SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 18, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11613 Wyle Inc., et al., Index 653465/11
Plaintiffs-Appellants,

-against-

ITT Corp., et al.,
Defendants-Respondents.

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Morrison Cohen LLP, New York (Donald H. Chase of counsel), for appellants.

Venable LLP, New York (Michael Schatzow of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 14, 2012, which granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion denied.

The issue here is whether the allegations in the complaint, when viewed in the light most favorable to plaintiffs, state a cause of action for breach of contract (*see Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 [2001]). We find that a claim is stated.

This lawsuit arises from the sale by defendant EDO Corporation of the stock of EDO's subsidiary, nonparty CAS, Inc.,

to plaintiff Wyle Services Corporation. The complaint alleges the following: CAS contracts with federal agencies to provide engineering, scientific, and technical services. Most of the company's revenue is derived from work it bills pursuant to a negotiated service contract with the General Service Administration (GSA), which sets forth a "Professional Engineering Services" (PES) schedule listing the specific rates that CAS can charge agencies for various work.

In early 2010, defendants put CAS up for sale. At the same time, the term of CAS's contract to provide government services, including the PES schedule, was due to expire. In March 2010, the GSA's Office of the Inspector General (OIG) notified CAS in writing that, while it was considering extending the term of the service contract, the OIG would first exercise its contractual right to audit the "pricing policies and practices" reflected in the PES schedule, and that a change to the PES schedule rates might result.

The parties executed a Stock Purchase Agreement on August 7, 2010. Under the agreement, EDO and CAS submitted a "Company Disclosure Schedule" that they represented and warranted to Wyle set forth, among other things, each government contract to which CAS was a party that the company knew was being audited by a governmental authority. Although the OIG's audit of the PES

schedule was still under way when the agreement was executed, EDO and CAS omitted any mention of that audit on the Company Disclosure Schedule.

In March 2011, the OIG completed its audit, and as a result, GSA reduced many of the rates that CAS could charge under the PES schedule. In April 2011, Wyle demanded compensation for CAS's reduced profitability under Article VIII of the agreement, which is headed, "SURVIVAL OF REPRESENTATIONS AND WARRANTIES; INDEMNIFICATION." Article VIII states that Wyle is entitled to "indemnification" for "Losses" arising from the selling parties' breach of their representations and warranties. Plaintiffs claim that, if they had known about the OIG audit, Wyle would have paid less for CAS because the GSA's audit of a government contractor's schedule "inevitably leads to reductions, often substantial reductions, in the rates a contractor can charge for future government work." Although Wyle informally sought indemnification from defendants in April 2011, it did not put its demand in writing until it sent two letters in June and September 2011. In December 2011, after defendants refused to compensate Wyle, plaintiffs commenced this action asserting a single claim for breach of contract.

The motion court granted defendants' motion to dismiss on the ground that Wyle waited until some months after OIG had

issued the audit before sending the letters. Wyle's delay, the court found, breached its contractual obligation under Article VIII to promptly notify defendants of its indemnification claim in writing. According to the court, the OIG audit constituted a "Third Party Claim," defined as a "claim, action, suit, proceeding or demand" brought by a person who is not a party to the agreement against CAS's buyer or seller. The agreement precludes indemnification of a Third Party Claim if the prospective indemnitee failed to promptly notify the indemnitor of the claim in writing and the late notice materially prejudiced the indemnitee. Further, under the agreement, prejudice is presumed if the Third Party Claim is settled before the indemnitee was notified. The motion court found that defendants were prejudiced by Wyle's late notice because it deprived them of the opportunity to negotiate with GAS about the OIG audit findings and the new PES schedule rates.

Without reaching the issue whether the OIG audit constitutes a Third Party Claim within the meaning of the agreement, we find that the complaint states a breach of contract because Article VIII excuses late notice by providing that "no limitation or condition of liability provided for in this Article VIII shall apply in the event of . . . intentional misrepresentation." The factual allegations set forth in the complaint effectively claim

that defendants deliberately kept Wyle from learning about the audit before the sale, which constitutes intentional misrepresentation. Plaintiffs assert that, eight days before the agreement was executed, CAS's head of finance alerted a lawyer who was assembling the agreement's disclosure schedules for defendants that the current draft did not reference the OIG audit but needed to do so. The CAS officer also sent the lawyer a proposed schedule that included the audit. According to plaintiffs, the CAS officer's concerns were ignored. Plaintiffs also submitted documentary evidence of the exchange between the CAS officer and the lawyer.

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

ENTERED: FEBRUARY 18, 2014

CLERK

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

9969-
9970 The People of the State of New York,
Respondent,

-against-

Raymond Denson,
Defendant-Appellant.

Ind. 701/99

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Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (James A. Yates, J.), rendered September 19, 2002, convicting defendant, after a nonjury trial, of attempted kidnapping in the second degree and endangering the welfare of a child, and sentencing him to an aggregate term of 10 years, affirmed.

The crime of attempted kidnapping in the second degree was established by evidence that defendant intended to secrete or hold the 10-year-old victim in his apartment, a place where she was not likely to be found; that he made efforts to move or confine the victim without consent (*see* Penal Law §§ 135.00; 135.20); and that defendant came dangerously near to achieving his objective.

The evidence left no doubt that the victim was unlikely to

be found had she succumbed to defendant's pressure to take his keys and go to the apartment. Similarly, the evidence left no doubt that defendant, a "highly-fixated" pedophile, attempted to restrain the victim, i.e. to move her to a different location without the permission of her mother.

The dissent, in arguing that the crime was not established because defendant did not grab or unsuccessfully attempt to grab the victim, misconstrues the statutory requirement of restraint. While, with respect to an adult, it is necessary to establish that the movement or confinement was accomplished by "force, intimidation or deception," the definition of restraint, with respect to a child less than 16 years of age, encompasses movement or confinement by "any means whatever," including the acquiescence of the child (Penal Law § 135.00[1][b]). In relaxing the requirement with respect to minors, the Legislature recognized that a child is not possessed of the same faculties as an adult and is incapable of consenting to any type of confinement.

Defendant engaged in a calculated effort to lure the victim to his apartment. Having observed the daily ingress and egress of the victim and her mother, defendant was well aware that the victim walked home from school unaccompanied. His insistence that she go to his apartment, and his offer of keys, were steps

that came "dangerously near" to accomplishing his objective (*see People v Cruz*, 296 AD2d 22, 25 [1st Dept 2002], *lv denied* 99 NY2d 534 [2002]). Indeed, had the victim complied with his request and gone to the apartment, the crime of second-degree kidnapping would have been complete (*see People v De Vyver*, 89 AD2d 745, 747 [3d Dept 1982]).

There was extensive evidence to support the conclusion that defendant's motive was to sexually molest the victim, which, contrary to the dissent's contention, was highly probative of his intent to abduct her. Defendant's entire course of conduct toward the victim mirrored his conduct toward his stepdaughter, whom he had molested years earlier. Even the defense expert agreed that defendant was attracted to and "highly fixated" on the victim and had "eroticized thoughts" about her. The defense expert further testified that defendant had attempted to forge an adult-type relationship with the victim, as he had with his stepdaughter, and agreed that he was "in pursuit" of the girl. The evidence established that defendant repeatedly offered to take the victim out to get ice cream, to go ice skating, or to go to the movies. On one occasion, when the victim and her mother were in the street attempting to hail a taxi, defendant approached the victim and asked her to see a movie. On another, defendant unexpectedly knocked on the door to the victim's

apartment (visitors were supposed to use an intercom system to gain admittance to the building, and no one had called up). The victim opened the door, surprised to see defendant standing there, wearing a crushed red velvet suit, red shoes and a beret. It was a Sunday, a day when the hardware store he worked at on the ground floor of the building was closed. Defendant asked the victim whether she was ready to go to the movies, and whether she was "busy" that week.

Under the unusual circumstances of this case, the court properly exercised its discretion in receiving testimony regarding defendant's prior conviction of a sex crime committed against a child, as well as its underlying facts, on the issue of intent. As discussed, above, there was extensive expert testimony that connected the past crime involving defendant's stepdaughter to defendant's intent in this case, by showing that defendant's fixation and sexual fantasy regarding his stepdaughter had been transferred to the victim in this case. Moreover, the court in a nonjury trial is presumed to have disregarded prejudicial matter (*see People v Moreno*, 70 NY2d 403, 406 [1987]), and here the court made it clear that it was not treating this testimony as propensity evidence.

There is no merit to defendant's argument that the merger doctrine mandates dismissal of the attempted kidnapping charge

on the ground that any confinement of the victim in defendant's apartment would have been incidental to a sex offense. Defendant was not charged with any sex offense, and "there is obviously no merger where kidnapping is the only crime charged" (*Cruz*, 296 AD2d at 27; *see also People v Rios*, 60 NY2d 764, 766 [1983]).

The court properly denied defendant's motion to suppress statements. The initial police questioning did not require *Miranda* warnings, because a reasonable innocent person in defendant's position would not have thought he was in custody (*see People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]). When defendant made a limited invocation of his right of silence as to some aspects of the case, the initial detective asked nothing more than a pedigree question, and defendant's post-*Miranda* statement, made hours later to another detective, was admissible (*see Michigan v Mosley*, 423 US 96 [1975]; *People v Gary*, 31 NY2d 68 [1972]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or not fully explained by, the trial record concerning counsel's preparation and strategic choices (*see People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received

effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713–714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown "the absence of strategic or other legitimate explanations" for the challenged aspects of counsel's performance (*People v Rivera*, 71 NY2d 705, 709 [1988]), or that these alleged deficiencies deprived defendant of a fair trial, affected the outcome of the case, or caused defendant any prejudice.

Defendant's contentions regarding the prosecutor's alleged misconduct are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that although the prosecutor was somewhat overzealous in his cross-examination of the defense expert witness, there was no prejudice to defendant, particularly in the context of a nonjury trial (*see Moreno*, 70 NY2d at 406).

All concur except Andrias and Saxe, JJ. who dissent in part in a memorandum by Saxe, J. as follows:

SAXE, J. (dissenting in part)

Even a convicted sexual predator like defendant -- one who committed a sex crime against his young stepdaughter more than 20 years ago -- is entitled to protection from an overcharged prosecution arising from accusations that defendant had begun to focus his attention on another young girl. The conviction for the crime of attempted kidnapping in the second degree was not supported by sufficient evidence, since defendant's conduct did not bring the intended crime dangerously near to completion. Rather, it relies primarily on what amounts to propensity evidence, essentially reasoning that based on defendant's prior act of molesting a child, we can expect that he would do it again. The only valid inference that may be made from the facts adduced at trial, namely, that defendant had hoped to have the opportunity to sexually molest the complainant, is not sufficient to establish all the elements of an attempted kidnapping. I therefore dissent.

The record established that the 54-year-old defendant, who had a 20-year-old conviction for a sex crime against his young stepdaughter, was considered by mental health professionals to be a pedophile and that he had focused his interest on the 10-year-old complainant. He was employed at a hardware store occupying the ground floor of the building in which her apartment was

located. The girl's testimony showed that in 1998, when she began attending the junior high school across the street, and was permitted to walk home alone and to stay home unsupervised until her mother returned from work, defendant began to offer to take her out to get ice cream, to go ice skating, or to go to the movies; she rejected these repeated requests. In late August 1998, while the girl was waiting on the sidewalk in front of the building for her mother to hail a cab, defendant approached her and offered to take her to see the movie "Blade"; she declined.

On Sunday, September 6, 1998, the girl heard an unexpected knock on the door to her apartment. Visitors need to use an intercom system to gain admittance to the building, and no one had called up to her apartment. She responded to the knock because her mother was in the shower at the time. She asked who was there, but got no response. When she looked through the peephole, she could not see anyone. She then put the chain on the door and opened it slightly, and was surprised to see defendant standing there, since the hardware store was closed on Sundays. Defendant was dressed up, and asked the girl if she was "ready to go to the movies." She said no, and that she had never agreed to go to the movies with defendant. Defendant then asked if she was "busy this week." She said that she was and closed the door.

Later that week, on Friday, September 11, 1998, the girl saw defendant on her way home from school. As she entered the building, defendant greeted her, got within two to three feet from her and said, "Here's the keys to my apartment," as he tried to remove the keys from the chain that he wore around his neck. The girl refused to take the keys. Defendant insisted, asking her three times if she was sure. He then said, "Well, if you think about it, meet me downstairs at four o'clock and I'll go get you some ice cream."

By this time, the girl had become frightened of what defendant might do; she and her mother soon contacted the police and filed a complaint, and the police began an investigation.

In his statement to the police, defendant asserted that he and the girl were friends, that they had had many conversations, that he had asked her out on dates a number of times, that on one occasion he knocked on the girl's door and asked her out to the movies, and that on another occasion he offered her the keys to his apartment and "suggested that she stay at his apartment until he got off of work, [and] that she could play with his cats."

Defendant was arrested and charged with attempted kidnapping in the second degree (Penal Law §§ 135.20; 110.00) and endangering the welfare of a child (Penal Law § 260.10[1]), and was convicted of both counts after a nonjury trial.

I do not dispute that defendant was a pedophile who had focused his attentions and delusions on the complainant. There is no question that he engaged in criminal conduct, including endangering the welfare of a child. The point I dispute is that the acts he engaged in constituted attempted kidnapping.

"A person is guilty of kidnapping in the second degree when he abducts another person" (Penal Law § 135.20). For the purposes of this case, the definition of "abduct" is "to restrain a person with intent to prevent his liberation by . . . secreting or holding him in a place where he is not likely to be found" (PL § 135.00[2]). "Restraint," in turn, is defined as the intentional restriction of a person's movements "by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent and with knowledge that the restriction is unlawful" (Penal Law § 135.00[1]). The movement or confinement is "without consent" when accomplished by "any means whatever, including acquiescence of the victim, if he is a child less than sixteen years old . . . and the parent, guardian or other person or institution having lawful control or custody of him has not acquiesced in the movement or confinement" (Penal Law § 135.00[1][b]).

