

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**APRIL 23, 2015**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Acosta, Moskowitz, Richter, Feinman, JJ.

14635 Lee Rothman, Index 104230/10  
Plaintiff-Appellant,

-against-

McLaughlin & Stern, LLP, et al.,  
Defendants-Respondents.

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Arnold E. DiJoseph P.C., New York (Arnold DiJoseph of counsel),  
for appellant.

Melito & Adolfsen, P.C., New York (S. Dwight Stephens of  
counsel), for respondents.

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Judgment, Supreme Court, New York County (Manuel J. Mendez,  
J.), entered December 5, 2013, dismissing the complaint,  
unanimously affirmed, without costs.

In this action for legal malpractice, defendants, attorney  
Martin J. Friedman and his firm, McLaughlin & Stern, LLP,  
represented plaintiff in connection with the acquisition of an  
interest in two companies. After plaintiff lost the money he  
invested because the companies turned out to be part of a Ponzi  
scheme, he commenced this action alleging that defendants failed

to conduct due diligence with respect to the companies' finances.

Defendants established their entitlement to judgment as a matter of law by submitting proof that plaintiff, an experienced investor, understood that the retainer agreement excluded due diligence from the scope of representation. Namely, the evidence demonstrates that plaintiff declined his accountant's advice to conduct due diligence and that he advised defendants that none was needed because he trusted the companies' owner and had engaged in numerous business transactions with her. Plaintiff's statements that he did not want any due diligence conducted, set forth in affidavits by defendant Friedman and plaintiff's accountant, are admissible as party admissions (see e.g. *Delgado v Martinez Family Auto*, 113 AD3d 426 [1st Dept 2014]).

Furthermore, plaintiff's damages are not attributable to defendants. To the extent plaintiff sustained any non-speculative losses, the motion court correctly concluded that those losses were caused by the fraud committed by the owner of the companies and plaintiff's own misjudgment of the business risks, not by defendants' alleged conduct (see *Garten v Shearman & Sterling LLP*, 102 AD3d 436, 436-37 [1st Dept 2013], *lv denied* 21 NY3d 851 [2013]).

The record belies plaintiff's contention that defendants

received undisclosed third-party payments that constituted a conflict of interest (see former Code of Professional Responsibility DR 5-107[A][1] [22 NYCRR 1200.26[a][1]]). Plaintiff knew of and consented to the offer by the companies' owner to pay part of defendants' legal fees. Moreover, payments were made well after the acquisition closed, and plaintiff cites no evidence that the arrangement pre-dated the closing.

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

ENTERED: APRIL 23, 2015

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CLERK

Gonzalez, P.J., Acosta, Moskowitz, Richter, Feinman, JJ.

14643N- Index 650795/09  
14643NA-  
14643NB Gordon Group Investments, LLC,  
Plaintiff-Appellant,

-against-

Michael "Jack" Kugler, et al.,  
Defendants,

Alexander Vik, et al.,  
Defendants-Respondents.

- - - - -

Kennedy Berg, LLP,  
Nonparty-Appellant.

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Dechert LLP, New York (James M. McGuire of counsel), for appellants.

Becker, Glynn, Muffly, Chassin & Hosinski, LLP, New York (Michael D. Margulies of counsel), for respondents.

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Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered October 30, 2013, September 27, 2013, and September 18, 2013, which granted defendants-respondents' motion for sanctions to the extent of awarding attorney's fees and expenses against plaintiff-appellant and nonparty-appellant in the total amount of \$54,597.46, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, the motion denied, and the award vacated.

Plaintiff Gordon Group Investments, LLC (GGI) commenced this

action against defendants seeking damages arising from an alleged pump-and-dump scheme. The complaint asserted, inter alia, causes of action for breach of contract, breach of fiduciary duty and fraud. Defendant Michael "Jack" Kugler (Kugler) moved to dismiss the complaint as time-barred and for failure to state a cause of action. The remaining defendants also sought dismissal on various grounds. The motion court dismissed the complaint in its entirety on statute of limitations and other grounds.

