May 16, 2012, Gao and Chen commenced a third-party action against Ni, the Park Regent parties, and others, alleging fraud

and breaches of fiduciary duty and seeking a return of their investments. Gao and Chen alleged, inter alia, that Ni diverted TYT funds to Park Regent. Gao and Chen alleged that improper payments to Park Regent orchestrated by Ni were falsely recorded on the books of TYT as "repayment for a loan by Park Regent to TYT." Gao and Chen alleged that no such "loan" had taken place.

In February 2014, the Park Regent parties moved for summary judgment dismissing the third-party claims against them. They argued that Gao and Chen "lump[ed] all of the [t]hird-[p]arty [d]efendants together with absolutely no facts or evidence that they were working together or in concert." The Park Regent parties argued that the record was devoid of evidence establishing that they exercised unauthorized dominion over property owned by Gao or Chen. Even assuming, arguendo, a breach of fiduciary duty by Ni, they asserted there was no evidence in the record to suggest that the Park Regent parties knowingly induced or participated in said breach. They relied on a promissory note, produced for the first time on the motion, evidencing a debt between TYT and Park Regent that would account for $200,000 in payments from TYT to Park Regent.

Gao moved for a default judgment against all of the plaintiffs except TYT, and for summary judgment, inter alia, on

the second, eighth and ninth causes of action in the third-party complaint as against Park Regent. (Gao's motion was not directed toward Zhuang Yan.) Gao asserted that third-party defendants had made inconsistent statements concerning money exchanged between TYT and Park Regent, referring to the monies as an "investment," at times, and at other times alleging the monies to be "loans."

Chen moved for, among other things, a default judgment against all of the plaintiffs except TYT, and for summary judgment on his remaining third-party claims and counterclaims, to the extent not already discontinued.

Lin opposed Gao's motion for a default judgment and made a cross motion for summary judgment dismissing any claims in the third-party complaint that might be construed against him. He did not move to dismiss the counterclaims asserted against him in the main action.

The motion court granted the motions of Gao and Chen, and denied the motion by the Park Regent parties and the cross motion by Lin. The court noted that Lin and the Park Regent parties were in default going into the motion, since they willfully and contumaciously disregarded their discovery obligations, including express directives to produce all documents reflecting loans made by TYT and Zhuang. The court reasoned that denial of their

motions was warranted on that ground alone.

The court stated that Lin and the Park Regent parties "cannot now rely on a supposedly game-changing financial document that they egregiously withheld in violation of numerous court orders." The court nonetheless observed that the note purported to evidence a debt between Yan Zhuang and Ni, not TYT, only bolstering the notion that Ni and TYT had disregarded corporate formalities: "[B]y averring that the Note . . . evidences a TYT corporate debt, the Park Regent Parties implicitly concede that there is no real difference between TYT and Ni (a fact that the unrebutted evidence firmly proves). Hence, even if the Note were considered despite the discussed discovery abuses, it would be the nail in the coffin on Gao and Chen's veil piercing claims."

The motion court erred in granting summary judgment to Gao and Chen on their third-party claims against the Park Regent parties. While the court properly declined to consider as

evidence a copy of the promissory note,[1] which the Park Regent parties produced in an untimely manner, issues of fact concerning the $200,000 in payments from TYT to Park Regent are presented by other record evidence, including affidavits and deposition testimony claiming that there was such a loan. Yan Zhuang averred that on October 5, 2008, she purchased 10 shares of TYT for $200,000. She also averred that on October 14, 2008, she lent $200,000 to TYT, a debt she thereafter assigned to Park Regent. Ni testified that the $200,000 in payments constituted a partial return of an investment, before clarifying that the payments were on account of a loan.

As to the other third-party claims against the Park Regent parties, there is no evidence to support those claims, and they should be dismissed. There are no specific allegations of, and the record does not contain any other evidence with respect to wrongdoing by the Park Regent parties. Indeed, there is no evidence that Zhuang ever controlled or conducted the actions of TYT or JHR, or otherwise participated in the conveyance of corporate assets. Nor is there evidence that Zhuang otherwise

[1]The note appears to be signed by Ni on behalf of TYT, undermining the motion court's characterization of the note as the "nail in the coffin" on third-party plaintiffs' veil piercing claims.

aided and abetted any wrongdoing of Ni (*see Kaufman v Cohen*, 307 AD2d 113, 125-126 [1st Dept 2003]). Accordingly, the third-party claims, apart from the claim as to the $200,000 in payments, should have been dismissed with respect to the Park Regent parties.

Lin cross-moved for summary judgment dismissing the third-party claims to the extent they might be construed against him. However, Gao and Chen did not assert any third-party claims against Lin, and thus they cannot be construed against him. The only claims asserted against Lin were the counterclaims asserted by Gao and Chen in the main action. Lin did not move for summary judgment on those counterclaims. Accordingly, the court correctly denied Lin's motion for summary judgment.

The court erroneously granted Chen's motion seeking summary judgment on the counterclaims against Lin.[2] As with the Park Regent parties, the evidence did not establish that Lin participated in any alleged misappropriation of TYT assets. Assuming the counterclaim allegations might be construed to cover the claim pertaining to the alleged improper transfer of funds

[2]As noted, *supra* at 4, Gao did not move for summary judgment on the counterclaims against Lin. He instead moved for, among other things, entry of a default judgment against plaintiffs, excepting TYT.

from TYT to Park Regent – which implicates Lin to the extent he is alleged to have been a principal of Park Regent – issues of fact exist concerning Lin's relationship with Park Regent so as to preclude summary judgment on the narrow claim regarding the $200,000 transfer of funds between TYT and Park Regent.[3]

As to the default judgment against Lin, in September 2013, the court issued a compliance order stating that the failure of certain parties, including Lin, to turn over responsive documents by October 31, 2013 and participate in a telephone conference on November 4, 2013 would result in a default judgment. On October 28, 2013, Lin, who was then acting pro se, produced a single document, claiming that he had no other responsive documents in his possession, but failed to appear for the November 4, 2013 telephone conference. We find that the court abused its discretion in imposing the harsh sanction of default against a pro se litigant who did not clearly defy both prongs of the compliance order.

[3]While the third-party answers of Park Regent and Zhuang admitted that Lin was a principal of Park Regent, the record also contains Lin's sworn statement that this admission was in error and that he was not a principal.

We have considered and rejected the parties' remaining arguments.

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Friedman, Saxe, Richter, JJ.