Thus, the kidnapping of a child under 16 may be established if the defendant moved the child from one place to another, even with her acquiescence (as long as the parent has not acquiesced), with the intent to secrete or hold her in a place where she is not likely to be found, as occurred in *People v Helbrans* (228 AD2d 612 [2nd Dept 1996], *lv denied* 89 NY2d 923 [1996]). There, the elements of kidnapping were satisfied despite the child-victim's acquiescence, where the defendant, a Hasidic rabbi, prevented the parents of a 13-year-old boy who was studying at his yeshiva from removing their son from the yeshiva, and ultimately secreted the boy to prevent his parents from finding him. The question in the present case is whether defendant's attempt to give the girl the keys to his apartment is sufficient to establish an attempted kidnapping.

"A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime (Penal Law § 110.00). An attempt is cognizable only where the defendant's conduct has brought the intended crime "dangerously near" to completion (*see People v Naradzay*, 11 NY3d 460, 466 [2008]; *People v Bracey*, 41 NY2d 296, 300 [1977]).

I do not agree with the majority's conclusion that defendant came dangerously close to completing the kidnapping since all

that would have been needed to complete a second-degree kidnapping was the victim's compliance with his request. The attempted kidnapping cases the majority relies on include some act by the defendant that involved taking hold of the child. In *People v Cruz* (296 AD2d 22, 25 [1st Dept 2002], *lv denied* 99 NY2d 534 [2002]), where the conviction of attempted kidnapping in the second degree was affirmed, the defendant physically grabbed the five-year-old boy, telling him he wanted to take him home. In another attempted kidnapping case, *People v Antonio* (58 AD3d 515 [1st Dept 2009], *lv denied* 12 NY3d 814 [2009]), where the defendant followed and ran after an 11-year old girl after expressing his interest in her, going so far as to grab at the girl's hand and falsely claim to a bystander that he was the girl's father, this Court explained that "[b]y telling the man who was trying to protect the girl that he, defendant, was the girl's father, defendant evinced his desire to gain control over the girl[, and] [b]y reaching out for the girl's hand, he demonstrated his intention to restrain her" (*id.* at 516). Here, defendant did not grab or unsuccessfully attempt to grab a child, with the intent to take the child away. Rather, he tried to convince her to accept his apartment keys in the hope that she would cooperate with his delusional plans.

To successfully prove that defendant came dangerously near to completing a kidnapping of the child in this particular situation, the evidence would have had to show either that he was near forcibly taking her, as occurred in *Cruz* and *Antonio*, *supra*, or that he came close to taking her with her acquiescence. However, neither means of committing an attempted kidnapping of the child was near completion here. Rather, the evidence establishes that there was essentially no possibility that the child was going to comply with defendant's request.

The reasoning that all that would have been needed to complete a second-degree kidnapping was the victim's compliance with his request ignores this fact. A different conclusion would be appropriate if there was proof that in the circumstances or based on her personality, or for some other reason, there was a possibility that the girl would agree to take his keys and wait for him in his apartment. But that is not the case here.

In addition, there is a fundamental flaw in the majority's reasoning that defendant's motive to sexually molest the victim was "highly probative of his intent to abduct the victim." The majority makes an unreasonable leap in logic, and embraces fuzzy psychology, when it infers the intent to abduct based on (1) the similarity in appearance between defendant's stepdaughter and the complainant, and (2) the reasoning that since (unlike his

stepdaughter) the complainant did not live with him, defendant's desires would have included an intent to abduct her. Defendant's sexual interest in the complainant did not justify an inference that he harbored the intent to abduct her at that time of the alleged attempted kidnapping; nor did his actual conduct toward her justify any such inference. The inference of an intent to abduct may not properly be based on the suggestion of the People's expert, in the context of her explanation of the psychological stages in which child molesters gain access to the targeted child, that defendant might have arrived at the point at which he needed to "take control" by abducting the girl. The expert's suggestion amounted to no more than a theoretical conjecture, which finds no support in the record. The expert also relied for her conclusion on propensity evidence, by reasoning that based on defendant's prior act of molesting a child, we can assume that he would do it again.

By upholding defendant's conviction for attempted kidnapping, the majority is, in effect, punishing him for his status rather than for his commission of the crime with which he was charged. Defendant engaged in frightening and deluded criminal conduct. There is reason to be concerned that his

desires and delusions could ultimately lead him to actually engage in conduct amounting to kidnapping. However, the conduct demonstrated at trial falls short of an attempted kidnapping as the statute and the cases define it.

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

ENTERED: FEBRUARY 18, 2014

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

11377-
11378 Index 301007/08

Lifeline Funding, LLC, doing business as US Claims, Inc.,
Plaintiff-Respondent,

-against-

Alan Ripka,
Defendant-Appellant.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellant.

Howard R. Vargas, Delmar, for respondent.

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered November 27, 2012, awarding plaintiff the total sum of $161,896.34 after finding defendant guilty of a misdemeanor and liable for treble damages pursuant to Judiciary Law § 487, and bringing up for review an order, same court and Justice, entered August 27, 2012, which granted plaintiff's motion for summary judgment, and denied defendant's cross motion for summary judgment, unanimously modified, on the law, to the extent of reversing defendant's misdemeanor adjudication and vacating the award of treble damages pursuant to Judiciary Law § 487, and otherwise affirmed, without costs.

A cause of action against a partnership for breach of contract does not lie against the individual partners absent an

allegation that the partnership is insolvent or otherwise unable to pay its obligations (*see United States Trust Co. of N.Y. v Bamco 18*, 183 AD2d 549, 550-551 [1st Dept 1992]). Hence, a plaintiff is required either to name the partnership as a party defendant, along with the individual partners, or to aver the insufficiency of partnership assets to satisfy the claim (*id.*). Here, although the partnership is listed as inactive by the New York Department of State, plaintiff made no showing that the partnership lacks sufficient funds to repay plaintiff. However, even if plaintiff's cause of action for breach of contract against the individual defendant was not properly pleaded, the remaining causes of action sufficiently allege individual wrongdoing pursuant to Partnership Law § 26(c) which provides that a partner may be liable for wrongful conduct committed by him. Plaintiff made a prima facie showing of its entitlement to judgment as a matter of law with respect to its remaining causes of action. In opposition, defendant failed to raise an issue of fact. Although he raises factual arguments on appeal, we have not considered them because they were not raised before the motion court (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Ferrell & Meyers, Inc.*, 26 AD3d 191 [1st Dept 2006], *lv denied* 7 NY3d 705 [2006]).

This Court finds, however, that the motion court erred in finding that defendant violated Judiciary Law § 487. Defendant did not engage in the "extreme pattern of legal delinquency" required to violate the statute (*Gonzalez v Gordon*, 233 AD2d 191, 191 [1st Dept 1996], *lv denied* 90 NY2d 802 [1997] [internal quotation marks omitted] [defendant attorney's disbursement of $39,000 in escrow funds without plaintiff's authority did not support an award of treble damages]; *Wiggin v Gordon*, 115 Misc 2d 1071, 1077 [Civil Ct, Queens County 1982] [defendant attorney who repeatedly told plaintiff he would pay taxes on the estate, never did so and then defaulted on the Judiciary Law 487 proceedings brought against him engaged in "chronic, extreme pattern of legal delinquency"]). Although we do not condone defendant's actions, his conduct does not constitute "an extreme case" of attorney misconduct (*Wiggin*, 115 Misc 2d at 1071).

Defendant's attempts to assert the defenses of usury and champerty, i.e., that the agreement at issue contained an excessive interest rate, similarly raise factual issues that were neither raised before the motion court nor asserted in defendant's answer and will not be addressed for the first time

on appeal (*see* CPLR 3018[b]; *National Union Fire Ins. Co. of Pittsburgh, Pa.*, 26 AD3d 191; *Connecticut Natl. Bank v Peach Lake Plaza*, 204 AD2d 909, 911 [3d Dept 1994]).

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

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

ENTERED: FEBRUARY 18, 2014

CLERK

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

11439 Orchard Hotel, LLC, Index 850044/11
Plaintiff-Appellant,

-against-

D.A.B. Group, LLC,
Defendant-Respondent,

Brooklyn Federal Savings Bank, et al.,
Defendants-Appellants,

Ochard Construction, LLC, et al.,
Defendants.

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Morrison Cohen LLP, New York (Y. David Scharf of counsel), for Orchard Hotel, LLC, appellant.

O'Reilly, Marsh & Corteselli P.C., Mineola (James G. Marsh of counsel), for Brooklyn Federal Savings Bank and State Bank of Texas, appellants.

Law Offices of Everett N. Nimetz, Kew Gardens (Everett N. Nimetz of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 28, 2013, which, to the extent appealed from as limited by the briefs, granted defendant D.A.B. Group, LLC's (DAB) motion to renew, and, upon renewal, vacated a prior order of the same court (Bernard J. Fried, J.), entered March 30, 2012, dismissing said defendant's counterclaims, reinstated DAB's counterclaims, and sua sponte granted DAB leave to serve an amended answer, unanimously reversed, on the law and the facts, without costs, the motion to renew denied, and the grant of leave

to serve an amended answer vacated.

In July 2011, plaintiff successor mortgagee Orchard Hotel, LLC (Orchard) commenced this action to foreclose on two commercial construction loans. DAB's answer asserted counterclaims against Orchard and against additional counterclaim defendants Brooklyn Federal Savings Bank (Brooklyn Federal) and State Bank of Texas (together, Bank defendants), the original mortgagees. DAB alleged that the Bank defendants misrepresented that the banks would extend the maturity date of the loans.

We find that the motion court erred in granting DAB renewal of Orchard and the Bank defendants' motions to dismiss DAB's counterclaims, thereby vacating an order that this Court had affirmed (*see Orchard Hotel, LLC v DAB Group, LLC*, 35 Misc 3d 1206[A], 2012 NY Slip Op 40476[U] [Sup Ct, NY County 2012], *affd* 106 AD3d 628 [1st Dept 2013]).

CPLR 2221(e)(2) provides in pertinent part that a motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination." The record indicates that the document on which DAB relied to change the prior determination, an Action Plan, dated February 15, 2011, was unenforceable because it was an internal bank document that the Office of Thrift Supervision (OTS), the federal oversight agency, never approved--an unfulfilled condition precedent. In addition,

Brooklyn Federal ultimately rescinded the Action Plan pursuant to a March 22, 2011 memorandum that it issued prior to OTS's consideration of an extension. Thus, the Action Plan provides no basis to find that there was reasonable reliance on a writing that extended the loans' maturity date. Further, even if this Court were to consider this document an indication of misrepresentation, DAB cannot establish that it reasonably relied upon the Action Plan--a document it was unaware of until May 2013--because it was an internal document that was not communicated, delivered or presented to DAB (*see Waterways Ltd. v Barclays Bank PLC*, 202 AD2d 64, 74 [1st Dept 1994], *lv denied* 85 NY2d 803 [1995]).

Moreover, under CPLR 2221(e)(3), a motion to renew "shall contain reasonable justification for the failure to present such facts on the prior motion." Here, DAB made the discovery request that yielded the Action Plan only upon the motion court's suggestion, and only after this Court affirmed the order dismissing DAB's counterclaims. The Action Plan was available at the time of the original motion--indeed, numerous witnesses alluded to it during their depositions. Even so, DAB did not provide a reasonable justification for its failure to serve a more exacting discovery demand that specifically requested Brooklyn Federal's internal documents related to the loan

extension issue. Thus, we find that DAB failed to show that it exercised due diligence in obtaining the documentary evidence, and the motion court erred in granting leave to renew (*see Rosado v Edmundo Castillo Inc.*, 54 AD3d 278, 279 [1st Dept 2008]; *Chelsea Piers Mgt. v Forest Elec. Corp.*, 281 AD2d 252 [1st Dept 2001]).

The motion court also erred in granting DAB's motion to renew and vacate based on "newly-discovered evidence" pursuant to CPLR 5015(a)(2). As the record demonstrates, had DAB exercised due diligence during discovery, it could have obtained the Action Plan through discovery well over a year earlier than it did (*see Weinstock v Handler*, 251 AD2d 184 [1st Dept 1998], *lv dismissed* 92 NY2d 946 [1998]).

Any vacatur pursuant to CPLR 5015(a)(3) is also erroneous because the findings of "fraud, misrepresentation, or other misconduct" are predicated on DAB's assertions that the Bank defendants failed to turn over the Action Plan. To the contrary, the record reveals that DAB's initial discovery demands did not specifically request Brooklyn Federal's documents in connection with an extension of the maturity date and DAB did not present evidence to establish misconduct.

Accordingly, because the motion court improvidently considered the Action Plan as new evidence, its sua sponte grant

to D.A.B. of leave to amend its answer was erroneous. Moreover, the proposed amendment lacks merit (*see Bishop v Maurer*, 83 AD3d 483, 485 [1st Dept 2011]; *360 West 11th LLC v ACG Credit Company II, LLC*, 90 AD3d 552 [1st Dept 2011]).

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

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11641 In re Uniformed Firefighters Association of Greater New York, etc., Petitioner-Appellant, Index 108759/11

-against-

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

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Certilman Balin Adler & Hyman, LLP, East Meadow (Paul S. Linzer of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for The City of New York, respondent.

John F. Wirenius, New York, for The New York City Board of Collective Bargaining, respondent.

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Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered December 6, 2012, denying the petition brought under CPLR article 78 to annul a portion of the interim decision and order of respondent the New York City Board of Collective Bargaining (the board or the BCB), dated June 29, 2011, which dismissed petitioner's charges of an improper practice upon determining that respondent the City of New York (the City) was not required to negotiate its decision to reduce fire engine staffing levels, and dismissing the proceeding, unanimously affirmed, without costs.