GGI, by its counsel, nonparty-appellant Kennedy Berg, subsequently moved by order to show cause and pursuant to CPLR 2221 and 5015(a) to renew or vacate the order dismissing the complaint. Although the cover page of the order to show cause indicates that the motion was directed to all of the defendants, the accompanying papers made clear that GGI sought to reinstate a discrete cause of action against one defendant only – Kugler. In the affirmation in support, GGI's counsel stated that "[t]his motion is directed at . . . the Court's ruling that GGI's breach of contract claim against defendant Michael 'Jack' Kugler ('Kugler') is time-barred . . ." In the accompanying memorandum of law, counsel wrote that the motion seeks to "revisit the dismissal of GGI's breach of contract claim [against Kugler]." The arguments set forth in both the affirmation and memorandum of

law related solely to the breach of contract claim against Kugler.

In response to GGI's motion, three sets of opposition papers were filed by the defendants other than Kugler.<sup>1</sup> In these submissions, those defendants explicitly recognized that GGI's motion sought no relief against them. They also made substantive arguments as to why renewal or vacatur was not warranted with respect to the court's dismissal of the contract claim against Kugler. The court denied the renewal/vacatur motion, finding that it was, in effect, an untimely motion for reargument and that no basis existed for vacatur under CPLR 5015(a).

Defendants-respondents (hereinafter defendants)<sup>2</sup> moved, pursuant to 22 NYCRR 130-1.1, for sanctions, attorney's fees and expenses against GGI and Kennedy Berg. Defendants argued, inter alia, that the renewal/vacatur motion was frivolous because the order to show cause had been directed at all defendants, yet sought relief only as to Kugler. The motion court granted the motion to the extent of awarding attorney's fees and expenses

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<sup>1</sup> Kugler did not file any opposition to the renewal/vacatur motion.

<sup>2</sup> Defendants Kugler and Barbara Vogt Kugler are not parties to this appeal.

incurred in opposing the motion to renew or vacate. In its decision, the court did not identify the exact conduct found to be frivolous, made no specific findings, and did not give reasons for its decision to grant the motion.

We find that the motion court improvidently exercised its discretion in awarding attorney's fees and expenses. 22 NYCRR 130-1.1(a) allows for "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." Section 130-1.1(c) defines conduct as frivolous if, inter alia, "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (§ 130-1.1[c][1]). The mere fact that the cover page of GGI's order to show cause directed the renewal/vacatur motion to all defendants does not rise to the level of frivolous conduct. Viewed in its entirety, the order to show cause, along with the accompanying affirmation and memorandum of law, made clear that GGI sought relief only as to Kugler and not the remaining defendants. Nor is there any convincing claim that defendants were misled by the mislabeled order to show cause. Indeed, their opposition papers explicitly recognized that GGI's motion sought only to reinstate the breach of contract claim against Kugler.

The better practice would have been for GGI's counsel to have withdrawn the motion as to the defendants other than Kugler once it received their responses.<sup>3</sup> However, its failure to have done so was not "so egregious as to constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1" (*Carson v Hutch Metro Ctr., LLC*, 110 AD3d 468, 469 [1st Dept 2013] [internal quotation marks omitted]).

Nor can it be said that GGI's attempt to reinstate the breach of contract claim against Kugler was "completely without merit in law" (22 NYCRR 130-1.1[c][1]) or that the motion was filed for improper purposes. Although ultimately rejected by the motion court, the arguments advanced by GGI as to Kugler were of colorable merit, and were not made in bad faith (see *Yenom Corp. v 155 Wooster St. Inc.*, 33 AD3d 67, 70 [1st Dept 2006] "(courts) must be careful to avoid the imposition of sanctions in cases where the (party) asserts colorable, albeit unpersuasive, arguments in good faith and without an intent to harass or injure" ]).

Moreover, the award of costs would have to be vacated

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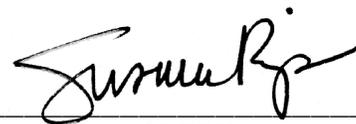
<sup>3</sup> On appeal, GGI notes that any confusion as to the scope of the relief sought could have been resolved if defendants' counsel had contacted GGI's counsel upon receipt of the order to show cause.

because the motion court failed to satisfy the procedural requirements of 22 NYCRR 130-1.2 (see *Dubai Bank v Ayyub*, 187 AD2d 373 [1st Dept 1992]). That section provides that a court may award costs or impose sanctions "only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate." Thus, the court must "fully explain its decision" in writing (*Holloway v Holloway*, 260 AD2d 898, 899-900 [3d Dept 1999]). Here, the court did not set forth the conduct it found to be frivolous, and provided no reason whatsoever for its decision to impose legal fees and costs.

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

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

ENTERED: APRIL 23, 2015

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suppress these two pistols.