585 Christopher Vasquez, etc., Index 155613/14
Plaintiff-Respondent,

-against-

National Securities Corporation,
Defendant-Appellant,

Mark Goldwasser,
Defendant.

_____

Baker & Hostetler LLP, New York (Daniel J. Buzzetta of counsel), for appellant.

Virginia & Ambinder, LLP, New York (James Emmet Murphy of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 4, 2015, which granted plaintiff's motion to give notice of the impending dismissal of the complaint to putative class members pursuant to CPLR 908, unanimously affirmed, without costs.

The motion court correctly required notice of the impending dismissal of the putative class action even though the class had not been certified. The court correctly relied on our decision in *Avena v Ford Motor Co.* (85 AD2d 149 [1st Dept 1982]), the subsequent amendment of Federal Rule of Civil Procedure 23(e) to restrict the notice requirement to dismissals, discontinuances

and compromises of "certified class" actions notwithstanding. The legislature, presumably aware of the law as stated in *Avena*, has not amended CPLR 908 to conform to the federal statute. Although defendant-appellant raises policy arguments in support of its position, its remedy lies with the legislature and not with this Court (*see Bright Homes v Wright*, 8 NY2d 157, 162 [1960]).

We have considered defendant-appellant's other contentions and find them unavailing.

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

ENTERED: MAY 12, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

754-
755 Index 601934/06

Steven M. Alevy, doing business
as Bankers Capital Realty Advisors,
Plaintiff-Appellant,

-against-

Isaac Uminer,
Defendant-Respondent,

Ditmas Capital, Inc., et al.,
Defendants.

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Harvinder S. Anand, Long Beach, CA, of the bar of the State of California, admitted pro hac vice, for appellant.

Heller Horowitz & Feit, P.C., New York (Eli Feit of counsel), for respondent.

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J., and a jury), entered February 5, 2014, in defendant Isaac Uminer's favor, unanimously affirmed. Appeal from order, same court and Justice, entered September 27, 2013, which denied plaintiff's motion to set aside the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff sued defendant Uminer for breaching a written Independent Contractor Agreement (ICA). Defendant denies that he signed the ICA. He testified that, while he may have signed an

agreement, that agreement would have been limited to cooperative mortgages, and was not the ICA. Plaintiff contends that, pursuant to the best evidence rule, which "requires the production of an original writing where its contents are in dispute and sought to be proven" (*People v Haggerty*, 23 NY3d 871, 876 [2014] [internal quotation marks omitted]), the trial court should have precluded defendant from testifying about an agreement that he might have signed.

Even assuming, arguendo, that the trial court erred in admitting defendant's testimony in violation of the best evidence rule, the error was harmless since there was overwhelming evidence to support the jury's finding that the ICA was not signed by defendant (*see id.*). Defendant testified that he did not recall signing the agreement. He also testified that the signature on the proffered agreement did not appear to be his, because the U in Uminer did not have a loop on it, while his signature does. The jury was shown copies of defendant's signature with a loop. There were additional issues with the agreement that called into question its authenticity, i.e., the second page was not numbered, paragraph 5 was missing, and the fax time stamps on the pages were out of sequence. Finally, the jury was presented with sworn deposition testimony that plaintiff

had provided in another case, where he denied under oath that he had any written agreement with defendant.

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

ENTERED: MAY 12, 2016

CLERK

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

902-
903 In re Gabrielle N., and Another,

Children Under the Age of Eighteen
Years, etc.,

Jacqueline T., et al.,
Respondents-Appellants.

The Administration for
Children's Services,
Petitioner-Respondent.

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George E. Reed, Jr., White Plains, for Jacqueline T., appellant.

Law Office of Israel Premier Inyama, New York (Israel Inyama of counsel), for Delroy N., appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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

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Appeal from order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about July 1, 2014, to the extent it brings up for review a fact-finding order, same court and Justice, entered on or about April 15, 2013, which found that respondent parents neglected their special needs daughter and derivatively neglected their younger daughter, held in abeyance, and the matter remanded to Family Court for a reconstruction hearing with respect to the missing medical records admitted into

evidence as Exhibits 1 to 4. Appeal from order of disposition otherwise dismissed, without costs, as moot.

At issue on appeal is whether a preponderance of the evidence supports the court's finding that the parents neglected the special needs child by interfering with her medical care, and delaying necessary treatment to the point where petitioner Administration for Children's Services sought, and was granted, a medical override of the parents' refusal to consent to surgery (*see Matter of Jaquan F. [Alexis F.]*, 120 AD3d 1113, 1114 [1st Dept 2014]), and whether the finding of derivative neglect was also appropriate inasmuch as the parents' behavior demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in their care (*see Matter of Joshua R.*, 47 AD3d 465, 466 [1st Dept 2008], *lv denied* 11 NY3d 703 [2008]). However, these issues cannot be resolved on the record provided to this Court since the medical records from the four health facilities that treated the special needs child, received into evidence in Family Court, were not submitted to this Court as part of the original record and are missing (*see Matter of Garner v Garner*, 88 AD3d 708, 709 [2d Dept 2011]; *Matter of Hall v Ladson*, 18 AD3d 753, 754 [2d Dept 2005]). Accordingly, the matter should be remanded for a reconstruction

hearing as indicated.

The father's appeal from disposition is moot, since the dispositional order has expired and been superseded by subsequent permanency orders (*see Matter of Skye C. [Monica S.]*, 127 AD3d 603, 604 [1st Dept 2015]).

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1124 The People of the State of New York, Ind. 3291/10
Respondent,

-against-

Michael Howell,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Andrew J. Zapata of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered May 18, 2012, convicting defendant, after a nonjury trial, of attempted criminal possession of a controlled substance in the seventh degree, and sentencing him to a term of 90 days, unanimously affirmed.

The court properly exercised its discretion in denying defendant's CPL 210.40 motion to dismiss the charges in furtherance of justice. After considering the statutory factors in totality, we find no "compelling factor" (CPL 210.40[1]) that would warrant that "extraordinary remedy" (*People v Moye*, 302 AD2d 610, 611 [2d Dept 2003]), "which we have cautioned should be exercised sparingly" (*People v Keith R.*, 95 AD3d 65, 67 [1st Dept 2012], *lv denied* 19 NY3d 963 [2012] [internal quotation marks

omitted]). Defendant's complaints about the validity of his original prosecution for felony charges, upon which the People were unable to proceed, do not undermine the remaining misdemeanor drug charge, and there is no extraordinary circumstance warranting dismissal of that charge.