Petitioner Uniformed Firefighters Association (UFA) serves as the collective bargaining representative for FDNY

firefighters. Since the 1980s, there has been a dispute between the City and the firefighters' unions concerning the City's attempts to reduce the number of firefighters assigned to each engine.

On January 31, 1990, the City implemented a roster staffing program that reduced fire engine crews in certain companies from five to four firefighters per engine. Petitioner subsequently challenged this action as creating a safety threat to firefighters. In considering the challenge, the BCB directed a hearing to establish a record and determine whether a practical safety impact would result from the City's action. The parties conducted safety impact hearings before a special trial examiner, but he died before issuing a decision for the board's consideration. On January 30, 1996, the parties settled the matter by executing the Roster Staffing Agreement (the agreement); the agreement was to be effective for a 10-year term, expiring on January 31, 2006.

The agreement provided that "the [FDNY] will initially designate sixty (60) Engine Companies to be staffed with a fifth firefighter at the outset of each tour.... All other engine company staffing not so designated will remain at the maximum of five firefighters at the start of each tour." During the term of the agreement, FDNY had the right to reduce the engine staffing

levels in companies with five firefighters per engine if the level of firefighter medical leave exceeded a certain percentage.

The agreement contained the following provision in the eleventh paragraph:

> "ELEVENTH: By entering into this Stipulation of Settlement, the Union agrees to waive its right to file any litigation or grievance regarding the Department Roster Staffing program as set forth in the case docketed with the Office of Collective Bargaining as BCB-1265-90, or with regard to the practical impact of this agreement until January 31, 2006. Should a court of competent jurisdiction or any other administrative entity, except for enforcement purposes, grant the right to initiate any such litigation or grievance within that time, this agreement will be terminated immediately. Should litigation or a grievance commence, this agreement or any portion thereof shall not be admissible in any court proceeding or other administrative forum. After the expiration of this Agreement, January 31, 2006, the City in view of factors including, but not limited to changes in technology, structural and non-structural fires, and response times, may wish to change staffing levels. In the event the City plans to make such changes, the parties will negotiate to the extent required by the New York City Collective Bargaining Law. Should differences between the parties arise, it is the intent of the parties to work expeditiously to resolve them."

In October 2005, petitioner and the City agreed to extend the term of the agreement by five years to January 31, 2011.

In October 2010, the City notified petitioner that, following the agreement's impending January 31, 2011 expiration date, the City planned to staff engines in certain companies with a minimum of four firefighters per engine at the beginning of

each tour and others with five firefighter crews, effective February 1, 2011. The City noted that, while it was not obligated to bargain with the union over the changes, it was "willing to meet with the UFA to discuss any concerns the union may have." The City gave petitioner a publication containing the FDNY's guidelines and procedures for implementing the new staffing policy.

On January 31, 2011, petitioner, with the Uniformed Fire Officers Association (the UFOA), brought a combined Improper Practice and Scope of Bargaining petition to challenge the City's decision to reduce the engine staffing levels at certain companies from five firefighter crews to four, beginning February 1, 2011. The petition challenged the City's unilateral action as violative of both the agreement and the New York City Collective Bargaining Law (NYCCBL).

In an interim decision and order dated June 29, 2011, the BCB, by a four-to-two vote, dismissed all challenges except the allegations concerning the practical impact of the City's decision to reduce the engine staffing levels. The board also directed a hearing before a trial examiner to determine whether the reduction would have a safety impact that would require negotiations between the parties concerning implementation of the changes.

In its decision, the board found that the agreement contained a "sunset" provision because paragraph Eleventh and the subsequent extension indicated an expiration date. Thus, any provision in the agreement to maintain the engine staffing levels had "sunset"--that is, terminated a benefit at a specific time or on a specific condition. The board rejected a reading of paragraph Eleventh as requiring the parties to negotiate post-expiration should the City decide to reduce engine staffing levels. This construction, the board held, would render the agreement's expiration meaningless and would impose an absolute obligation on the City to bargain, where the language indicated only that the parties would bargain "to the extent required by the [NYCCBL]."

The board further found that the agreement allowed petitioner to file grievances after the expiration date, but that petitioner's proposed reading would not similarly permit the City to act; thus, petitioner's reading of the agreement would evince a lack of mutuality that could not have been the parties' intent. The board also found that, based on its determination that paragraph Eleventh "on its face, constitutes a sunset provision," neither maintenance of the status quo under Civil Service Law § 209-a(1)(e), nor the conversion theory of negotiability, applied.

Based on its own precedent, the board determined that the agreement was not incorporated into the parties' Collective Bargaining Agreement. The board further held that, consistent with its previous decisions and NYCCBL 12-307, fire engine staffing levels are a nonmandatory bargaining subject and the City was not required to bargain unless, following a hearing, the board found a practical safety impact. Thus, the board held that the City was not required to bargain, but directed a hearing regarding the safety impact on firefighters.

Petitioner then commenced this article 78 proceeding, seeking to annul the portion of the board's decision finding that the agreement did not require the City to negotiate its decision to reduce fire engine staffing levels of certain companies.[1] Petitioner argued that the decision was arbitrary and capricious because it incorrectly interpreted paragraph Eleventh to mean that the agreement had expired and that it imposed no post-expiration obligation on the parties in the event the City reduced engine staffing levels. Petitioner further argued that the board's construction rendered meaningless the last two sentences of that provision indicating that the parties would negotiate and work expeditiously to resolve any differences that

[1] The UFOA is not a party to the agreement and, thus, is not a party to this appeal.

may arise.

Thereafter, the board moved and the City cross-moved to dismiss the proceeding for failure to state a cause of action, arguing that the board's decision had a rational basis and was not arbitrary but rather was consistent with the record and applicable law. Following the motion court's denial of the motion and cross motion, respondents answered and again sought dismissal of the proceeding.

The court found no reason to disturb the board's determination. The court held that, once the board determined that the agreement expired on January 31, 2011, it rationally applied its own precedent to find that this "sunset provision" rendered inapplicable the theory that nonmandatory subjects could be converted into mandatory subjects by way of incorporation into a collective bargaining agreement. Hence, any provision in the agreement that required petitioner and the City to negotiate the reduction of engine staffing levels expired with the agreement. The court further found that the board rationally determined, based on its own precedent interpreting the NYCCBL, that there was no post-expiration obligation to negotiate the matter unless the reduction had an impact on safety. Thus, the board properly directed a hearing to establish a record concerning that issue.

We find that the motion court properly denied the petition

and dismissed the proceeding. Indeed, the board's determination was rational and did not render any provision in paragraph Eleventh meaningless.

To begin, if the board's determination has a rational basis, we must affirm, even if this Court would have interpreted the provision differently (see *Matter of Peckham v Calogero*, 12 NY3d 424, 430-431 [2009]). Here, the board rationally concluded that paragraph Eleventh's reference to the "expiration of this Agreement, January 31, 2006" was a sunset provision (*see Matter of Professional Staff Congress-City Univ. of N.Y. v New York State Pub. Empl. Relations Bd.*, 7 NY3d 458, 468 [2006]). Further, the board properly concluded that, after the agreement's expiration, if the City intended to reduce engine staffing levels, it would negotiate "to the extent required by the New York City Collective Bargaining Law." Under the current Collective Bargaining Law, staffing levels are a nonmandatory subject of collective bargaining (*see Matter of Uniformed Firefighters Assn. of Greater N.Y. v New York City Off. of Collective Bargaining, Bd. of Collective Bargaining*, 163 AD2d 251 [1st Dept 1990]). Contrary to petitioner's contention, the board's decision does not render meaningless the last sentence of paragraph Eleventh--"[s]hould differences between the parties arise, it is the intent of the parties to work expeditiously to

resolve them"--because the safety impact of any staffing level reduction remains negotiable. Nor does that sentence render staffing levels a mandatory subject of collective bargaining, as petitioner argues.

The result of petitioner's interpretation would be that, at a time when the City had obtained a final determination that staffing levels were not subject to mandatory collective bargaining, it must then follow petitioner's reading of paragraph Eleventh, rendering the negotiation of staffing levels mandatory going forward. If this were the intent of the parties, the agreement could simply have stated that, following its expiration, staffing levels would be subject to mandatory collective bargaining. On the other hand, limiting bargaining "to the extent required by the New York City Collective Bargaining Law," left open the possibility that the union could persuade the Legislature to amend the law.

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

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

ENTERED: FEBRUARY 18, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11739 The People of the State of New York, Ind. 746/10
Respondent,

-against-

Roger Patterson,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Natalia B. Bedoya of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Juan M. Merchan, J. at plea and sentencing), rendered January 4, 2011, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of seven years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility

determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 18, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11740 Beth Abott, Index 103402/09
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Morelli Alters Rater, P.C., New York (Adam E. Deutsch of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered January 8, 2013, dismissing the complaint, unanimously affirmed, without costs.

The court properly directed a verdict for defendant City, as there was no rational process that would lead the trier of fact to find for plaintiff, who was injured after stepping into a pothole (*see generally Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). The Pothole Law's written notice requirement (Administrative Code of City of NY § 7-201[c][2]) contains a "written acknowledgement" provision which permits a lawsuit "where there is documentary evidence showing, as clearly as written notice to DOT would show, that the City knew of the hazard and had an opportunity to remedy it" (*Bruni v City of New York*, 2 NY3d 319, 326 [2004]). However, repair orders or

reports, reflecting only that pothole repairs had been made to the subject area more than a year before the accident, are insufficient to constitute prior written notice of the defect that allegedly caused a plaintiff's injuries (*see Khemraj v City of New York*, 37 AD3d 419, 420, [2d Dept 2007]; *see also Walker v City of New York*, 34 AD3d 226 [1st Dept 2006]). Here, the record demonstrates that plaintiff presented no evidence or testimony which contradicted the City's documentation showing that the subject defect had been repaired, closed, and made safe, more than a year prior to the accident (*see Khemraj* at 420).

We have considered plaintiff's remaining contentions, including that the City's failure to honor so-ordered subpoenas warranted the striking of its answer, and find them unavailing.

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

ENTERED: FEBRUARY 18, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11741 In Corey McM.,

A Child under Eighteen Years
of Age, etc.,

Randy McM.,
Respondent-Appellant,

Edwin Gould Services for Children
and Families and The Administration
for Children's Services,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Steven N. Feinman, White Plains, attorney for the child.

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Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about September 1, 2012, which denied the father's habeas corpus petition seeking the return of the subject child Corey N., and granted the motion of the Administration of Children's Services to reinstate the neglect proceedings against the father, unanimously affirmed, without costs.

The Family Court appropriately vacated the August 4, 2008 order dismissing the neglect proceeding, and reinstated said proceeding nunc pro tunc. Dismissal of the neglect proceeding, occasioned by the disposition of permanency hearings and the termination of parental rights after the father's default, was a mere ministerial act. In light of the powers granted under

Family Court Act §§ 1055 and 1088, the father's contention that the Family Court was not authorized to correct the procedural problem encountered when the father's default was vacated is without merit (*see Matter of Dale P.*, 84 NY2d 72 [1994]). The father's contention that a more equitable result would have been to direct ACS to begin all proceedings anew is also without merit, as such a directive would disrupt the child's stable home and place the father in a more advantageous position than if he had never defaulted in the permanent neglect proceeding. The court more appropriately restored the predefault status quo.

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

ENTERED: FEBRUARY 18, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11746 The People of the State of New York, Ind. 1722/09
Respondent,

-against-

Cheickna Hamala Sidibe, etc.,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello 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 (Charles Solomon, J.), rendered on or about November 2, 2009,

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: FEBRUARY 18, 2014

CLERK

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

Sweeney, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11747 Patricia Rojas-Wassil, Index 21318/11E
Plaintiff-Respondent,

-against-

Altagracia Villalona, et al.,
Defendants-Appellants.

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

Worby Groner Edelman, LLP, White Plains (Michael G. Del Vecchio of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered May 31, 2013, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing plaintiff's negligence cause of action, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Dismissal of the negligence cause of action is warranted in this case where plaintiff, a parole officer, was injured when, while on defendants' property to arrest defendant Pena, she twisted and hyperextended her knee while climbing over a chain-link fence in the rear of defendants' property. Defendants had no duty to ensure that the fence was safe for adults to climb

(*see Koppel v Hebrew Academy of Five Towns*, 191 AD2d 415 [2d Dept 1993], *lv denied* 82 NY2d 652 [1993]), and no evidence was presented that the defects in the fence noted by plaintiff's expert were a substantial factor in plaintiff's accident.

Although defendants raised the arguments concerning duty and proximate cause for the first time on appeal, legal issues appearing on the face of the record which could not have been avoided may be reviewed by this Court for the first time on appeal (*see Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]).

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

ENTERED: FEBRUARY 18, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11748 The People of the State of New York, Respondent, Ind. 1003/11

-against-

Bryan Leach, Defendant-Appellant.

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Mischel & Horn, P.C., New York (Richard E. Mischel of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at suppression hearing; Lewis Bart Stone, J. at plea and sentencing), rendered November 29, 2012, convicting defendant of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of two years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations.

In making a lawful traffic stop, the police observed defendant making movements that suggested he was removing an item from his waistband and placing it in the center console. In addition, defendant was twisting his body and moving back and

forth. Additional suspicious factors were defendant's failure to respond to the officers' repeated attempts to pull over his car, and, after finally being pulled over, his failure to respond to an officer's repeated requests for his license and registration.

The totality of the information available to the officers supported a reasonable conclusion that there was a weapon in the center console that posed an actual, specific danger to their safety, thus justifying a protective search (*see People v Mundo*, 99 NY2d 55, 57-59 [2002]; *People v Omowale*, 83 AD3d 614, 617 [1st Dept 2011], *affd* 18 NY3d 825 [2011]; *People v Anderson*, 17 AD3d 166, 168 [1st Dept 2005]). Furthermore, the intrusion was very limited, as the officer focused only on the center console toward which he had seen defendant move, and he saw the grip of a pistol protruding from the console when he opened the car door.