In opposition to defendant's assertion that the weapon possession charges were based solely on the statutory presumption that weapons recovered from the interior of an automobile are deemed to be possessed by all its occupants (Penal Law § 265.15[3]), the People failed to "point to evidence reasonably tending to show the defendant's actual or constructive possession" of the two pistols (*People v Cheatham*, 54 AD3d 297, 301 [1st Dept 2008], *lv denied* 11 NY3d 854 [2008]). Instead, the People asserted that the statutory presumption did not apply, claiming erroneously that the two handguns at issue were recovered from the person of one of the car's passengers (see Penal Law § 265.15[3][a]). The People concede on appeal that this argument was incorrect, because the two pistols (unlike a revolver found on the person of a passenger) were in fact recovered from a box on the back seat. There is no indication that the motion court relied either on the grand jury minutes or the search warrant affidavit. Because the People failed to adequately demonstrate that the charges relating to the two pistols were not based entirely on the statutory presumption, defendant had automatic standing to challenge seizure of those weapons (see *People v Millan*, 69 NY2d 514, 519-520 [1987]).

We do not reach the People's new theory for defeating automatic standing, nor defendant's newly advanced argument that he had an independent privacy interest in the car he was driving, but did not own, as both claims are unpreserved.

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

ENTERED: APRIL 23, 2015

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CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14066 Marianne Ramade, Index 21728/11E  
Plaintiff-Appellant,

-against-

C.B. Contracting Corp.,  
Defendant,

ECCO Development LLC, et al.,  
Defendants-Respondents.

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ECCO Development LLC, et al.,  
Third-Party Plaintiffs-Respondents,

-against-

Welsbach Electric Corp.,  
Third-Party Defendant-Respondent.

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Scarcella Law Offices, White Plains (M. Sean Duffy of counsel),  
for appellant.

Fabiani Cohen & Hall, LLP, New York (Michael E. Sande of  
counsel), for ECCO Development LLC, ECCO III Enterprises Inc.,  
ECCO III Development Inc., Skanska USA Civil Northeast Inc. and  
Skanska Koch, Inc., respondents.

London Fischer LLP, New York (Daniel C. Perrone of counsel), for  
Emcor Group, Inc. and Welsbach Electric Corp. respondents.

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Order, Supreme Court, Bronx County (Alexander W. Hunter,  
Jr., J.), entered October 15, 2013, which, insofar as appealed  
from as limited by the briefs, granted defendants ECCO  
Development LLC, ECCO III Enterprises, Inc., ECCO III  
Development, Inc., Skanska USA Civil Northeast Inc., and Skanska

Koch Inc.'s (collectively, SEW) motion for summary judgment dismissing the Labor Law §§ 241(6) and 200 and common-law negligence claims as against them, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff was injured when she tripped and fell on a piece of rebar protruding from an unfinished concrete floor at a construction site. Her employer, third-party defendant Welsbach Electric Corp., had entered into a prime contract with the New York City Department of Environmental Protection (DEP) to perform electrical work on the project. Defendant SEW, which had a separate prime contract with DEP to furnish all labor and materials for structures and equipment, subcontracted with Welsbach for certain electrical work and with defendant C.B. Contracting for the installation of rebar.

The motion court did not abuse its discretion by considering the answers of codefendants Emcor and C.B. Contracting, since SEW cured the deficiency in its motion papers by submitting the answers in its reply papers (see *Pandian v New York Health & Hosps. Corp.*, 54 AD3d 590, 591 [1st Dept 2008]; CPLR 3212[b]). Contrary to plaintiff's contention, the contracts submitted by SEW were properly authenticated as accurate reproductions made during the regular course of business by an affidavit of its

claims manager, Kathleen Kaval.

SEW failed to establish prima facie that it cannot be held liable for plaintiff's injuries under Labor Law § 200 and in common-law negligence. SEW was unable to demonstrate that it did not have the authority to control and direct the injury-producing rebar installation work (see e.g. *Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003]). While SEW submitted portions of the prime contract between SEW and DEP, those portions do not set forth the complete obligations under that contract. Further, SEW did not produce the contract between it and C.B. Contracting, which purportedly details its obligations toward the rebar installation work. As such, issues of fact exist whether SEW had the requisite authority to control and direct the method and manner of C.B. Contracting's rebar installation work (see *Hughes v Tishman Constr. Corp.*, 40 AD3d 305 [1st Dept 2007]). Issues of fact also exist as to SEW's responsibility to cap the subject piece of rebar (see *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