The motion court implicitly considered the statutory factors, and defendant's challenge to the form of the court's decision is unavailing.

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1126 In re Nephra P. I.,

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

Shanel N., et al.,
Respondents-Appellants,

Administration for Children Services,
Petitioner-Respondent.

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Carol L. Kahn, New York, for Shanel N., appellant.

Aleza Ross, Patchogue, for Nephra John P., appellant.

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), attorney for the child.

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Order, Family Court, New York County (Jane Pearl, J.), entered on or about August 8, 2014, insofar as it determined that respondents derivatively neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence demonstrates that respondents posed an imminent risk of harm to the subject child (*see* Family Court Act § 1046[a][i], [b]). Prior orders had found that respondent father neglected and abused others of his children by inflicting excessive corporal punishment upon them,

derivatively neglecting another of his children, and that respondent mother failed to protect the children from the risk posed by their father. Respondents' previous behavior demonstrates so impaired a level of parental judgment as to create a substantial risk of harm for any child in their care (*see Matter of Keith H. [Logann Marchele K.]*, 135 AD3d 483, 484 [1st Dept 2016]). The record establishes that the circumstances leading to the prior findings had not been ameliorated at the time of the filing of the instant petition (*see Matter of Jayden C. [Luisanny A.]*, 126 AD3d 433 [1st Dept 2015]).

The child's brothers' out-of-court statements that the father inflicted excessive corporal punishment upon them and that the mother was aware of the excessive corporal punishment were properly admitted into evidence since the brothers' statements corroborated one another and were further corroborated by the caseworkers' observation of the brothers' injuries in the prior

neglect proceeding (*see* Family Court Act § 1046[a][vi]; *Matter of Genesis F. [Xiomaris S.]*, 121 AD3d 526 [1st Dept 2014]).

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1127 The Bank of New York as Trustee for Equity One Inc. Mortgage/Pass Through Certificate Series #2006-D, Plaintiff-Respondent, Index 380140/08

-against-

Ram Singh, Defendant-Appellant,

City of New York Parking, et al., Defendants.

_____

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellant.

Dorf & Nelson LLP, Rye (Jonathan B. Nelson of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered January 9, 2015, which granted plaintiff's motion for a judgment of foreclosure and sale, and denied defendant Ram Singh's cross motion to vacate a judgment of foreclosure and to dismiss the action or permit him to answer the complaint, unanimously modified, on the law, to direct plaintiff to provide a corrected affidavit of merit with certificate of conformity in accordance with CPLR 2309(c), and otherwise affirmed, without costs.

Singh is not entitled to vacate the judgment of foreclosure

and sale, because he has not established a reasonable excuse for his failure to appear, or a meritorious defense (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). The affidavit of the process server established, prima facie, that Singh was properly served (*Grinshpun v Borokhovich*, 100 AD3d 551, 552 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013]). The conclusory denials of receipt of service of both Singh and his son were insufficient to rebut the presumption that Singh was served. Also, Singh's general assertion that he was unaware of this action is belied by the record, which supports a finding that the proposed judgment of foreclosure was mailed to his home via first class mail almost four years before he moved to vacate the default.

While Singh suffered from serious health issues, and was hospitalized, during some of the time that this action was pending, it is noted that Singh first defaulted under the note and received a notice of default several months before his health issues began, and his medical records plainly provide that his son was assisting him with his real estate business. Moreover, Singh provides no sworn statement that his health issues prevented him from understanding that the mortgaged premises was the subject of a foreclosure proceeding.

Plaintiff has standing to foreclose because it established through the affidavit of its vice president that it was the holder of the note and mortgage when this action was commenced (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). However, because that affidavit, which was executed in New Jersey, did not include a certificate of conformity in accordance with CPLR 2309(c), plaintiff is directed to correct the defect nunc pro tunc by providing a new conforming affidavit (*Midfirst Bank v Agho*, 121 AD3d 343, 351 [2d Dept 2014]; *accord DaSilva v KS Realty, L.P.*, 133 AD3d 433 [1st Dept 2015]; *Diggs v Karen Manor Assoc., LLC*, 117 AD3d 401, 402-403 [1st Dept 2014]).

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

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1128 Adelina DaCosta, Index 308916/09
Plaintiff-Appellant,

-against-

Carlos Gibbs, et al.,
Defendants-Respondents.

_____

Law Offices of Eric H. Green and Associates, New York (Marc Gertler of counsel), for appellant.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered February 17, 2015, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to the claims of permanent consequential and significant limitation of use of the lumbar spine, cervical spine, and right hand, and otherwise affirmed, without costs.

Defendants established prima facie that plaintiff did not suffer either significant limitation or permanent consequential limitation of use of her lumbar and cervical spine, by submitting affirmations by an orthopedist who found full ranges of motion in all planes and a neurologist who found no injury, except right

hand weakness and deficits not related to the accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350, 353 [2002]). However, the sworn reports of plaintiff's treating chiropractor and pain management physician, who found objective indications of injury to the cervical and lumbar spine, raise triable issues of fact as to the extent of plaintiff's injuries and causation (*see Reyes v Se Park*, 127 AD3d 459 [1st Dept 2015]; *Sanchez v Draper*, 123 AD3d 492 [1st Dept 2014]). In concluding that plaintiff's spinal injuries were causally related to the accident, plaintiff's physician adequately addressed plaintiff's previous treatment for scoliosis, in light of plaintiff's claim that she was asymptomatic before the accident and the absence of any medical records showing otherwise (*see Jeffers v Style Tr. Inc.*, 99 AD3d 576, 577 [1st Dept 2012]).

Further, plaintiff's pain management physician diagnosed her with intrinsic minus hand injury involving a clawhand deformity, and opined that the hand condition resulted from cervical spine trigger point injections administered to relieve spinal pain causally related to the accident. Defendants, as the initial tortfeasors, may be liable not only for any injuries plaintiff may have sustained because of the accident, but also for any aggravation of her injuries resulting from subsequent negligent

medical treatment of those injuries (*see Glaser v Fortunoff of Westbury Corp.*, 71 NY2d 643, 647 [1988]). The conflicting expert opinions as to the cause of plaintiff's subsequent hand injuries raise an issue of fact for trial (*see Jacobs v Rolon*, 76 AD3d 905 [1st Dept 2010]).