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

ENTERED: FEBRUARY 18, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11749-
11750-
11751 Ninth Street Associates,
Plaintiff-Appellant,

-against-

20 East Ninth Corporation,
Defendant-Respondent.

Index 650434/10

The Law Offices of Richard B. Rosenthal, P.A., Miami, FL (Richard B. Rosenthal of the bars of the States of California and Florida, admitted pro hac vice, of counsel), for appellant.

Smith, Gambrell & Russell, LLP, New York (Donald L. Rosenthal of counsel), for respondent.

Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered August 19, 2013, dismissing the complaint, unanimously modified, on the law, to vacate the dismissal and to declare that plaintiff has no right to renew its lease after the lease expires in 2024, and, as so modified, affirmed, without costs. Appeal from order, same court and Justice, entered on or about June 18, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The lease on plaintiff tenant's commercial space unambiguously provides that it may be renewed for a term commencing March 1, 2024 and expiring March 1, 2045 if, inter alia, defendant landlord has, in its discretion, exercised its

right to renew its ground lease for the same period. That plaintiff's lease renewal is conditioned on defendant's renewing its ground lease is also stated in two documents prepared contemporaneously with the lease, i.e. a "Memorandum of Lease" and the offering plan issued by defendant, a cooperative corporation. Plaintiff, which was the tenant under the ground lease, sponsored the 1974 conversion to cooperative use; it became the tenant of the commercial space, and its interest in the ground lease was assigned to defendant. Once defendant was named the primary tenant on the ground lease, it was reasonably foreseeable that defendant could chose, for any reason whatsoever, not to renew the ground lease (*see Futterman v South Africa Airways*, 126 Misc 2d 90, 92 [Sup Ct, NY Co 1984, Saxe, J.]). Notwithstanding, plaintiff, which drafted the lease renewal provisions during the conversion process, failed to provide for an obligation requiring defendant to renew the ground lease under all circumstances. Defendant's decision to not renew the ground lease, when it became the owner of the fee, was entirely consistent with the parties' agreement (*see Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). Since the parties' intent is clear from the lease itself, there is no need to resort to their course of performance thereunder to determine their intent (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162

[1990]). Nor does the doctrine of prevention or frustration avail plaintiff where the contingency was foreseeable and defendants' acts were consistent with the agreement (*see HGCD Retail Servs., LLC v 44-45 Broadway Realty Co.*, 37 AD3d 43, 53-54 [1st Dept 2006]).

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

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

ENTERED: FEBRUARY 18, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11752 Larry T. Becker, et al., Index 150838/12
Plaintiffs-Appellants,

-against-

Federal Home Loan Mortgage Corporation,
Defendant-Respondent,

John Does 1-10, etc.,
Defendants.

_____

Carl E. Person, New York, for appellants.

Rosicki, Rosicki & Associates, P.C., Plainview (Robert H. King of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered August 6, 2013, which granted, without prejudice, defendant's motion to dismiss the action on the ground of forum non conveniens, unanimously affirmed, without costs.

The motion court providently exercised its discretion in dismissing the action since plaintiffs' claims lack a substantial nexus with New York. Plaintiffs reside in Illinois, the note and mortgage are secured by real property in Illinois, and plaintiffs seek reformation of the note to reflect, among other things, the present value of the real property in Illinois. In addition, while the promissory note contains no choice of law provision, the underlying mortgage states that the laws of Illinois shall

apply (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]; *see also Farahmand v Dalhouse Univ.*, 96 AD3d 618, 619 [1st Dept 2012]).

Although defendant has an office in New York and plaintiffs' note was eventually securitized by a New York trust, these facts are insufficient to create a factual connection between New York and the dispute, notwithstanding that certain documents and witnesses knowledgeable about the securitization are located in New York (*Ziska v Bank of Am., N.A.*, 99 AD3d 602 [1st Dept 2012]).

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

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

ENTERED: FEBRUARY 18, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11753 Tarry Realty LLC, Index 156966/12
Plaintiff-Appellant,

-against-

Utica First Insurance Company,
Defendant-Respondent,

Sinis Contracting, Inc.,
Defendant-Appellant.

_____

Melito & Adolfsen P.C., New York (Ignatius John Melito of counsel), for Tarry Realty LLC, appellant.

Arnold Stream, New York, for Sinis Contracting, Inc., appellant.

Farber, Brocks & Zane, LLP, Garden City (Sherri N. Pavloff of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 22, 2013, which, to the extent appealed from as limited by the briefs, granted defendant Utica First Insurance Company's motion for summary judgment declaring that it is not obligated to defend and indemnify defendant Sinis Contracting, Inc. in the underlying personal injury action, denied plaintiff's and Sinis's motions for summary judgment declaring in their favor, and declared that Utica First has no obligation to defend and indemnify Sinis in the underlying action, unanimously affirmed, without costs.

The allegation in the underlying complaint and bill of particulars that defendant Sinis was the project general contractor contradicted the signed statement taken by Utica First of Sinis's principal, on which Utica First was entitled to rely (*see Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 37 [1st Dept 2006]). Sinis's principal's own deposition testimony in January 2012 did not make clear whether Sinis was the general contractor for the entire project, including the exterior masonry work in which the underlying plaintiff, an employee of subcontractor Briga Landscaping, Inc., was engaged when he was injured, or for the interior work only, which included work done in the basement by Briga. It was only made clear in Sinis's February 8, 2013 answer to the instant complaint that plaintiff, the owner of the project, hired Sinis as the general contractor for the entire project and that Sinis hired Briga to perform exterior masonry work, and again in an affidavit dated March 4, 2013 by Sinis's principal, who stated that Sinis hired Briga as a subcontractor on the project.

Contrary to plaintiff and Sinis's contention, equitable estoppel does not bar Utica First from relying on the policy exclusion on which it based its March 7, 2013 disclaimer. Although Utica First defended Sinis for two years, through the completion of discovery, there has been no disposition in the

underlying action, and there is no evidence that the action is close to trial (*see 206-208 Main Street Assoc., Inc. v Arch Ins. Co.*, 106 AD3d 403, 406 [1st Dept 2013]). Nor will estoppel be invoked simply because Utica First agreed to defend Sinis without reserving its rights (*see Federated Dept. Stores*, 28 AD3d at 36).

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

ENTERED: FEBRUARY 18, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11754 SunLight General Capital LLC, Index 157935/12
Plaintiff-Appellant,

-against-

CJS Investments Inc., et al.,
Defendants-Respondents,

Effisolar Energy Corporation,
Defendant.

_____

Nixon Peabody LLP, New York (Frank H. Penski of counsel), for appellant.

Herrick, Feinstein LLP, New York (Jeffrey I. Wasserman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 27, 2013, which granted defendants CJS Investments Inc. and Clean Jersey Solar LLC's motion, pursuant to CPLR 3211(a)(8), for dismissal of the complaint as against them, unanimously affirmed, with costs.

In this action, plaintiff Sunlight General Capital LLC, a New York corporation, seeks, inter alia, recovery for damages allegedly incurred as a result of defendants' breaches of contract and tortious interference. Defendants CJS Investments Inc. (CJS) and Clean Jersey Solar LLC (Clean Jersey) are New Jersey entities, with offices and employees located solely within the State of New Jersey, and whose alleged actions herein

occurred with the State of New Jersey. The contractual claims, as against CJS arise out of CJS's entry into a memorandum of understanding (MOU) with plaintiff which contemplated a joint venture whose business was to consist of the development of solar energy facilities on New Jersey properties owned by CJS. All of the meetings between plaintiff and CJS took place in New Jersey, and the MOU contained a New Jersey choice-of-law provision.

The fact that CJS negotiated the terms of the MOU and communicated with plaintiff via email and telephone, which communications do not serve as the basis for plaintiff's claims, is insufficient to constitute the transaction of business within New York (*see* CPLR 302(a)(1); *Arouh v Budget Leasing, Inc.*, 63 AD3d 506 [1st Dept 2009]; *Warck-Meister v Diana Lowenstein Fine Arts*, 7 AD3d 351 [1st Dept 2004]; *Granat v Bochner*, 268 AD2d 365 [1st Dept 2000]). Plaintiff's actions within New York, including making presentations to potential investors and executing the MOU, cannot be imputed to CJS for jurisdictional purposes (*see Royalty Network, Inc. v Harris*, 95 AD3d 775 [1st Dept 2012]; *see also Standard Wine & Liq. Co. v Bombay Spirits Co.*, 20 NY2d 13, 17 [1967]; *Libra Global Tech. Servs. (UK) v Telemedia Intl.*, 279 AD2d 326 [1st Dept 2001]). Accordingly, plaintiff's breach of contract and breach of duty of fair dealing claims were properly dismissed as against CJS.

Likewise, dismissal of the tortious interference claims asserted against CJS and Clean Solar was proper. Plaintiff cannot establish personal jurisdiction, pursuant to CPLR 302(a)(3)(ii), in the absence of evidence that these defendants "derive[] substantial revenue from interstate or international commerce."

Finally, plaintiff failed to make a "sufficient start," via tangible evidence, in demonstrating that long-arm jurisdiction may exist over these defendants, and thus, jurisdictional discovery is not warranted (*see Insurance Co. of N. Am. v EMCOR Group, Inc.*, 9 AD3d 319, 320 [1st Dept 2004]*; Granat v Bochner*, 268 AD2d at 365).

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

ENTERED: FEBRUARY 18, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11755 The People of the State of New York, Respondent, Ind. 3500/09

-against-

Donald Cameron, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Renee A. White, J.), entered on or about June 12, 2012, which adjudicated defendant a level two sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously reversed, on the law, without costs, and the matter remanded for further proceedings.

While we recognize a court's authority to control its calendar, we conclude that under the unique circumstances here, the court abused its discretion by denying defendant's second request for a brief adjournment in order to obtain documentation from the Department of Corrections and Community Supervision that was relevant to the determination of his risk level, especially with regard to the issue of downward departure. Correction Law § 168-n(3) provides that the court "shall adjourn the hearing as

necessary to permit [a] sex offender or the district attorney to obtain [such] materials."

The record shows that counsel moved expeditiously to obtain the relevant documentation from DOCCS and was unable to do so due to no fault of her own, that she received misinformation from DOCCS that significantly delayed her ability to obtain the relevant documentation, and that she sought only a brief adjournment that would have still permitted a timely determination of defendant's risk level. Under these circumstances, a brief adjournment should have been granted.

We have considered and rejected defendant's request for additional relief.

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

ENTERED: FEBRUARY 18, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11756 Anna Terilli, Index 302975/10
Plaintiff-Appellant,

-against-

Nicholas Peluso, et al.,
Defendants-Respondents.

_____

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered March 21, 2013, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was proper in this action where plaintiff was injured when, while walking on the sidewalk in front of defendants' property, her foot became caught in a hole and she fell to the ground. Defendants showed that their property abutting the sidewalk where plaintiff fell was a single-family, owner-occupied residence, exempt from Administrative Code of City of NY § 7-210, and thus, they had no duty to maintain or repair the flagstone on which plaintiff fell. Nor did that portion of the sidewalk on which plaintiff fell constitute a

special use to defendants, since defendants did not derive any exclusive benefit of the use of the sidewalk, unrelated to public use (*see Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 298-299 [1st Dept 1988], *lv dismissed in part, denied in part* 73 NY2d 783 [1988]). That defendants replaced other flagstones on the sidewalk did not give rise to a duty to repair the entire sidewalk, or the flagstone where plaintiff fell.

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

ENTERED: FEBRUARY 18, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11757 The People of the State of New York, Respondent, Ind. 5747/97

-against-

Rafael Mendez, etc., Defendant-Appellant.

_____

Donald E. Cameron, New York, for appellant.

_____

Order, Supreme Court, New York County (Michael Obus, J.), rendered on or about August 2, 2012, unanimously affirmed.

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

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

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

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

ENTERED: FEBRUARY 18, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11758N Deutsche Bank National Trust Company, etc., Plaintiff-Respondent, Index 380173/08

-against-

Michelle A. Ned, Defendant-Appellant,

Impac Funding Corporation, et al., Defendants.

_____

Michael Kennedy Karlson, New York, for appellant.

Stein, Wiener & Roth, LLP, Carle Place (Jonathan M. Cohen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered November 21, 2012, which granted plaintiff's motion to vacate a prior order granting defendant Michelle A. Ned's motion to dismiss the complaint and vacating the Judgment of Foreclosure and Sale on default, and upon reconsideration, denied defendant's motion, and reinstated the Judgment of Foreclosure and Sale, unanimously affirmed, without costs.

In this mortgage foreclosure action, the motion court properly denied defendant's motion to dismiss the complaint on the ground of lack of jurisdiction. Defendant waived the defense of lack of personal jurisdiction since she failed to assert it in

her answer and in the two prior motions she made (*see* CPLR 320; *Ohio Sav. Bank v Munsey*, 34 AD3d 659 [2d Dept 2006]). Although defendant is correct that the evidence of her physical description rebuts the presumption of proper service since it does not match the description provided by the process server, the court was not required to direct a traverse hearing since defendant waived this defense prior to alerting the court to the discrepancies.

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: FEBRUARY 18, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11759N 87 Chambers, LLC, et al.,
Plaintiffs-Appellants,

Index 104437/10
590322/11
590312/12

Catlin Insurance Co. (UK), Ltd., etc.,
Intervening Plaintiff,

-against-

77 Reade, LLC, et al.,
Defendants-Respondents,

Concrete Courses Corp., et al.,
Defendants.

[And Other Third Party Actions]

_____

Weg and Myers, P.C., New York (David A. McGill of counsel), for appellants.

Brown Gavalas & Fromm LLP, New York (David H. Fromm of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered October 2, 2012, which denied appellants' motion for leave to amend their complaint to add claims of gross negligence and punitive damages, unanimously reversed, on the law, with costs, and the motion granted.