SEW failed to establish prima facie that it cannot be held liable for plaintiff's injuries under Labor Law § 241(6), predicated on an alleged violation of Industrial Code (12 NYCRR) § 23-1.7(e)(2). SEW failed to demonstrate that it was not a

general contractor that owed a nondelegable duty to provide reasonable and adequate protection and safety to persons employed at the work site, as opposed to a mere prime contractor (see *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 300-301 [1978]). Nor did it demonstrate that it was not a statutory agent, having been given the authority to supervise and control the work giving rise to plaintiff's injuries (see *Russin*, 54 NY2d at 318; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 192-193 [1st Dept 2011]).

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and otherwise affirmed, without costs.

In the second cause of action, plaintiff alleges that the removal of nonparty RES Management, Inc. (RES) as the general partner of defendant Changing World Technologies, L.P. (CWT) constituted a breach of a limited partnership agreement (LPA) by defendants CWT Canada II Limited Partnership (CWT Canada), Resource Recovery Corporation (RRC), and Jean Noelting (collectively the CWT defendants). The CWT defendants assert that the fifth sentence of the disputed section of the LPA gives a majority of the partners of CWT an absolute and unfettered right to remove RES at any time. However, as plaintiff counters, the CWT defendants' interpretation would seem to render meaningless the second sentence of the disputed section, which provides that the general partner "shall" serve in that role until it resigns and a successor is designated by a majority of the partners, or until the filing of a certificate of cancellation of the partnership (see *Estate of Osborn v Kemp*, 991 AD2d 1153, 1159 [Del Sup Ct 2010] [a court shall read a contract as a whole and "give each provision and term effect, so as not to render any part of the contract mere surplusage" or "meaningless"] [internal quotation marks omitted]). As plaintiff argues, the second sentence can be reasonably read to apply to

the initial general partner named in the LPA (that is, RES), while the fifth sentence applies to a general partner that is thereafter "selected" by a majority of the partners and may also "be removed and replaced" by the majority. Since neither party's interpretation is clearly correct as a matter of law, the agreement is ambiguous and the court may consider extrinsic evidence, such as the other contracts entered into by the parties at the same time as the LPA, to interpret the intent of the parties (see *Galantino v Baffone*, 46 A3d 1076, 1081 [Del Sup Ct 2012]). Those other contracts support plaintiff's interpretation, since they contemplated that RES would continue as general partner until at least April 30, 2013. Accordingly, the CWT defendants were not entitled to dismissal of the second cause of action.

We reject the CWT defendants' assertion that plaintiff cannot rely on the LPA because it had materially breached the parties' Stockholders Agreement by failing to comply with a demand for capital in March 2013. The CWT defendants' argument depends on affidavits and documents that are not properly considered on a motion to dismiss pursuant to CPLR 3211(a)(7) and do not conclusively establish a defense based on documentary evidence pursuant to CPLR 3211(a)(1).

Plaintiff's third cause of action, alleging that the CWT defendants breached the implied covenant of good faith and fair dealing in the LPA by purporting to remove RES as general partner during the investment period, is adequately pleaded. Although the disputed provision of the LPA addresses the issue of removal of a general partner, plaintiff alleges that there is an implied provision in the LPA that RES would continue as general partner until at least April 30, 2013, as contemplated in the parties' Stockholders Agreement and Securities Purchase Agreement (SPA) (see *Renco Group, Inc. v MacAndrews AMG Holdings LLC*, 2015 WL 394011, \*6, 2015 Del Ch LEXIS 25, \*21 [Del Ch Ct, Jan. 29, 2015, No. 7668-VCN]).

The court correctly dismissed the fourth cause of action, which alleges that the CWT defendants breached the implied covenant of good faith and fair dealing in the parties' Stockholders Agreement. Defendants' alleged conduct of removing RES as general partner did not breach an express or implied provision of the Stockholders Agreement.

The court correctly denied defendants' motion to dismiss the sixth cause of action, which alleges that the CWT defendants tortiously interfered with the SPA, and the eighth cause of action, which alleges that the CWT defendants tortiously

interfered with a Non-Disclosure and Non-Circumvention Agreement (NDA). Plaintiff alleges all of the elements of a tortious interference claim (see *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). The CWT defendants' defense that they acted to protect their own legal or financial stake in the breaching party's (CWT's) business since plaintiff had left CWT in grave financial condition is unavailing, because it depends on affidavits and documents outside of the complaint and it raises issues that cannot be determined at this stage of the proceedings. It also contradicts the complaint's allegations that plaintiff had improved CWT's financial condition.