Plaintiff's testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked "light duty" is fatal to her 90/180-day claim (*Tsamos v Diaz*, 81 AD3d 546, 547 [1st Dept 2011]).

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1129 Lisa Pitkow, Index 800047/11
Plaintiff-Appellant,

-against-

Everett M. Lautin, M.D., et al.,
Defendants,

Aventis Pharmaceuticals, Inc.,
et al.,
Defendants-Respondents.

_____

Massimo & Panetta, P.C., Mineola (Frank C. Panetta of counsel), for appellant.

Troutman Sanders LLP, New York (Eric Rumanek of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered December 9, 2014, which granted the motion of defendants Aventis Pharmaceuticals, Inc. and Sanofi-Aventis U.S., LLC (collectively Sanofi) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action arising from plaintiff's use of Sanofi's product called "Sculptra," used for smoothing facial wrinkles and filling in lost facial fat deposits, the motion court correctly determined that plaintiff's claims against Sanofi are preempted by the Federal Food, Drug and Cosmetics Act, as amended by the Medical Device Amendments (MDA) of 1976 (*see* 21 USC § 360e). The

claims alleged by plaintiff under state law impose requirements that are "different from, or in addition to [the federal] requirement[s]," and relate to either the "safety or effectiveness" of the medical product under the MDA (21 USC § 360k[a][1], [2]; *see Riegel v Medtronic, Inc.*, 552 US 312, 321-322 [2008]; *Mitaro v Medtronic, Inc.*, 73 AD3d 1142 [2d Dept 2010])).

We have considered plaintiff's remaining contentions, including that further discovery should be conducted, and find them unavailing.

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1130 The People of the State of New York, Ind. 778/08
Respondent,

-against-

Alex Rowser,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Natasha C. Merle of counsel), for appellant.

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

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Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered June 26, 2012, convicting defendant, after a jury trial, of murder in the second degree, criminal possession of a weapon in the second degree and unlawful possession of ammunition, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

The court's adverse inference instruction was a suitable remedy for a detective's inadvertent loss of the jacket that the victim had been wearing when he was shot, and the court properly exercised its discretion in declining to dismiss the indictment, declare a mistrial, or deliver a more lengthy charge (*see People v Haupt*, 71 NY2d 929, 931 [1988]; *People v Kelly*, 62 NY2d 516, 521 [1984]). Defendant has not established that he was

prejudiced by the loss of the jacket. Although, in asserting a justification defense, defendant claimed that the victim had a firearm in his jacket pocket, he has not explained how physical examination or forensic testing of the jacket could have corroborated that claim, particularly since there was no testimony by any prosecution or defense witness that the victim fired any shots. Furthermore, the emergency medical technician who removed the jacket did not notice anything heavy in any pocket. Defendant was able to make full use of the loss of the jacket in cross-examination and summation, and the adverse inference charge, while not including the expansive language requested by defendant, was sufficient to convey the appropriate principles (*see People v Handy*, 20 NY3d 663, 669-670 [2013]).

When, on the third day of jury deliberations, the jury issued its second deadlock note, the court properly exercised its discretion in denying defendant's defendant's mistrial motion and instead giving a full *Allen* charge (*see People v Hardy*, 26 NY3d 245, 252 [2015]). Without counting the time spent on readbacks of testimony and reinstruction on the law, the jury had actually deliberated for less than a day, and there was nothing coercive in the content of the charge or the circumstances under which it was given. Defendant did not preserve his present arguments concerning the court's response to the jury's first deadlock

note, and other events that occurred during deliberations, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. We perceive no basis for reducing the sentence.

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1131 Yea Soon Chung, et al., Index 153135/14
Plaintiffs-Appellants,

-against-

Mid Queens LP,
Defendant-Respondent.

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Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellants.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered December 18, 2014, which denied plaintiffs' motion for entry of a default judgment against defendant, and granted defendant's cross motion for an order compelling plaintiffs to accept the answer, unanimously affirmed, without costs.

The motion court's denial of plaintiff's motion for entry of a default judgment was a provident exercise of discretion. Defendant's excuse for its delay in answering, based on law office failure, while "not particularly compelling," was sufficient to show good cause for the delay (*see Marine v Montefiore Health Sys., Inc.*, 129 AD3d 428, 429 [1st Dept 2015]). Further, defendant provided an affidavit of its property manager which, although somewhat perfunctory, at this stage in the

proceedings was sufficient to set forth a potentially meritorious defense of lack of notice of any defect in the stairs involved in the accident (*see M&E 73-75 LLC v 57 Fusion LLC*, 121 AD3d 528 [1st Dept 2014]; *Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008]). Absent any showing of prejudice to plaintiff, the State's policy of resolving such disputes on the merits warranted denial of the motion and grant of defendant's cross motion (*New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465 [1st Dept 2012]).

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1132 Alvin Chanin, et al., Index 651579/14
Plaintiffs-Appellants,

-against-

Victor A. Machcinski, Jr., et al.,
Defendants-Respondents.

_____

Drinker Biddle & Reath LLP, New York (Jack N. Frost, Jr. of counsel), for appellants.

Braverman Greenspun, P.C., New York (Tracy Peterson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered December 24, 2014, which granted defendants' motion to dismiss the complaint and for summary judgment dismissing the complaint, and denied plaintiffs' cross motion for leave to file the proposed amended complaint, unanimously reversed, on the law, with costs, defendants' motion denied, and plaintiffs' cross motion granted.

The evidence shows that plaintiffs requested a letter from defendants, who were outside counsel to a hedge fund in which plaintiffs had invested, regarding the implications of certain Security and Exchange Commission (SEC) inquiries into the fund. Defendants responded with a letter, addressed to plaintiffs, specifically answering plaintiffs' questions by characterizing

the SEC inquiry as part of a new routine the SEC would be following under the newly passed Dodd-Frank legislation. Plaintiffs allege that, based upon defendants' assurances, they did not withdraw their investment in the fund. About a year after receiving the letter, the SEC instituted administrative cease and desist proceedings against the fund's managers, and the SEC ultimately prevailed in the proceedings. Plaintiffs allege that they lost their entire investment as a result of their reliance on defendants' false and misleading statements. Under the circumstances, plaintiffs adequately pleaded and showed the required "privity-like" relationship for their negligent misrepresentation claim (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *see Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382-385 [1992]).