Appellants made the requisite evidentiary showing in support of their proposed new claims for gross negligence (*see Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 116 [1st Dept 1998]). Among other things, the record contains evidence that, on April 9, 2009, three weeks before appellants' building partially

collapsed, the Department of Buildings (DOB) issued defendant 77 Reade, LLC, a violation, warning that "drilling operations" being performed as part of a construction project on 77 Reade's property were causing "cracking and sagging" of the northwest corner of appellants' building, situated on an adjacent lot. DOB directed respondents to "stop all work at North side of lot," the side closest to appellants' building, but there is record evidence that respondents continued such work, leading to the collapse of appellants' building.

Appellants' motion was timely filed and respondents have not shown that they would be prejudiced by granting appellants' leave to assert the new claims. Among other things, appellants are not prejudiced by the mere fact of exposure to potentially greater liability in the form of punitive damages (*see Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]; *Letterman v Reddington*, 278 AD2d 868 [4th Dept 2000]).

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11760 The People of the State of New York, Respondent, Ind. 3772/10

-against-

Pedro Melendez, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered August 2, 2011, convicting defendant, after a jury trial, of burglary in the first degree and attempted robbery in the first degree and sentencing him to an aggregate term of 12 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification. The identification testimony was corroborated by evidence that DNA recovered from the hat left by the intruder at the scene matched defendant's DNA profile, and we find defendant's explanations for the DNA evidence to be implausible. To the extent defendant is also challenging the sufficiency of the evidence as a matter of law, that claim is unpreserved and we

decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We have considered and rejected defendant's related claim of ineffective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

The court properly declined to submit third-degree burglary and attempted third-degree robbery to the jury as lesser included offenses of first-degree burglary and attempted robbery, since there was no reasonable view of the evidence, viewed most favorably to defendant, to support such charges. The victims both testified that the intruder displayed what appeared to be a revolver, and there was no reason for the jury to selectively discredit only that portion of each victim's testimony (*see e.g. People v Davis*, 47 AD3d 506, 507 [1st Dept 2008], *lv denied* 10 NY3d 861 [2008]). Although there was evidence that defendant was also in possession of a stick, there was no reasonable view that

he committed these crimes without displaying what appeared to be a firearm.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11761 Zoila Alvarez, Index 307295/10
Plaintiff,

-against-

Christopher A. Bivens,
Defendant-Appellant,

Jeffrey Gadsden,
Defendant-Respondent.

_____

DeSena & Sweeney, LLP, Bohemia (Shawn P. O'Shaughnessy of counsel), for appellant.

Kornfeld, Rew, Newman & Simeone, Suffern (William S. Badura of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered December 5, 2012, which denied defendant Christopher A. Bivens's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

On August 26, 2008, Bivens parked his truck on the street near the old Yankee stadium. When he exited the truck, he locked it and placed a hide-a-key box with the spare key inside in the rear wheel frame. Bivens returned at approximately 11:30 p.m., at which time the truck was gone and he reported it stolen. When it was recovered by police about three days later, the hide-a-key box was not there. However, the police recovered the key that

had been in the box, which Bivens recognized because it was "all bent up." Meanwhile, on August 28, 2008, plaintiff was struck by the stolen truck. On September 3, 2008, defendant Jeffrey Gadsden pled guilty to grand larceny in the fourth degree, admitting that "on or about August 27, 2008, and in between August 28, 2008, at the corner of 150th Street and Third Avenue of the Bronx, [he] did steal [the truck] valued at over $100.00."

Bivens established by substantial evidence that his truck was stolen at the time of the accident, thereby rebutting the presumption that the motor vehicle was being operated with his consent (Vehicle and Traffic Law § 388[1]; *see Adamson v Evans,* 283 AD2d 527 [2d Dept 2001]). In opposition, plaintiff failed to raise an issue of fact as whether Bivens had violated Vehicle and Traffic Law § 1210(a).

Pursuant to Section 1210(a), "[n]o person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle." However, the section states that "the provision for removing the key from the vehicle shall not require the removal of keys hidden from sight about the vehicle for convenience or emergency." Thus, to avoid liability under the section, " a motorist need only ensure that the ignition key is 'hidden from sight' and need not additionally conceal it so

that the key is 'not readily discoverable by a prospective car thief without extreme difficulty'" (*Banellis v Yackel*, 49 NY2d 882, 884 [1980], quoting NY Legis Ann, 1967, pp 205, 206).

Here, Bivens's testimony that someone could "probably" see the hide-away-box if they looked for it, and that "you would have a very small window as you are walking past it," from which you could "possibly" see the key, did not suffice to raise an issue as to whether the key was "hidden from sight." Bivens testified that one would "have to kind of be peeking around a little bit" to find the key in the hide-a-key box and the record establishes that the key was not in plain view and that one would have to be actively looking for it to find it (*see Manning v Brown,* 91 NY2d 116, 120 [1997]*; Gore v Mackie*, 278 AD2d 879 [4th Dept 2000]; *Poss v Feringa*, 241 AD2d 877, 879 [3d Dept 1997]).

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11762 In re Richard Ronga, Index 151091/13
Petitioner-Appellant,

-against-

New York City Department of Education,
Respondent-Respondent.

_____

Lichten & Bright, P.C., New York (Stuart Lichten of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered August 12, 2013, denying the petition to vacate a post-hearing arbitration award finding petitioner guilty of disciplinary charges and terminating his employment, unanimously modified, on the law, to grant the petition as to specifications Nos. 5 and 6, and to vacate the penalty of termination, and to remand the matter to respondent for consideration of the appropriate penalty as to specifications Nos. 7 and 9, and otherwise affirmed, without costs.

In specifications Nos. 5 and 6, respondent alleged that petitioner, then a principal at P.S. 166 in Manhattan, improperly directed his math and literacy coaches to conduct formal observations of unspecified teachers in the classroom during the period from January 14, 2008 through the end of the 2007-2008

school year and to write observation reports on his behalf. We find that these charges were not specific enough to satisfy the principle of due process that actual notice be given so as to allow the preparation of an adequate defense (*see Wolfe v Kelly*, 79 AD3d 406, 410 [1st Dept 2010], *appeal dismissed* 17 NY3d 844 [2011]). Moreover, at the hearing, neither coach could recall the dates of any observations, or the names of any of the teachers they observed; the math coach testified to conducting between 3 and 10 observations, and the literacy coach testified that she was "[p]ossibly" asked to conduct "one or two." Nor did respondent identify or present any of the coaches' reports for the observations conducted during the six-month period.

We find that the hearing officer's determination that petitioner was guilty of specifications Nos. 7 and 9 pertaining to specific acts of misconduct on June 17 and June 18, 2008 is supported by adequate evidence (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567-68 [1st Dept 2008]). Irrespective of anything in the math coach's file that may have undermined her credibility or established a specific bias against petitioner, as to specification No. 7, the hearing officer found that the math coach's testimony that petitioner directed her to stay late on June 17, 2008 to fabricate formal observation reports of teachers and school-wide professional

development plans was credible and that her account was corroborated by the credible testimony of other teachers who refuted the accuracy and/or authenticity of specific observation reports identified by the math coach as falsely created on that night. The hearing officer also found petitioner's witness to be generally incredible. These determinations are entitled to deference.

Petitioner argues that he was denied the opportunity to confront his accusers as to the charge in specification No. 9 that on June 18, 2008 he submitted to the superintendent the false reports and plans prepared the previous night. This argument misstates the record. The finding was based in large part on the undisputed fact that the superintendent had demanded the material during her visit to petitioner's school on June 17, 2008 and it was not ready at that time, and petitioner's own e-mail to the superintendent on June 18 informing her that the documents were being hand-delivered that morning. The hearing officer rationally concluded that the false documents found to have been prepared the night before constituted the material petitioner himself admitted sending to the superintendent.

Since the penalty of termination was based on the finding of guilt on all four charges, the matter must be remanded for reconsideration of the penalty.

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: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11763 The People of the State of New York, Respondent, Ind. 1773/12

-against-

Richard Hall, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered on or about November 20, 2012, unanimously affirmed.

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

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

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

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11764-
11764A New York City Educational Construction Fund, Plaintiff-Appellant,

-against-

Verizon New York Inc., etc., Defendant-Respondent,

Taconic Investment Partners LLC, et al., Defendants.

Index 650193/09

Anderson Kill P.C., New York (Jeffrey E. Glen of counsel), for appellant.

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for respondent.

Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 25, 2012, dismissing the complaint with prejudice, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 12, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant contends that Zoning Resolution § 12-10 bars all of plaintiff's claims because it excludes "floor space used for mechanical equipment" from "floor area." However, the Zoning Resolution does not define "floor space used for mechanical

equipment" (*cf. Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 101 [1997] [Zoning Resolution defines "cellar space," which is also excluded from "floor area"]). An engineer employed by the New York City Department of Buildings has opined that "floor space for housing telephone switching equipment for business operation and not for the building's mechanical system . . . will not qualify for mechanical space and therefore should not be exempt from zoning floor area." However, this is not a final agency determination. Thus, the motion court correctly found that the definition of floor space used for mechanical equipment "demands administrative determination in the first instance" (2012 NY Slip Op 51142[U], *6).

The court correctly dismissed the first through fourth causes of action (fraud and negligent misrepresentation) because plaintiff did not establish justifiable reliance, due to its failure to use ordinary intelligence to ascertain the truth of defendant's representations (*see e.g. Centro Empresarial Compresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 278-279 [2011]; *1537 Assoc. v Kaprielian Enters.*, 259 AD2d 447 [1st Dept 1999]). This rule is not limited to parties that are contracting for the first time (*see Centro*, 17 NY3d at 272-274, 278-279). Assuming, arguendo, that plaintiff is not a sophisticated investor, it cites no precedential authority for the proposition

that only sophisticated investors have a duty to investigate.

Unlike *DDJ Mgt., LLC v Rhone Group L.L.C.* (15 NY3d 147 [2010]) and *CIFG Assur. N. Am., Inc. v Goldman, Sachs & Co.* (106 AD3d 437 [1st Dept 2013]), on which plaintiff relies, the case at bar does not involve a *written* representation, as plaintiff concedes (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 106 AD3d 494, 494, 496 [1st Dept 2013], *appeal dismissed* 22 NY3d 909 [2013]; *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 198 n 9 [1st Dept 2012]).

We turn now to the contract claims. In the parties' July 31, 2007 deed, plaintiff conveyed certain property to defendant. In the contemporaneous Zoning Lot Development and Easement Agreement (ZLDA), defendant conveyed certain property to plaintiff. Since the deed did not cover conveyances from *defendant* to *plaintiff,* section 2(b) of the ZLDA, in which defendant conveyed 246,407 square feet of floor area to plaintiff, did not merge into the deed (*see Schoonmaker v Hoyt*, 148 NY 425, 429-430 [1896]). Section 6(a) of the ZLDA, in which defendant agreed not to sell any of plaintiff's 246,407 square feet of floor area, did not merge into the deed because that obligation could not be performed until after the conveyance (*see White v Long*, 204 AD2d 892, 894 [3d Dept 1994], *mod on other grounds* 85 NY2d 564 [1995]). By contrast, the 1972 agreement in

which plaintiff agreed to sell defendant the real estate at issue, as amended in 2007, merged into the deed.

Plaintiff contends that the 1972 contract contained obligations collateral to the transfer of real property. However, the amount of floor space allotted to defendant is not a collateral matter but an aspect of the conveyance of property from plaintiff to defendant that is related to the nature or extent of the property to be conveyed (*see Novelty Crystal Corp. v PSA Institutional Partners, L.P.*, 49 AD3d 113, 117 [2d Dept 2008]; *see also Cordua v Guggenheim*, 274 NY 51, 57 [1937]).

Plaintiff also contends that the 1972 agreement contained obligations that the parties intended to continue after the deed was issued. However, while the 1972 contract provides that various sections constitute covenants running with the land, it does not say that the limitations on the size of defendant's building will run with the land (*see 527 Smith St. Brooklyn Corp. v Bayside Fuel Oil Depot Corp.*, 262 AD2d 278 [2d Dept 1999]).

The fraud exception to the merger doctrine (*see Woodworth v Delgrand*, 174 AD2d 1011 [4th Dept 1991]) does not apply because plaintiff's fraud claims were correctly dismissed.

In its present state, the amended complaint does not specify which provisions of the ZLDA defendant breached; hence, the ninth cause of action (for breach of the ZLDA) was correctly dismissed

(*see 767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75 [1st Dept 2004]; *Kraus v Visa Intl. Serv. Assn.*, 304 AD2d 408 [1st Dept 2003]).

Contrary to defendant's contention, plaintiff is not equitably estopped from suing defendant for breach of the ZLDA (*see Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]).

The court correctly dismissed the fifth and sixth causes of action, for unjust enrichment with respect to the Overbuilt Zoning Space (as defined in the complaint), as duplicative of plaintiff's contract claims (*see e.g. IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). The whole concept of Overbuilt Zoning Space depends on the contracts. The complaint alleges, "Upon information and belief, the Verizon Building exceeds the Floor Area *contractually* and legally allocated and available to Verizon (such excess Floor Area utilized by the Verizon Building is referred to as the 'Overbuilt Zoning Space')" (emphasis added).

Plaintiff contends that its unjust enrichment claims should not have been dismissed as duplicative of its contract claims

because it was fraudulently induced into entering the various contracts between itself and defendant.

However, we have found that plaintiff's fraud claims were correctly dismissed.

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11765 The People of the State of New York, Respondent, Ind. 1170/11

-against-

Kristi Stickey, also know as
Kristi Stickney
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered February 29, 2012, convicting defendant, upon her plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing her to a term of 2½ years, unanimously affirmed.