The court properly granted plaintiff's cross motion to allow plaintiff to amend the complaint to add GEM Ventures as a party on the tortious interference claim involving the NDA, since GEM Ventures, not plaintiff, is a party to the NDA (see CPLR 3025[b]).

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

ENTERED: APRIL 23, 2015



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627 [1994]). Notwithstanding the “principle of deference to the jury on questions of mens rea” (*People v Fernandez*, 64 AD3d 307, 310 [2009], *appeal withdrawn* 13 NY3d 796 [2009]), and the cognitive differences between adults and juveniles, the jury would have had no basis, other than speculation, for concluding that the above-described conduct was merely reckless or was only intended to cause serious physical injury.

The court’s *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court properly permitted cross-examination about the underlying facts of a juvenile delinquency adjudication (*see People v Greer*, 42 NY2d 170, 176 [1977]). Any prejudicial effect was outweighed by the probative value of these acts on the issue of credibility, and that value was not negated by defendant’s age at the time of the incident.

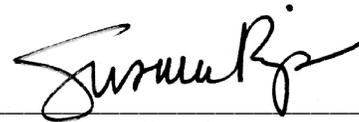
Defendant’s challenges to the People’s summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the challenged remarks generally constituted fair comment on the evidence, and that the summation did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D’Alessandro*, 184 AD2d 114, 118-119 [1992], *lv*

*denied* 81 NY2d 884 [1993]). We have considered and rejected defendant's claim that his counsel rendered ineffective assistance by failing to make objections to the summation (see *People v Cass*, 18 NY3d 553, 564 [2012]).

We perceive no basis for reducing the sentence. Defendant's request for removal of the proceeding to Family Court is both belated and without merit.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 23, 2015

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

14852- Index 155301/12  
14853N-  
14854N New GPC Inc.,  
Plaintiff-Appellant,

-against-

Kaieteur Newspaper Inc.,  
Defendant-Respondent.

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Ray Beckerman, P.C., Forest Hills (Ray Beckerman of counsel), for  
appellant.

Law Offices of James F. Sullivan, P.C., New York (Giovanna  
Tuttolomondo of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.),  
entered June 30, 2014, which, to the extent appealed from as  
limited by the briefs, denied plaintiff's application for an  
order precluding defendant from offering any evidence in this  
action as to defendant's supposed sources for the newspaper  
articles at issue other than Lloyd Singh, unanimously modified,  
on the law and the facts, to grant the motion to the extent of  
precluding defendant from producing or introducing evidence as to  
the identity of any natural person, other than Lloyd Singh, who  
provided information to defendant in connection with the  
articles, unless that information has been disclosed to plaintiff  
at least 10 days before any such use by defendant in this action,

and otherwise affirmed, without costs. Order, same court and Justice, entered May 16, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for a protective order directing the confidentiality of all discovery produced in this litigation, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered May 12, 2014, which denied plaintiff's motion for an order "directing that no deposition in this proceeding may be used by either party for any purpose outside of the within litigation," unanimously dismissed, without costs, as academic.

This libel action arises out of defendant's alleged publication of articles accusing plaintiff, a Guyanese pharmaceutical manufacturing and supplying company, of selling pharmaceuticals to the Guyanese government at grossly inflated prices. In response to an interrogatory asking for the identity of natural persons who provided information to defendant in connection with those articles, defendant answered that no such information was provided to it because it merely republished information published by another corporation (see *New GPC Inc. v Kaieteur Newspaper Inc.*, 124 AD3d 437 [1st Dept 2015]). This response would appear to end the inquiry. However, because defendant's answer also named Lloyd Singh, stated that "[o]ther

sources include individuals within the Public Ministry of Health and Georgetown Public Hospital who wished [sic] to remain anonymous," and cited a case invoking the Shield Law (Civil Rights Law § 79-h[b]), plaintiff is entitled to a preclusion order to the extent indicated above (see *Oak Beach Inn Corp. v Babylon Beacon*, 62 NY2d 158, 166 [1984], cert denied 469 US 1158 [1985]; see also *Sands v News Am. Publ.*, 161 AD2d 30, 37 [1st Dept 1990]).