Defendants are correct that this Court can affirm on alternative bases argued to, but not reached by, the motion court (*Nickerson v Volt Delta Resources*, 211 AD2d 512, 512 [1st Dept 1995], *lv dismissed in part and denied in part* 86 NY2d 860 [1995]), and that they cured their improper submission of the attorney defendant's affirmation by submitting the same affirmation in affidavit form on reply (*see Berkman Bottger & Rodd, LLP v Moriarty*, 58 AD3d 539, 539 [1st Dept 2009]).

Nevertheless, they are not entitled to dismissal of the complaint. Plaintiffs adequately pleaded the other elements of their negligence claim, and defendants failed to establish as a matter of law that there were no false statements in the letter, that plaintiffs' reliance on defendants' statements was unreasonable, or that the alleged false statements did not proximately cause plaintiffs' alleged losses (*see generally J.A.O. Acquisition Corp.*, 8 NY3d at 148).

Plaintiffs' cross motion for leave to file their proposed amended complaint to correct a typographical error with regard to the attorney defendant's first name should be granted.

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1133-
1134 Index 151372/14

In re William Setters, et al.,
Petitioners-Appellants,

-against-

AI Properties and Developments
(USA) Corp.,
Respondent-Respondent,

Boymelgreen Family LLC,
Respondent.

_____

Law Offices of Bernard D'Orazio & Associates, P.C., New York (Bernard D'Orazio of counsel), for appellants.

Troutman Sanders LLP, New York (Matthew J. Aaronson of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered August 4, 2015, which, insofar as appealed from, dismissed petitioners' first cause of action, for intentional fraudulent conveyance under Debtor and Creditor Law (DCL) § 276, and their seventh cause of action for attorneys' fees under DCL § 276-a, unanimously reversed, on the law, with costs, and those claims reinstated and granted. Order, same court and Justice, entered February 9, 2016, which granted respondent AI Properties and Developments (USA) Corp.'s (AI) motion for leave to reargue, and upon reargument, recalled, modified and denied so much of the

August 4, 2015 order as granted the DCL § 273-a claim against AI and directed them to pay to petitioner the sum of $1,251,347.00 plus postjudgment interest and costs pursuant to CPLR 5225 (b), unanimously reversed, on the law, with costs, and that portion of the August 4, 2015 order reinstated. The Clerk is directed to enter judgment accordingly.

Respondent AI was not entitled to reargument. "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided ... or to present arguments different from those originally asserted" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]). Although AI properly preserved the statute of limitations as an affirmative defense in its answer (CPLR 3018[b]; *see Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 85 [1st Dept 2015]), it never argued that petitioner's claims were barred by the applicable statute of limitations *(see Derico v City of New York*, 66 AD2d 740 [1st Dept 1978]; *Garza v 508 W. 112th St., Inc.*, 22 Misc3d 920, 929 [Sup Ct, NY County 2008]), nor did it cite New York Limited Liability Company Law (LLCL) § 508(c), which it raised for the first time on its motion to reargue. Contrary to AI's contention, and the motion court's

reasoning on reargument, the statement of AI's CEO that, [b]y May 2009, all of the units were sold and the most recent distribution made by W Squared to AI occurred in 2007," was insufficient to support a statute of limitations argument or prove their defense (*see Kiamos & Tooker v Zelis Florist*, 264 AD2d 623 [1st Dept 1999]).

The three-year limitation period imposed by LLCL § 508(c) does not override the six-year statute of limitations for fraudulent conveyance claims brought under the DCL, since the plain language of section 508 indicates that the statute applies to members of an LLC, holding them "liable to the limited liability company" for wrongful distributions (*see* LLCL § 508[b]; *Lyman Commerce Solutions, Inc. v Lung*, 2015 WL 1808693, *5, 2015 US Dist LEXIS 51447, *13 [SD NY 2015]). The statute does not address the claims of outside creditors (*277 Mott St., LLC v Fountainhead Constr., LLC*, 2012 NY Slip Op 30185[U], *9-10 [Sup Ct, NY County 2012]).

In view of our holding as to LLCL § 508(c), we find that petitioner's claim under DCL § 273-a was timely, and AI failed to raise an issue of fact in this regard. Even if, as AI contends, its CEO's affidavit "confirmed" that the final distribution by W Squared occurred in March 2007, rather than 2011, the statute of

limitations would not have begun to run in 2007 on petitioner's claim under DCL § 273-a, since the judgment in the personal injury action was not entered until November 2011 (*see Coyle v Lefkowitz*, 89 AD3d 1054, 1056 [2d Dept 2011]).

Petitioner sustained his burden of proof on his claims for actual fraud under DCL § 276 (*see Marine Midland Bank v Murkoff*, 120 AD2d 122, 126 [2d Dept 1986], *appeal dismissed* 69 NY2d 875 [1987]). Although "fraudulent intent, by its very nature, is rarely susceptible to direct proof and must be established by inference from the circumstances surrounding the allegedly fraudulent act" (*id.* at 128), we find sufficient "badges of fraud" to support petitioner's first cause of action for fraudulent conveyance under DCL § 276. For example, respondents were the sole members of W Squared, the judgment debtor, no adequacy of consideration has been shown, W Squared was aware of petitioner's claim in the personal injury action, and W Squared is unable to pay the judgment, as it has informed petitioner that it has no funds remaining with which to do so (*see Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006]). AI failed to provide any evidence to negate the inferences of intent. The record also established that despite the statement of AI's CEO

that AI did not learn of petitioner's underlying litigation until November 2013, its 2007 contract with co-respondent Boymelgreen established otherwise. Having established actual intent to defraud, petitioner is entitled to attorneys' fees under DCL § 276-a.

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

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1136-
1137-
1138-
1139 In re Cameron W., and Others,

Dependent Children Under the Age
of Eighteen, etc.,

Lakeisha E. W., etc.,
Respondents-Appellants,

SCO Family of Services,
Petitioner-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

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

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the children.

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Orders of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about July 25, 2013, which, upon fact-finding determinations that respondent permanently neglected the four subject children, terminated her parental rights as to the children and transferred custody and guardianship of the children to the Commissioner of Social Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

Family Court's determination that respondent permanently

neglected the subject children is supported by clear and convincing evidence (Social Services Law 384-b[7][a]; [3][g][i]). Petitioner agency engaged in diligent efforts to encourage and strengthen respondent's relationship with the children by referring her to domestic violence counseling, mental health services, and parenting classes, and by scheduling regular visitation (*see Matter of Adam Mike M. [Jeffrey M.]*, 104 AD3d 572 [1st Dept 2013]). Despite these diligent efforts, respondent continued to deny responsibility for the conditions necessitating the children's removal from her in the first place, failed to complete or to benefit from the parenting skills programs offered to her, and failed to demonstrate that she had adequate parenting skills to meet the children's needs (*see id.*; *see also Samantha C.*, 305 AD2d 167 [1st Dept 2003]). She acted disruptively and violently during scheduled visitation, failed to visit the children consistently, and failed to appreciate why the children had been placed in foster care (*Matter of Ebonee Annastasha F. [Crystal Arlene F.]*, 116 AD3d 576 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014]).