Under the particular circumstances of the case, the court properly exercised its discretion when it declined to adjourn the sentencing, which had already been adjourned twice, for the purpose of having defendant's retained attorney of record appear instead of his law partner. The partner had actually represented defendant for most purposes, including the Supreme Court arraignment, the plea negotiations, and the plea proceedings, and he was plainly familiar with the case. The only issue that arose

at sentencing was whether defendant's postplea conduct had disqualified her for a more lenient disposition than the agreed-upon sentence. The partner capably represented defendant in this regard, and the court properly concluded that defendant had violated the conditions of her plea. The prison sentence to be imposed in the event that defendant violated these conditions had been negotiated, and neither the partner nor the attorney of record would have had any reason or basis for requesting further leniency (*see People v Guerrero*, 27 AD3d 386, 387 [1st Dept 2006]).

Defendant nevertheless asserts that the court's denial of an adjournment deprived her of effective assistance of counsel. She alleges that the partner was inadequately prepared for the sentencing proceeding and that the attorney of record had additional relevant information. These claims are unreviewable on direct appeal because they involve matters not reflected in the record (*see People v Krasnovsky*, 45 AD3d 446 [1st Dept 2007], *lv denied* 10 NY3d 767 [2008]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of these claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received

effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11767 Port Parties, Ltd., Index 116257/08
Plaintiff-Counterclaim Defendant-Respondent,

—against—

The UnConvention Center, Inc.,
Defendant-Counterclaim Plaintiff-Appellant,

ENK International LLC, et al.,
Defendants.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Milton A. Tingling, J.), entered on or about October 16, 2012,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated January 28, 2014,

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11768-
11769-
11770 In re Kesan W., and Another,

Children Under Eighteen Years
of Age, etc.,

Tawana M.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Kelly A. O'Neill Levy, J.), entered on or about January 15, 2013, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding determination that respondent mother neglected her son Kesan W. by inflicting excessive corporal punishment, unanimously affirmed, without costs. Appeal from order of fact-finding, same court and Judge, entered on or about November 29, 2012, unanimously dismissed, without costs, as superseded by the appeal taken from the order of disposition. Appeal from order of visitation, same court and Judge, entered on

or about January 15, 2013, unanimously dismissed, without costs, as abandoned.

The Family Court's neglect finding that respondent inflicted excessive corporal punishment on her son was supported by a preponderance of the evidence (*see Matter of Deivi R.[Marcos R.]*, 68 AD3d 498 [1st Dept 2009]). Respondent's son's out-of-court statements, that respondent had a history of hitting him with a belt, causing bruises to his body, was properly admitted into evidence, as they were corroborated by ACS's caseworker, the Legal Aid Society's social worker, and his guidance counselor's observations of bruises on his arm (*see Matter of Naomi J.[Damon R.]*, 84 AD3d 594 [1st Dept 2011]).

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11771 The People of the State of New York, Dkt. 30959C/10
Respondent,

-against-

Chantal Johnson,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), rendered May 16, 2012, convicting defendant, after a jury trial, of driving while intoxicated (two counts) and operating a motor vehicle without a license, and sentencing her to a term of 30 days of intermittent imprisonment to be served on weekends, a conditional discharge for a period of one year and a $300 fine, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the term of intermittent imprisonment, and otherwise affirmed.

The fact that a breathalyzer test was administered to defendant more than two hours after her arrest did not entitle her to a hearing on the reliability of the results (*see People v Rosa*, 112 AD3d 551 [1st Dept 2013]).

To the extent the court engaged in undue denigration of, or interference with, defense counsel, reversal is not required because the court's actions did not reach the level of preventing the jury "from arriving at an impartial judgment on the merits" (*People v Moulton*, 43 NY2d 944 [1978]).

The evidence of defendant's furtive behavior at the time of the stop, furnished the corroboration requirement of CPL 60.50 was satisfied.

We find the sentence excessive to the extent indicated.

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11773-
11773A Albert Togut, etc.,
Plaintiff-Respondent,

-against-

Riverbay Corporation,
Defendant-Appellant.

Index 302596/08

_____

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

Wingate, Russotti, Shapiro & Halperin, LLP (William P. Hepner of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about July 17, 2012, upon a jury verdict, awarding plaintiff $150,000 for past pain and suffering, $150,000 for future pain and suffering, $25,000 for past medical expenses, and $100,000 for future medical expenses, unanimously modified, on the facts, to vacate the award for future medical expenses and order a new trial solely as to such damages, unless plaintiff, within 30 days of service of a copy of this order with notice of entry, stipulates to accept a reduced award for future medical expenses of $60,000, and to the entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about December 29, 2011, which, after a

jury trial, denied defendant Riverbay Corporation's motion pursuant to CPLR 4404(a) for a directed verdict or, in the alternative, for a new trial, unanimously affirmed.

Defendant's motion for a directed verdict was properly denied. The jury could rationally conclude that defendant had constructive notice of the alleged defect and that the defect was not trivial from plaintiff's testimony that she tripped on a "drop" between the sidewalk and the courtyard on defendant's premises and from the photographs of the defect submitted into evidence (*see Simmons v New York City Tr. Auth.*, 110 AD3d 625, 625 [1st Dept 2013]). In addition, the testimony from plaintiff and her expert permitted the jury to reasonably conclude that the subject accident, and not a pre-existing condition, was the cause of the meniscus tear in plaintiff's left knee (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). We note that although defendant failed to submit the transcript of plaintiff's expert's testimony with its motion to set a side the verdict pursuant to CPLR 4404(a), we have taken judicial notice of it (*Santos v National Retail Transp., Inc.*, 87 AD3d 418 [1st Dept 2011]).

Plaintiff's motion in limine to preclude defendant from submitting evidence of her other health conditions was properly granted since the conditions are not relevant to the treatment of her knee injury. In any event, defendant's counsel was permitted

to question plaintiff and her treating physician at length about these other health conditions, rendering harmless any alleged error in its exclusion (*see Ateser v Becker*, 272 AD2d 219 [1st Dept 2000], *lv denied* 95 NY2d 762 [2000]). To the extent defendant argues that the medical conditions are relevant to damages for future loss of enjoyment of life, it does not seek to vacate that portion of the jury award.

Defendant did not preserve its argument that the trial court abused its discretion in permitting plaintiff's counsel to cross-examine defendant's expert on collateral issues, including a prior medical malpractice claim brought against him, and his testimony in unrelated trials that the meniscus tears sustained by those plaintiffs were degenerative and not traumatic in nature. Defendant either failed to object to the line of questioning or objected on grounds that differ from those it raises on appeal (*see* CPLR 5501[a][3]; *Griffin v Clinton Green S., LLC*, 98 AD3d 41, 47 [1st Dept 2012]).

Although the award of $25,000 for past medical expenses is supported by the evidence, the award of $100,000 for future medical damages is excessive, given plaintiff's treating physician's testimony that her future left knee replacement surgery and associated costs will amount to $50,000-$60,000 (*see Brewster v Prince Apts.*, 264 AD2d 611, 617 [1st Dept 1999], *lv*

dismissed 94 NY2d 875 [2000], *lv denied* 94 NY2d 762 [2000]).

Defendant's claim that the jury rushed to judgment and did not give the case due deliberation is speculative and unsubstantiated.

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11774-
11775 Peter A. Leidel, et al.,
Plaintiffs-Appellants,

-against-

John P. Annicelli, doing business
as Old Stone Hill Road Associates, et al.,
Defendants-Respondents.

Index 102456/10

Gordon & Haffner, LLP, Bayside (David Gordon of counsel), for appellants.

Michael F.X. Ryan, Cortlandt Manor, for John P. Annicelli and Old Stone Hill Road Associates, respondents.

Snyder & Snyder, LLP, Tarrytown (Leslie J. Snyder of counsel), for New York SMSA Limited Partnership, respondent.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 21, 2012, which denied plaintiffs' motion for a default judgment and granted defendants' motions to compel plaintiffs to accept their late answers, unanimously affirmed, without costs. Order, same court and Justice, entered on or about July 11, 2012, which granted defendants' motion to dismiss the complaint, and denied plaintiffs' motion for summary judgment as to liability, unanimously affirmed, without costs.

Plaintiffs and defendant Old Stone Hill Road Associates are adjoining property owners. In 1998, Old Stone leased its property to defendant New York SMSA Limited Partnership d/b/a

Verizon Wireless (Verizon) for the construction and operation of a cellular telephone facility. In 2000, plaintiffs, along with others, commenced an action against defendants in Supreme Court, Westchester County, seeking injunctive enforcement of restrictive covenants limiting use of the property to residential development. An order was entered November 19, 2001 permanently enjoining defendants from violating the restrictive covenants and directing them to remove the facility (*Chambers v Old Stone Hill Rd. Assoc.*, 303 AD2d 536 [2d Dept 2003], *affd* 1 NY3d 424 [2004]). Defendants removed the facility on July 5, 2007.

The instant action, commenced in 2010, asserts claims for unjust enrichment, constructive trust, and implied or quasi-contract, and seeks rents collected and profits earned by defendants in violation of the permanent injunction from the date on which the Court of Appeals affirmed the injunction order, through the date on which defendants removed the facility.

Defendants demonstrated a reasonable, if not "particularly compelling," excuse for their failure to serve timely answers and a meritorious defense (*see Lamar v City of New York*, 68 AD3d 449, 449 [1st Dept 2009]; *ICBC Broadcast Holdings-NY, Inc. v Prime Time Adv., Inc.*, 26 AD3d 239 [1st Dept 2006]; *see also* CPLR 3012[d]). Their delays are attributable, in part, to the timing of Verizon's receipt of the complaint, as evidenced by an

affidavit by Verizon's registered agent for service, and to defendant Annicelli's severe illness.

Their meritorious defense is that the complaint fails to state a cause of action (CPLR 3211[a][7]). The relationship between the parties, that of abutting landowners and former neighbors, as alleged, is not one that "could have caused reliance or inducement," and therefore is inadequate to sustain a claim of unjust enrichment (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]; *Georgia Malone & Co., Inc. v Rieder,* 86 AD3d 406, 408-409 [1st Dept 2011], *affd* 19 NY3d 511 [2012]). Nor does the complaint allege that defendants were enriched at plaintiffs' "expense" (*see Mandarin Trading*, 16 NY3d at 182). While the development of an eyesore certainly could affect property values, the complaint does not allege that the value of plaintiffs' property was affected during the relevant period and that they sustained damages as a result.

The failure to state a cause of action for unjust enrichment is fatal to the remaining causes of action (*see Sharp v Kosmalski*, 40 NY2d 119 [1976] [constructive trust]; *Kagan v K-Tel Entertainment*, 172 AD2d 375 [1st Dept 1991] [quasi-contract]). The complaint also fails to allege any of the other elements of a constructive trust cause of action, i.e. a confidential or fiduciary relationship, a promise, and a transfer in reliance on

that promise (*see Sharp*, 40 NY2d at 121), and fails to allege that plaintiffs performed services for defendants, an element of an implied or quasi-contract cause of action (*see Kagan*, 172 AD2d 376).

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

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11776 The People of the State of New York, Respondent, Ind. 6145/09

-against-

Dwayne Hoke, Defendant-Appellant.

_____

Stanley Neustadter, Cardozo Criminal Appeals Clinic, New York (Nathaniel S. Boyer of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered June 1, 2011, as amended June 27, 2011, convicting defendant, after a jury trial, of six counts of robbery in the first degree, two counts of robbery in the second degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of five years, unanimously affirmed.

Defendant only challenges the legal sufficiency of the evidence supporting the weapon counts, which relate to a loaded revolver recovered from a codefendant. At trial, defendant made a general claim of lack of proof that he acted in concert with the codefendant. However, this did not preserve his specific appellate claim that proof of his accessorial liability for the robbery did not establish his possession of the weapon wielded

during that crime by the codefendant, and we decline to review it in the interest of justice.

As an alternative holding, we reject that claim on the merits. Defendant does not dispute the sufficiency of the evidence that he took part in a robbery in which he and the codefendant both displayed what appeared to be firearms. The jury could have reasonably concluded that defendant was a joint possessor of the loaded revolver recovered from the codefendant immediately after the crime, which was an instrumentality of their joint criminal enterprise (*see Matter of Kadeem W.*, 5 NY3d 864 [2005]; *People v Ramos*, 59 AD3d 269 [1st Dept 2009], *lv denied* 12 NY3d 858 [2009]; *People v Velasquez*, 44 AD3d 412 [1st Dept 2007], *lv denied* 9 NY3d 1040 [2008]).

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11777 Quing Sui Li, Index 108598/07
Plaintiff-Appellant,

-against-

37-65 LLC,
Defendant-Respondent.

_____

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

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

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered October 16, 2012, which, to the extent appealed as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

"A landlord is generally not liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept 1996], *lv denied* 88 NY2d 814 [1996]).

Defendant landlord does not dispute that it had a contractual right to reenter, inspect and make needed repairs at the tenant's expense.

However, the court properly found that plaintiff failed to raise a triable issue of fact as to whether the spiral staircase in the tenant restaurant's premises was a significant structural or design defect that was contrary to any specific statutory safety provisions. The parties do not dispute that the spiral staircase, from which plaintiff slipped due to worn treads and grease, was the means of traversing from the interior first floor to the interior mezzanine level employee locker rooms, and hence was an access staircase. The staircase was not an "interior stair" because it did not serve as a required exit, providing a means of egress from the interior of the building to an open exterior space (*see* Administrative Code of City of NY § 27-232). Thus, plaintiff failed to demonstrate any specific statutory safety violations.

Plaintiff's expert's opinion was insufficient to raise a triable issue of fact as to whether the staircase was a

significant structural feature because he did not inspect the staircase and did not explain how it was necessary in order for the building to function (*see Garcia-Rosales v 370 Seventh Ave. Assoc., LLC*, 88 AD3d 464, 465 [1st Dept 2011]).