A preponderance of the evidence supports the court's determination that termination of respondent's parental rights was in the best interests of the children, who have been in a

stable foster home for a large portion of their lives and do not wish to be removed from that home; all their basic needs are being met there, and the foster mother wishes to adopt them (*see Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]).

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1140 The People of the State of New York, Ind.967/14
Respondent,

-against-

Harry Mendez,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about December 19, 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: MAY 12, 2016

CLERK

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

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1141 The People of the State of New York, Ind. 3357/12
Respondent,

-against-

Steven Pacheco,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (William McGuire, J., at plea; Robert Sackett, J., at sentencing), rendered May 8, 2014, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

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

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, JJ.

1143 In re Touro College, Index 101338/13
Petitioner,

-against-

City of New York Environmental Control Board,
Respondent.

Tenenbaum, Berger & Shivers, LLP, Brooklyn (Damien Bernache of counsel), for petitioner.

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

Determination of respondent Environmental Control Board, dated May 30, 2013, which found petitioner in violation of Administrative Code of City of NY §§ 28-118.3.2 and 28-204.4 and imposed civil penalties in the amount of $2,000, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Michael D. Stallman, J.], entered February 4, 2014), dismissed, without costs.

The ambiguities in the first notice of violation were clarified at the first session of the hearing and petitioner had the opportunity to present a defense at the second session. Substantial evidence, including the issuing officer's affirmed

statements in the notice of violation, supports the finding that petitioner's use of the cellar for a laundry room, workshop, and recreation area was unauthorized since such uses were not noted in the most recent certificate of occupancy (*see generally 300 Gramatan Ave Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]).

Furthermore, petitioner did not dispute the presence of a laundry room in the cellar, and its claim that the laundry room was a permitted accessory use of the premises was not raised before the administrative agency and is, thus, unpreserved *(see Matter of Seitelman v Lavine,* 36 NY2d 165, 170 [1975]).

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

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1144N Liberty Mutual Insurance Company, Index 23664/14E
Petitioner-Respondent,

-against-

Phillip Robles,
Respondent,

United Services Auto Assn., et al.,
Proposed Additional Respondents-Appellants.

_____

Fixler & LaGattuta, LLP, New York (Paul F. LaGattuta III of counsel), for appellants.

Burke, Conway, Loccisano & Dillon, White Plains (David M. Berkley of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered on or about January 6, 2015, which granted the petition to permanently stay arbitration pursuant to CPLR 7503, unanimously reversed, on the law, with costs, and the petition granted to the extent of temporarily staying the arbitration sought by respondent Phillip Robles, and remanding the matter to allow for the addition of proposed additional respondents and for further proceedings in accordance with this decision.

Petitioner seeks a permanent stay of an arbitration demanded by respondent Robles, a passenger in a motor vehicle insured by petitioner that was involved in a hit-and-run car accident.

Proposed additional respondents are the insurer and the owners of the vehicle that allegedly fled the scene. In a prior arbitration concerning a property damage claim, the arbitrator determined that the proposed additional respondents' vehicle was the vehicle that fled the scene.

Supreme Court erred in granting the petition to permanently stay the arbitration demanded by Robles based on the doctrine of collateral estoppel. Petitioner did not raise the issue of collateral estoppel in support of its petition, and proposed additional respondents did not raise it in their opposition. Although the issue was addressed in Robles's opposition and in petitioner's reply, those papers were served after the due date of the proposed additional respondents' opposition. Accordingly, the proposed additional respondents had no obligation or opportunity to address the issue (*see Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625 [1st Dept 1995]; *see also Lazar v Nico Indus.*, 128 AD2d 408, 409-410 [1st Dept 1987]).

On appeal, proposed additional respondents argue that they did not have a full and fair opportunity to litigate the issues in the property damage arbitration, and assert that the relevant arbitration agreement expressly limits the preclusive effect of the arbitrator's findings. Such limiting language may be

dispositive on the issue (*see Feinberg v Boros*, 99 AD3d 219, 226-228 [1st Dept 2012], *lv denied* 21 NY3d 851 [2013]). However, because the agreement is not in the record on appeal, the issue cannot be determined (*see Diarrassouba v Consolidated Edison Co. of N.Y. Inc.*, 123 AD3d 525, 525 [1st Dept 2014]). Accordingly, the arbitration demanded by Robles should be temporarily stayed, and the matter should be remanded to allow for the addition of the proposed additional respondents and for further proceedings on the issues of collateral estoppel and coverage, including, if necessary, further discovery and a framed issue hearing (*see Matter of ELRAC, Inc. v Brooks*, 36 AD3d 470, 471 [1st Dept 2007]).

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

ENTERED: MAY 12, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1145N Mt. Hawley Insurance Company, et al., Plaintiffs-Respondents, Index 156663/14

-against-

American States Insurance Company, Defendant,

J&R Glassworks, Inc., Defendant-Appellant.

_____

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

Cascone & Kluepfel, LLP, Garden City (Howard B. Altman of counsel), for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered December 23, 2015, which denied defendant J&R Glassworks, Inc.'s motion to vacate a default judgment, unanimously affirmed, with costs.

Plaintiff Chatsworth Builders, LLC (Chatsworth) was the general contractor for a construction project and subcontracted with J&R Glassworks, Inc. (J&R) to perform certain glasswork. A construction worker, Raphael Mejia, was subsequently injured while performing glasswork. Mejia commenced an action against plaintiff 537 West 27th Street Owners, LLC (537) and Chatsworth, among others (the Mejia Action). Chatsworth and 537 commenced a

third-party action against J&R and Walsh Glass & Metal, Inc. (Walsh), another glass-work subcontractor on the project, asserting causes of action for contractual and common-law indemnification and breach of contract for failure to procure insurance. While the Mejia action was pending, plaintiffs commenced this action seeking a declaratory judgment that J&R breached its obligation to purchase insurance. J&R failed to respond to plaintiffs' summons and complaint in this action, and plaintiffs moved for default judgment, which was granted.

The court properly denied J&R's motion to vacate the default judgment. J&R argues that the court, in addition to denying J&R's motion to vacate the default, improperly granted plaintiff damages related to contractual indemnification, which J&R asserts plaintiff did not seek in its amended complaint. Contrary to J&R's argument, the court's decision denying the motion to vacate states that the default was limited to "the claims alleged against movant in the amended summons and complaint," which did not include a claim that J&R was in breach of its contractual obligations to indemnify and defend Chatsworth and 537 in the Mejia action.

An agreement to indemnify is separate and distinct from an agreement to procure insurance (*Kinney v Lisk Co.*, 76 NY2d 215,

218 [1990]). As plaintiffs' complaint only sought a declaratory judgment that J&R had breached its obligation to procure insurance, its default judgment may not exceed the relief sought and must be limited to that cause of action (CPLR 3215[b]; *Gluck v Allen Mfg. Co.*, 53 AD2d 584, 585 [1st Dept 1976]). We have examined appellant's remaining contentions and find them unavailing.

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

ENTERED: MAY 12, 2016

CLERK

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

16647 Jack Kelly Partners LLC, Index 600351/08
Plaintiff-Appellant,

-against-

Elsa Zegelstein, et al.,
Defendants-Respondents.

_____

Moulinos & Associates LLC, New York (Peter Moulinos of counsel), for appellant.

Port & Sava, Lynbrook (George S. Sava of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 23, 2014, modified, on the law and the facts, to vacate the declaration and deny defendants' motion, and otherwise affirmed, without costs.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

16647
Index 600351/08

_____x

Jack Kelly Partners LLC,
Plaintiff-Appellant,

-against-

Elsa Zegelstein, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Paul Wooten, J.), entered October 23, 2014, which, to the extent appealed from, denied plaintiff's cross motion for summary judgment on its causes of action for rescission and for a declaratory judgment, declared that the lease between the parties is valid and enforceable, and granted defendants' motion for summary judgment dismissing the amended complaint and for summary judgment on their breach of contract counterclaim.

Moulinos & Associates LLC, New York (Peter Moulinos and Ian Henri of counsel), for appellant.

Port & Sava, Lynbrook (George S. Sava of counsel), for respondents.

TOM, J.P.

Plaintiff, as tenant, and defendants, as owner, entered into a commercial lease agreement dated March 7, 2006 for second floor space of a building located at 210 East 60th Street in Manhattan for a term of five years and two months, commencing March 1, 2006, at a monthly rent of $4,000. Under Paragraph 57(B), the lease stated that "Tenant shall use and occupy the Demised Premises for general offices of an executive recruiting firm" and "no other purpose." Paragraph 57(A) provides that plaintiff was not permitted to use the premises in any manner that "violates the certificate of occupancy for the Demised Premises, if any, or for the Building," or that violates any other laws or regulations.

Plaintiff asserts that in December 2007, it discovered that the certificate of occupancy (CO) for the building required that the leased premises be used only for residential purposes. Plaintiff further claims that, it requested defendants to amend and correct the CO to permit the demised premises to be used for commercial purposes, but defendants refused to comply. Plaintiff vacated the premises on May 8, 2009 and commenced this action asserting causes of action for rescission, a declaratory judgment that the lease was invalid, unenforceable and illegal, and breach of contract.

Plaintiff's breach of contract claim was dismissed by a prior order of the Supreme Court. Thereafter, the parties moved and cross-moved for summary judgment relating to plaintiff's remaining causes of action, and defendant's counterclaims for breach of contract and breach of the covenant of good faith and fair dealing.

The court denied plaintiff's cross motion for summary judgment on its causes of action for rescission and for a declaratory judgment, declared that the lease between the parties was valid and enforceable, and granted defendants' motion for summary judgment dismissing the complaint and granting them judgment on their counterclaim for breach of contract.

Because there are issues of fact as to whether plaintiff's cause of action for rescission of the lease can be proved on the grounds of impossibility, fraud or misrepresentation, and also whether the lease should be terminated based on frustration of purpose, defendants' motion for summary judgment dismissing the amended complaint should not have been granted.

While there is case law holding that "[t]he mere failure of a landlord to obtain a certificate of occupancy before a commercial tenant's date of occupancy does not, without more, give the tenant the right to terminate the lease" (*Progressive Image Gruppe v 162 Charles St. Owners*, 272 AD2d 66, 66 [1st Dept

2000]), those cases are clearly distinguishable from the facts of this case. Notably, *Progressive* cites to *Jordache Enters. v Gettinger Assoc.* (176 AD2d 616 [1st Dept 1991], which in turn relies on *56-70 58th St. Holding Corp. v Fedders-Quigan Corp.* (5 NY2d 557, 561 [1959]. Significantly, both *Jordache Enters.* and *56-70 58th St.* deal with situations in which the absence of a valid CO could be readily cured by obtaining a corrected CO, whereas it is unknown from this record whether the CO could be corrected based on zoning or other local ordinances or regulations to allow the demised premises to be used for commercial purposes, or whether defendants were willing to have it corrected.

Further, in *56-70 58th St.*, "[t]he tenant knew, when it signed the lease and immediately entered into possession, that plans had to be drawn and approved and the specified alterations completed before a new certificate would issue." The tenant agreed but failed to afford the landlord the opportunity to "exhaust all remedies" to obtain a new certificate and prematurely vacated the premises (*id.* at 561-562). The Court of Appeals pointed out that a conforming CO was issued within days after tenant vacated the premises, and found that the tenant breached the lease agreement. In the present case, plaintiff was not aware that the use intended by the lease as represented by

defendants was prohibited by the CO or that a new CO would have to be requested and issued, and when requesting defendants to assist in conforming the CO, plaintiff claims defendants refused.