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11778-
11778A Index 111691/11

Empire Insurance Company
as Successor in Interest to
Allcity Insurance Company,
Plaintiff-Respondent,

-against-

Robert San Miguel,
Defendant,

Thomas McHenry,
Defendant-Appellant.

_____

Loretta McHenry, Brooklyn, for appellant.

Dillon, Horowitz & Goldstein LLP, New York (Michael M. Horowitz of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 11, 2013, which granted plaintiff Empire Insurance Company's motion for summary judgment declaring that it had no obligation to defend or indemnify its insured, defendant Robert San Miguel, in the underlying action, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered May 10, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The Empire policy states, in relevant part: "[o]ur obligation to defend any claim or suit ends when the amount we pay for damages resulting from the occurrence equals our limit of

liability." The term "occurrence" is not ambiguous, as it refers to a "fortuitous event," as opposed to an intended act (*see* Insurance Law § 1101; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 220 [2002]). Further, the policy utilizes the terms "accident" and "occurrence" interchangeably, as it states that "[a]ll 'bodily injury' and 'property damage' resulting from any one accident or from continuous or repeated exposure to substantially the same general conditions shall be considered to be the result of one occurrence." Reading the above sentence to include an intentional assault with a metal pipe (the act at issue here) within the meaning of "occurrence" would make no textual sense and would "run afoul of the 'cardinal rule of construction that a court adopt an interpretation that renders no portion of the contract meaningless'" (*Kolmar Ams., Inc. v Bioversal Inc.*, 89 AD3d 493, 494 [1st Dept 2011]).

Although the injured party now argues, contrary to his pleadings and testimony before the trial court, that the injuries he received from Empire's insured were the unexpected result of an intended act, where the harm to the victim was inherent in the nature of the act, courts have determined that there is no coverage, despite the fact that the intention of the insured, allegedly, was not to cause the harm (*see Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 161 [1992]). The insured testified in the

underlying action that he intended to hit McHenry with a metal pipe in order to "subdue" him. The fact that the injuries may have been more extensive than San Miguel intended does not negate the fact that this was an intentional assault.

The jury found that San Miguel did not act in self defense, and having tried the case to verdict and there having been a judgment entered on the verdict, both McHenry and Robert San Miguel are bound by the verdict that San Miguel engaged in an intentional and unjustified assault of McHenry (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 668 [1990]).

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11779 Priscila Ramirez, an Infant Under the Age of Fourteen Years by Her Mother and Natural Guardian, Cecilia Freytes, et al., Plaintiffs-Respondents, Index 350223/11

-against-

Ana L. Molina, et al., Defendants-Appellants.

_____

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Michael H. Zhu of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 3, 2013, which denied defendants' motion for summary judgment, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Defendant Juan Carlos Molina testified that he first saw the eight year old plaintiff, who had no memory of the incident, two to three seconds before impact, when she was approximately one foot away from his vehicle. Traveling 12 miles per hour, he hit his brakes and turned his wheel to the right in an unsuccessful attempt to avoid the accident. It was also unrefuted that the infant plaintiff left the safety of the sidewalk, attempted to

cross the roadway outside of the crosswalk, and moved into the path of the vehicle. Under such circumstances, defendants were entitled to summary dismissal (*see Sakho v City of New York*, 88 AD3d 581 [1st Dept 2011]; *DeJesus v Alba*, 63 AD3d 460 [1st Dept 2009], *affd* 14 NY3d 860 [2010]; *Brown v Muniz*, 61 AD3d 526 [1st Dept 2009], *lv denied* 13 NY3d 715 [2010]; *Jellal v Brown*, 37 AD3d 179 [1st Dept 2007]).

The child's parents' affidavits which speculated that Molina was being untruthful about the speed of his vehicle, based upon the location of their daughter after the impact, or that he should have been able to stop in the two to three seconds after first observing the child, were insufficient to rebut defendants' entitlement to summary judgment (*see Brown v Muniz*, 61 AD3d at 528, citing *Murray v Donlan*, 77 AD2d 337 [1980], *appeal dismissed* 52 NY2d 1071 [1981]).

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11780N Luissa Chekowsky, Index 106532/11
Plaintiff-Appellant,

-against-

Windemere Owners, LLC, et al.,
Defendants-Respondents.

_____

Marc Bogatin, New York, for appellant.

Cullen & Troia, P.C., New York (Kevin D. Cullen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 24, 2013, which denied plaintiff's motion for summary judgment as to liability on her rent overcharge claim and a declaration that she is entitled to a rent stabilized lease, unanimously reversed, on the law, without costs, the motion granted, and it is declared that plaintiff is entitled to a rent stabilized lease.

Defendants failed to raise an issue of fact in opposition to plaintiff's prima facie showing that they did not make sufficiently costly improvements to her rent stabilized apartment to permit them to remove the apartment from rent regulation (*see* Administrative Code of City of NY §§ 26-504.2; 26-511[c][13]). To increase the rent over the demonstrated legal regulated rent, defendants would have had to make $53,541.60 worth of

improvements. However, their own contractors' invoices show only approximately $33,200.00 worth of renovations. While defendants' employee's affidavit in opposition stated that more than $55,000 had been spent on the improvements, the employee was not a person with knowledge of the facts, and her statement was unsupported by any admissible evidence, such as affidavits by the various vendors she claimed would testify to additional improvements at trial, and devoid of an explanation of why they are not now available (*see Castro v New York Univ.*, 5 AD3d 135 [1st Dept 2004]; CPLR 3212[b]).

Defendants failed to show that they needed further discovery, especially since they are not seeking any records from plaintiff, and they had 17 months to search their own records (*see Bailey v New York City Tr. Auth.*, 270 AD2d 156 [1st Dept 2000]; CPLR 3212[f]).

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

ENTERED: FEBRUARY 18, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11781N FC Bruckner Associates, L.P., et al., Index 600341/10
Plaintiffs-Appellants,

-against-

Fireman's Fund Insurance Co.,
Defendant-Respondent,

Gab Robins North America, Inc.,
Defendant.

_____

Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for appellants.

Rivkin Radler LLP, Uniondale (Stuart M. Bodoff of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 22, 2012, which denied plaintiffs' motion to vacate so much of a conference discovery order that ruled that defendant was not required to produce two specified claims files and to compel defendant to produce those files and any claims file arising under the excess insurance policy at issue, unanimously reversed, on the law and the facts, without costs, and the motion granted.

Plaintiffs seek a declaration that defendant is obligated to indemnify them in an underlying personal injury action. Defendant contends, among other things, that plaintiffs failed to provide timely notice of the occurrence. Under Ohio law, which

governs the issue of timely notice in this case (*see* 95 AD3d 556 [1st Dept 2012]), if it is determined that their notice was untimely, then plaintiffs will bear the burden of rebutting the consequent presumption of prejudice to defendant (*see Ferrando v Auto-Owners Mut. Ins. Co.*, 98 Ohio St 3d 186, 208 [2002]).

Plaintiffs seek to rebut the presumption by establishing, inter alia, that, as an excess insurer, defendant would not have become more involved in the handling of the underlying action had it received notice at an earlier time. The requested claims files may shed light on defendant's excess claims handling practices and policies during the pertinent time period by showing the actions that defendant took when it received timely notice of claims arising under the same excess policy. Therefore, the requested files are material and necessary to plaintiffs' prosecution of this case (*see Clarendon Natl. Ins. Co. v Atlantic Risk Mgt., Inc.*, 59 AD3d 284 [1st Dept 2009]; CPLR 3101[a]).

Plaintiffs' demand was not overbroad or unduly burdensome, since it specifically sought claims files arising during the relevant time period under the excess policy at issue in this case. Moreover, defendant's counsel represented to the court that "there weren't a lot of claims files," and defendant's ready access to these files is demonstrated by the fact that the files

were the source of two documents it has already produced.

In any event, plaintiffs' need for the discovery outweighs any special burden to be borne by defendant (*see Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000]). Defendant represented to the motion court that it was unable to locate the bulk of its records pertaining to plaintiffs' named insured. Furthermore, defendant has not produced a witness with first-hand knowledge of its excess handling practices during the applicable time period.

Since defendants did not move for a protective order, and plaintiffs' demand was not "'palpably improper,'" the motion court was precluded from denying plaintiffs' motion on the basis of unspecified "privacy" concerns (*see Zurich Ins. Co. v State Farm Mut. Auto. Ins. Co.*, 137 AD2d 401, 401-402 [1988]).

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

ENTERED: FEBRUARY 18, 2014

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11296-
11297 Index 300589/08
83842/08

Public Administrator of Bronx County, etc.,
Plaintiff-Respondent,

-against-

485 East 188th Street Realty Corp., et al.,
Defendants-Appellants.

- - - - -

[And A Third-Party Action]

- - - - -

T.C. Dunham Paint Company, Inc.,
Second Third-Party Plaintiff-Appellant,

-against-

Appula Management Corp.,
Second Third-Party Defendant-Appellant.

- - - - -

New Palace Painters Supply Co., Inc.,
Third Third-Party Plaintiff-Appellant,

-against-

Appula Management Corp.,
Third Third-Party Defendant-Appellant.

Public Administrator of Bronx County, etc.,
Plaintiff,

-against-

485 East 188th Street Realty Corp., et al.,
Defendants,

- - - - -

485 East 188th Street Realty Corp.,
Third-Party Plaintiff-Appellant,

-against-

Appula Management Corp.,
Third-Party Defendant-Respondent.

- - - - -

[And Other Third-Party Actions]

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for 485 East 188th Street Realty Corp., appellant.

Rosenbaum & Taylor, P.C., White Plains (Dara L. Rosenbaum of counsel), for New Palace Painters Supply Co., Inc., appellant.

Thomas Torto, New York (Jason Levine of counsel), for T.C. Dunham Paint Company, Inc., appellant.

Linda A. Stark, New York, for Appula Management Corp., appellant.

Law Offices of Marc A. Seedorf, Bronx (Marc A. Seedorf of counsel), for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about April 19, 2010, reversed, on the law, without costs and the third-party complaint reinstated. Order, same court and Justice, entered June 13, 2012, modified, on the law, to grant 485 East's motion for summary judgment dismissing Dunham's former cross claim, now third-party claim, for indemnification, and otherwise affirmed, without costs.

Opinion by Gische, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Rolando T. Acosta
Karla Moskowitz
Judith J. Gische, JJ.

11296-11297
Ind. 300589/08
83842/08

_____x

Public Administrator of Bronx County, etc.,
Plaintiff-Respondent,

-against-

485 East 188th Street Realty Corp., et al.,
Defendants-Appellants.

- - - - -

[And A Third-Party Action]

- - - - -

T.C. Dunham Paint Company, Inc.,
Second Third-Party Plaintiff-Appellant,

-against-

Appula Management Corp.,
Second Third-Party Defendant-Appellant.

- - - - -

New Palace Painters Supply Co., Inc.,
Third Third-Party Plaintiff-Appellant,

-against-

Appula Management Corp.,
Third Third-Party Defendant-Appellant.

_____

Public Administrator of Bronx County,
etc.,
Plaintiff,

-against-

485 East 188th Street Realty Corp., et al.,
Defendants,
- - - - -
485 East 188th Street Realty Corp.,
Third-Party Plaintiff-Appellant,

-against-

Appula Management Corp.,
Third-Party Defendant-Respondent.
- - - - -
[And Other Third-Party Actions]
_____x

Defendant/third-party plaintiff 485 East 188th Street Realty Corp., appeals from an order of the Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about April 19, 2010, which, to the extent appealed from as limited by the brief, sua sponte dismissed said party's third-party complaint. Defendant/third-party plaintiff 485 East 188th Street Realty Corp., defendant/third third-party plaintiff New Palace Painters Supply Co., Inc., defendant/second third-party plaintiff T.C. Dunham Paint Company, Inc., and second third-party/third third-party defendant Appula Management Corp., appeal from an order of the same court and Justice, entered June 13, 2012, which, to the extent appealed from as limited by the briefs, denied defendant New Palace Painters Supply Co., Inc.'s motion for summary judgment dismissing as against it the causes of action for negligence and strict liability based on failure to warn, denied defendant T.C. Dunham Paint Company, Inc.'s motion for summary judgment dismissing as against it the causes of action for negligence, failure to warn, and defective

condition, and denied as having previously been granted 485 East's motion to dismiss all cross claims against it by Dunham and third-party defendant Appula Management Corp.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for 485 East 188th Street Realty Corp., appellant.

Rosenbaum & Taylor, P.C., White Plains (Dara L. Rosenbaum of counsel), for New Palace Painters Supply Co., Inc., appellant.

Thomas Torto, New York (Jason Levine of counsel), for T.C. Dunham Paint Company, Inc., appellant.

Linda A. Stark, New York, for Appula Management Corp., appellant.

Law Offices of Marc A. Seedorf, Bronx (Marc A. Seedorf of counsel), for respondent.

GISCHE, J.

This personal injury and wrongful death action arises from a flash fire in which Ferrel Carino, a/k/a Jose Carino, was severely burned; he subsequently passed away. Carino's estate is represented in this case by the Public Administrator.

On July 26, 2006, while Carino was supervising a work crew refinishing wood floors in apartment 1A at a building owned by defendant 485 East 188th Street Realty Corp. (485 East), the products they were applying suddenly ignited. Carino was seriously burned in the fire and passed away only weeks later. Carino was employed by Appula Management Corp., which was defendant 485 East's residential property management company. The work crew included Victor Marache, who brought separate actions for his own injuries, and Danny Carino. Vito Mangiaelli was the sole owner and officer of both 485 East and Appula. He hired the work crew to rehabilitate empty apartments on behalf of the owner. The crew was responsible for all the rehabilitation work, which at times included refinishing the wood floors. Mangiaelli generally oversaw the floor refinishing work, even though he was a two to five minute drive away when the fire erupted. Mangiaelli testified at his deposition that after a fire occurred during another floor refinishing project only months before this fire, he decided to "babysit" the crew for a

time. Mangiaelli's brother, Angelo, was the foreman, and he purchased the floor finishing products used by the crew from defendant New Palace Painters Supply Co., Inc.