In any event, in *Progressive*, this Court, in denying the tenant's motion for summary judgment, also found, that there were issues of fact "as to whether defendant made a specific representation concerning permitted uses under the certificate of occupancy, and, if so, whether plaintiff's alleged reliance thereon was reasonable" (272 AD2d at 67). According to the present complaint, defendants advertised and conveyed to the general public that the premises was suitable for commercial use, and the executed lease indicated that only such use was permitted. Plaintiff thus claimed it relied on defendants' statements and representations concerning the use of the premises. Plaintiff stated, in an affidavit from Jack Kelly, plaintiff's founder and President, that it had relied on defendants' representation that the premises may be used as an office, and that when it informed defendants that the commercial use of the space was not in conformity with the CO, defendants failed to assist plaintiff's attempt to revise the CO. In fact, at his deposition, Kelly explained that although he confirmed with the Department of Buildings (DOB) that the premises was only to be used for residential purposes, defendant Debra Zegelstein

insisted that the DOB had made a mistake and defendants directed plaintiff to continue to occupy the premises to conduct its business. Concluding that further discussions with defendants would be futile, and fearing that the space posed a danger to its employees and clients, plaintiff vacated the premises. Plaintiff argued that under Reference Standard 9-2 of the New York City Building Code, commercial office space must be certified to withstand a live load of 50 pounds per square foot, while a residential CO only requires the building to be certified to withstand a live load of 40 pounds per square foot. Plaintiff argued that this live load deficiency put plaintiff's employees and guests at risk and vacated the space within a matter of months.

In support of defendants' motion for summary judgment, defendant Elsa Zegelstein submitted her affidavit stating that when Kelly approached her about the CO, she "indicated a desire to assist him" but Kelly was not interested. Defendants also submitted Kelly's deposition testimony wherein he stated that he did not know whether the CO could be changed with regard to the premises and that plaintiff did not submit paperwork in order to change the CO.

Paragraph 6 of the lease agreement provides:

> "Tenant, at Tenant's sole cost and expense, shall promptly comply with all present and future laws, orders and

> regulations of all state, federal, municipal and local governments . . . which shall impose any violation, order or duty upon Owner or Tenant with respect to the demised premises, whether or not arising out of Tenant's use or manner of use thereof, (including Tenant's permitted use) . . ."

However, notwithstanding Paragraph 6, there are issues of fact as to whether plaintiff's cause of action for rescission can be proved. While the purpose of the lease was for the space to be used as an office and plaintiff is in fact prohibited from any other use, the lease also prohibits plaintiff from using the premises in violation of the CO, and the CO itself prohibits commercial use of the space. Therefore, plaintiff properly raises the excuse of impossibility of performance as its ability to perform under the lease was destroyed by law (*see 407 E. 61st Garage v Savoy Fifth Ave. Corp*, 23 NY2d 275, 281 [1968]). Absent defendants' willingness to alter the CO it was impossible for plaintiff to perform its obligations under the lease, and the evidence raises an issue of fact as to whether defendants were willing to cooperate in this regard.

Nor should defendants be shielded by plaintiff's obligation in the lease to obtain any necessary licenses or permits for the premises under Paragraph 57(D) of the lease. Indeed, that obligation specifically excepts changes to the CO, and defendants would certainly have to, at a minimum, participate in changing

the CO (*cf. Kosher Konvenience v Ferguson Realty Corp.*, 171 AD2d 650 [2d Dept 1991] [finding lease valid where language used in the lease indicates that the parties intended that the defect in the CO be corrected and the premises legally occupied, and where the lease specifically provided that the tenant would procure a certificate of occupancy at its own expense in the event one was required by any governmental authority]).

Moreover, as a matter of equity, defendants should not be able to hide behind the "no representations" clauses included in the lease while at the same time having represented to plaintiff that the premises are suitable for commercial use, and in fact stating in the lease that plaintiff's use of the space as an office is "deemed to be a material inducement to the Landlord to enter into this Lease" and that tenant shall use the space for "no other purpose." The same paragraph provided that the parties "agree . . . that any use or occupancy by Tenant of the Demised Premises for a purpose not specifically set forth above shall be deemed a material default by Tenant." Under this scenario, plaintiff was in "default" immediately upon the execution of the lease since the stated commercial use was in violation of the CO, an incongruous result.

Of course, "[t]here is no hard and fast rule on the subject of rescission, for the right usually depends on the circumstances

of the particular case" (*Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284 [1910]). Further, fraud sufficient to support the rescission requires only a misrepresentation that induces a party to enter into a contract resulting in some detriment; proof of scienter is not necessary and even an innocent misrepresentation is sufficient for rescission (*see D'Angelo v Hastings Oldsmobile*, 89 AD2d 785 [4th Dept 1982], *affd* 59 NY2d 773 [1983]; *see also Seneca Wire & Mfg. Co. v Leach & Co.*, 247 NY 1, 8 [1928]). Accordingly, even assuming defendants were truly unaware that the CO prohibited commercial use of the premises and made an innocent misrepresentation, rescission may be appropriate (*see e.g. New Talli Enters., Inc. v Van Gordon*, 2003 NY Slip op 51066(U) [Civ Ct, Richmond County 2003] [granting rescission of a lease where, unbeknownst to the parties, use of premises not permitted under the CO, even though the lease included boilerplate provision that the landlord had made no promises or representations with respect to the demised premises]).

Finally, as an alternative consideration, there is an issue of fact as to whether the lease should be terminated on the ground of frustration of purpose. In order to invoke this defense, "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the

transaction would have made little sense" (*see Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004]; *see also* Restatement [Second] of Contracts, § 265, Comment a). Here, without the ability to use the premises as an office, the transaction would have made no sense, and the inability to lawfully use the premises in that manner combined with defendants' alleged failure and refusal to correct the CO constitutes a frustration of purpose entitling plaintiff to terminate the lease (*see Elkar Realty Corp. v Kamada*, 6 AD2d 155 [1st Dept 1958], *lv dismissed* 5 NY2d 844 [1958]; *see also Two Catherine St. Mgt. Co. v Yam Keung Yeung*, 153 AD2d 678 [2d Dept 1989] ["Since the intended purpose of the lease may have become impossible to effectuate through no fault of the defendant tenant, he may have been entitled to terminate the lease"]).

Accordingly, the order of the Supreme Court, New York County (Paul Wooten, J.), entered October 23, 2014, which, to the extent appealed from, denied plaintiff's cross motion for summary judgment on its causes of action for rescission and for a declaratory judgment, declared that the lease between the parties is valid and enforceable, and granted defendants' motion for summary judgment dismissing the amended complaint and for summary judgment on their breach of contract counterclaim, should be modified, on the law and the facts, to vacate the declaration

that the lease between the parties is valid and enforceable, and to deny defendants' motion for summary judgment dismissing the amended complaint and for summary judgment on their breach of contract counterclaim, and otherwise affirmed, without costs.

All concur.

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

ENTERED: MAY 12, 2016

CLERK