The accident occurred as the crew began the process of sealing newly sanded floors in apartment 1A. Marache was responsible for moving the buckets of sealer and polyurethane from place to place within the work site, while Jose Carino applied the substance to the floors. The sealer was applied first and allowed to dry for an hour before the polyurethane was applied. As Carino completed the polyurethane application, a fire erupted near the entrance to the apartment.

After an investigation, the New York City Fire Department concluded that the fire was caused by flammable vapors from the lacquer sealer and/or the polyurethane floor sealer and that the source of the ignition was "most likely" the pilot light on the stove or a spark from the refrigerator. The FDNY report also states that the gas was on in the apartment and that the refrigerator was plugged in. Victor Marache, however, testified that the refrigerator was unplugged, per Carino's instructions. Fire Captain Roach, one of the first responders, testified that when he reached the scene, the gas and electricity were off. It is unclear, however, whether these utilities were off when FDNY arrived at the scene or turned off by FDNY in order to respond to

the fire. Defendants' expert, Harold I. Zeliger,[1] could not definitively conclude whether the ignition source was the stove pilot light or a spark from the refrigerator. Burton Davidson, an expert who opined on the source of the fire in the Marache case, concluded that triboelectricity from the continual movement of the sealant products in the containers and the drippings from an applicator brush were just as likely an ignition source as a live pilot light or an electrical spark from a compressor motor. Zeliger opined, however, that the chemicals in use were not susceptible to spontaneous combustion.

Defendants' expert concluded that the source of the flash fire could only have been the lacquer sealer because the flashpoint (the temperature at which a liquid generates vapors that can be ignited from an external source) of the polyurethane was 100° F, while the flashpoint of the lacquer sealer was -4° F. Since the air temperature was only 82° F,[2] Zeliger concluded that the lacquer sealer and not the polyurethane served as the fuel

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[1]Although Zeliger was hired by defendant T.C. Dunham Paint Company, Inc., all of the defendants rely on his report in support of their respective dispositive motions.

[2]Defendants' expert states that he took this fact from Marache's expert's affidavit. However, Davidson, Marache's expert, asserts that the maximum air temperature was 85° F, although he gives no source for this information and does not specify whether it refers to the outside temperature or the temperature inside the apartment on the date of the fire.

for the fire. Davidson opined that because of the varying flashpoints of the different substances being used, the polyurethane alone could not have been the source of the fire. He did not, however, rule out that a combination of vapors from the lacquer sealer and the polyurethane ignited that day.

Davidson stated that the lacquer sealer was prohibited for indoor use in the City of New York.

Mangiaelli testified that the floor refinishing crew was repeatedly told over the course of years that finishing products were highly flammable and that before using the products all equipment were to be removed from the rooms, and the gas and electricity to the apartment was to be shut off.

The lacquer sealer was manufactured by nonparty Akzo Nobel Coatings, Inc. and distributed by defendant T.C. Dunham Paint Company, Inc. Dunham received the lacquer sealer in 55-gallon drums, repackaged the product into one and five gallon containers, and labeled these containers with its customer's name. Dunham created its own polyurethane by blending ingredients from different chemical manufacturers. It also created labels for each of these products in its customer's name, in this case New Palace. New Palace was a wholesale/retail paint, hardware and building supply store operating in the Bronx. It resold the products with the labels created for it by Dunham.

New Palace sold the lacquer sealer and the polyurethane to Appula. The label for the lacquer sealer contained certain warnings. The front of the lacquer sealer prominently stated "DANGER! HIGHLY FLAMMABLE! HARMFUL OR FATAL IF SWALLOWED." A back label stated: "DANGER! EXTREMELY FLAMMABLE: VAPORS MAY CAUSE FLASH FIRE.***Vapors may cause flash fire. Keep away from heat, spark and flame. Use with adequate ventilation. ***DANGER! EXTREMELY FLAMMABLE."

The label did not contain any warning that the substance was prohibited for indoor use within the City of New York.

The label for the polyurethane also contained certain warnings. The front label stated: "CAUTION! COMBUSTIBLE." The back label stated: "CONTAINS PETROLEUM SOLVENTS: Keep away from heat and open flame. To avoid breathing vapors or spray mist, open windows and doors or use other means to ensure fresh air entry during application and drying. *** Do not smoke during application and until all vapors (odors) are gone. *** use only with adequate ventilation."

Defendants' expert opined that these warnings were sufficient, while the experts proffered by plaintiff opined that these warnings were insufficient because they were too general. Plaintiffs' experts were particularly critical of the lacquer sealer warning, which fails to mention, as required by law, that

indoor use of the product is prohibited in the City of New York. Mangiaelli testified that he had seen product labels for the floor refinishing products many times over the years and that had any one of those labels contained a warning that use of the product was prohibited in the City of New York, he would not have purchased the product.

There are two orders on appeal. In the April 19, 2010 order, the motion court dismissed the complaint as against 485 East and Appula[3], finding that 485 East and Appula were indistinct legal entities and, therefore, plaintiff's exclusive remedy against them was limited to the workers' compensation law. The court also dismissed 485 East's third-party action against Appula for common-law indemnification and contribution on the basis that the action violated the anti-subrogation rules because 485 East and Appula were co-insureds under the same policy of insurance. Only 485 East has appealed from this order.

In the June 13, 2012 order, the court dismissed all of plaintiff's causes of action against New Palace and Dunham, except for the negligence and strict liability claims that were premised on the theory of failure to warn. Although Appula cross-moved for summary judgment dismissing the complaint and the

[3]Although the court dismissed the complaint against Appula, that entity was not a defendant in the main action.

third-party complaints against it, the court denied the cross-motion on the basis that its 2010 order mooted the relief by operation of law. 485 East also moved for summary judgment dismissing the complaint and Dunham's cross claims and Appula's claims against it, none of which the court addressed, reasoning that the 2010 order also addressed these issues.[4] 485 East, Appula, New Palace, and Dunham appealed from the 2012 order.

As Appula concedes on appeal, 485 East's third-party action against it is not precluded by Workers' Compensation Law § 11. Thus, the motion court incorrectly dismissed that action in its 2010 order. Although section 11 of the Workers' Compensation Law protects employers from actions by third parties for injuries sustained by an employee acting within the scope of his or her employment, 485 East may sue Appula for common law indemnification and contribution because plaintiff's decedent suffered a grave injury while employed by Appula (*see Fleming v Graham*, 10 NY3d 296, 299 [2008]).

The court also incorrectly dismissed 485 East's third-party claims against Appula on the basis of the anti-subrogation rules. In 2010, there was a pending declaratory judgment action by QBE, Appula's insurer, invoking a policy exclusion for injuries

[4]By prior stipulation the third-party action by New Palace against 485 East had been discontinued with prejudice.

sustained by an employee. Although the declaratory judgment action has since been discontinued, Appula correctly concedes that there was no basis for the court's conclusion, as a matter of law, that 485 East and Appula were co-insureds. Consequently, the anti-subrogation rule does not bar recovery by 485 East against Appula and the third party complaint should not have been dismissed (*see Medical Liab. Mut. Ins. Co. v Schurig*, 211 AD2d 518 [1st Dept 1995] *lv denied* 86 NY2d 703 [1995]).

Because plaintiff never appealed from the 2010 order, to the extent it dismissed the complaint as against 485 East, the order remains in effect. Although the 2010 order also dismissed the complaint as against Appula, plaintiff, as noted, never asserted any claim against Appula.

485 East, New Palace, Dunham, and Appula all argue that plaintiff's remaining failure to warn claims have no merit because Carino was a knowledgeable user and the sole proximate cause of his own injuries since he used the floor finishing products without turning off gas and electricity sources near the work. Although plaintiff has no claims against either 485 East (based upon the 2010 order) or Appula, these parties are aligned in interest with the other defendants in seeking to dismiss the complaint based upon the cross claims and third-party claims that have been asserted against them.

Defendants argue that the motion court improperly considered expert reports that plaintiff had obtained from a separately commenced action by Marache, a coworker, based upon the injuries Marache sustained in the very same fire and using the very same floor refinishing products. CPLR 3101(d)(1)(i) does not, however, require a party to respond to a demand for expert witness information at any specific time, and defendants do not show that they were prejudiced by plaintiff's reliance on this material in responding to their dispositive motions (*see Martin v Triborough Bridge & Tunnel Auth.*, 73 AD3d 481 [1st Dept 2010], *lv denied* 15 NY3d 713 [2010]). It is clear that all parties had these expert reports well before they made these motions, because defendants' own expert refers to them in his affidavit, which defendants submitted in support of their motions in this case.[5] Whether the motion court was mistaken about the parties' stipulation regarding the use of these materials is of no moment. The admissibility of expert testimony is a determination within the discretion of the court, and the court properly considered the materials in this case (*see Christoforatos v City of New York*, 90 AD3d 970 [2nd Dept 2011]).

The motion court correctly denied defendants' motions for

[5]Mr. Zeliger was an expert in Marache's case as well.

summary judgment dismissing the case on the ground that Carino was a knowledgeable user which would obviate the need for any warnings and/or the sole proximate or intervening cause of the flash fire.

A product may be defective due to inadequate warnings of the risks and dangers involved in its foreseeable use (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998]). The duty also extends to forseeable product misuse (*id.* at 240 n2). To be actionable, however, the absence of warnings must be a proximate cause of the claimed injuries (*Howard v Poseidon Pools*, 72 NY2d 972 [1988]). Even if a duty to warn otherwise exists, recovery may be denied to a knowledgeable user, i.e. one who was fully aware of the specific hazard without receiving the warning (*see Travelers Ins. Co. v Federal Pac. Elec. Co.*, 211 AD2d 40, 43 [1st Dept 1995], *lv denied* 86 NY2d 712 [1995]). While in a proper case the court can decide as a matter of law that there is no duty to warn (*id.*), in most cases whether a party is a knowledgeable user is a factual question (*see e.g. Passante v Agway Consumer Prod., Inc.*, 12 NY3d 372, 382 [2009]). Even if a user has some degree of knowledge of the potential hazards in the use of a product, summary judgment will not lie where reasonable minds might disagree as to the extent of the knowledge (*id.*). While there is evidence that Carino had some knowledge about general hazards associated with

using floor refinishing products, it cannot be said, as a matter of law, that his knowledge base was sufficient to relieve defendants of any duty they may have had to provide adequate warnings. There is evidence that Carino had used floor refinishing products before and that he had been told by his employer that they were flammable and required certain safety precautions, such as shutting off the gas and electricity. There is no evidence, however, that he knew about the particular properties of each product he was using, including their flashpoints, the fact that one product was much more volatile than the other and the specifications for proper ventilation when using these products, or that he knew one product was prohibited for indoor use in the City of New York. Thus, it is for a jury to determine whether Carino had sufficient knowledge of the specific hazards attendant to the use of the floor finishing products to relieve defendants of any duty to warn of those hazards.

We reject defendants' argument that the complaint should be dismissed because Carino was the sole proximate cause of his injuries. Even were it undisputed that the gas or the electricity was the ignition source for the fire, that fact would be insufficient to relieve defendants of all responsibility because the risks posed by using the products without turning off

the gas and electricity were neither extraordinary nor unforeseeable (*see Derdiarian v Felix Contracting Corp.*, 51 NY2d 308 [1980]; *Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29 [2011]; *Dillard v New York City Hous. Auth.*, 112 AD3d 504 [1st Dept 2013]). User negligence in the handling of these highly dangerous products is entirely forseeable, and it is the very reason that warnings are required. Even if Carino mishandled the products he was using, this would not entitle defendants to dismissal of the complaint (*id.*). It would raise an issue of fact as to the apportionment of liability between him and defendants (*see Dillard, supra*).

We reject Appula's and 485 East's collateral arguments, that they are entitled to different relief than the other parties because plaintiff did not specifically oppose their respective motions, to the extent that Appula and 485 East incorporate the same arguments and proof as New Palace and Dunham. Plaintiff fully opposed New Palace and Dunham's motions and had no claims against either 485 East or Appula at the time. To the extent 485 East argues that the motion court should have considered its individual arguments in favor of dismissing the complaint and all cross claims against it, the 2010 order already dismissed plaintiff's claim against it and plaintiff did not appeal from that order. New Palace previously discontinued its claims

against 485 East with prejudice. Dunham concedes that its indemnification claim against 485 East should be dismissed. The only remaining claim against 485 East is that of Appula. Notwithstanding that the motion court did not reach this issue, we have reviewed the record and conclude that 485 East has not established as a matter of law that it is entitled to dismissal of Appula's counterclaim. As previously stated, the anti-subrogation rules provide no basis for dismissal. In addition, 485 East's general claim, through its attorney, that it was not negligent, is insufficient to support the relief sought.

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

Accordingly, the order of the Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about April 19, 2010, which, to the extent appealed from as limited by the brief, sua sponte dismissed defendant/third-party plaintiff 485 East 188th Street Realty Corp.'s third-party complaint, should be reversed, on the law, without costs, and the third-party complaint reinstated. The order of the same court and Justice, entered June 13, 2012, which, to the extent appealed from as limited by the briefs, denied defendant New Palace Painters Supply Co., Inc.'s motion for summary judgment dismissing as against it the causes of action for negligence and strict liability based on failure to

warn, denied defendant T.C. Dunham Paint Company, Inc.'s motion for summary judgment dismissing as against it the causes of action for negligence, failure to warn, and defective condition, and denied as having previously been granted 485 East's motion to dismiss all cross claims against it by Dunham and third-party defendant Appula Management Corp., should be modified, on the law, to grant 485 East's motion for summary judgment dismissing Dunham's former cross claim, now third-party claim, for indemnification, and otherwise affirmed, without costs.

All concur.

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

ENTERED: FEBRUARY 18, 2014

CLERK