The motion court providently exercised its discretion in denying plaintiff's motion for a protective order directing that all discovery produced in this action shall be confidential (see CPLR 3103[a]; *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 [1st Dept 2003]). Plaintiff failed to support its claim that such an order is needed in order to "get witnesses to come forward."

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ENTERED: APRIL 23, 2015

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

14908-

Ind. 4234/09

14909 The People of the State of New York,  
Respondent,

-against-

Kenith Agard,  
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Renee A. White, J.), entered on or about September 23, 2011, which denied defendant's CPL 440.20 motion to set aside his sentence, unanimously reversed, on the law, the motion granted and the matter remanded for a new second violent felony offender adjudication and sentencing.

Defense counsel rendered ineffective assistance at the underlying sentencing proceeding by failing to ascertain that, in violation of *People v Catu* (4 NY3d 242 [2005]), defendant was not advised about postrelease supervision at the time of his prior plea, and by failing to litigate whether the *Catu* violation rendered the prior conviction unconstitutional for predicate

felony purposes (see *People v Fagan*, 116 AD3d 451 [1st Dept 2014]).

The People take the position that, as a matter of law, the *Catu* error does not prevent the prior conviction from being used as a predicate felony, and that therefore it would have been futile for sentencing counsel to have argued otherwise. In support of this position, the People assert that a *Catu* error is not a federal constitutional violation under CPL 400.15(7)(b), and they also assert that such an error does not affect the predicate status of the conviction in light of the retroactivity principle set forth in *People v Catalonotte*, 72 NY2d 641, 644-645 [1988]). However, these arguments are unpreserved (see *People v Santiago*, 91 AD3d 438, 439 [1st Dept 2012]), and we decline to address the merits of these issues on this appeal.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 23, 2015

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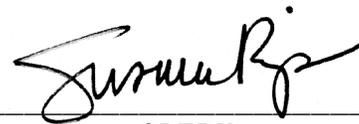


25, 2013, which granted defendants' motion to dismiss the amended complaint dated July 11, 2012, this Court explicitly "reinstated" "the breach of contract claim against the sponsor regarding the common elements" and "affirmed" "[t]he dismissal of the remaining claims" (107 AD3d 646, 647 [1st Dept 2013]). Thus, there are no existing claims to be dismissed by the motion court (see *Sea Trade Mar. Corp. v Hellenic Mut. War Risks Assn. [Bermuda] Ltd.*, 79 AD3d 601 [1st Dept 2010], lv dismissed in part, denied in part 17 NY3d 783 [2011]).

Plaintiffs failed to establish that either the motion court or this Court committed "scrivener's errors" in their prior orders.

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CLERK

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

14911-

14911A In re Skye C.,

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

Monica S., etc.,  
Respondent-Appellant,

Administration for Children's Services,  
Petitioner-Respondent.

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Anne Reiniger, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R.  
Gustafson of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Jane  
Pearl, J.), entered on or about February 7, 2014, to the extent  
it brings up for review a fact-finding order, same court and  
Judge, entered on or about January 9, 2014, which found that  
respondent mother had neglected the subject child, unanimously  
affirmed, and the appeal therefrom otherwise dismissed, without  
costs, as moot. Appeal from fact-finding order, unanimously  
dismissed, without costs, as subsumed in the appeal from the  
order of disposition.

The finding of neglect is supported by a preponderance of

the evidence (see Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). The record demonstrates that the mother's untreated mental illness placed the child at imminent risk of impairment. Hospital records show that the mother was diagnosed with several mental illnesses and that she suffered from paranoid ideation. Further, the testimony of the mother and the caseworkers show that the mother socially isolated the child and kept the child confined to an unsafe and unsanitary room in a shelter most of the time (see *Matter of Immanuel C.-S. [Debra C.]*, 104 AD3d 615 [1st Dept 2013]). Expert testimony was not required to demonstrate the mother's mental illness (see *Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 436 [1st Dept 2010]).

The mother's appeal from the disposition is moot, since the dispositional order has expired by its own terms and was superseded by two subsequent permanency orders (see *Matter of Fawaz A. [Franklyn B.C.]*, 112 AD3d 550, 551 [1st Dept 2013]).

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

ENTERED: APRIL 23, 2015



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

14912 In re Adabel D.,

A Person Alleged to  
be a Juvenile Delinquent,  
Appellant.

- - - - -

Presentment Agency

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

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for presentment agency.

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Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about December 6, 2013, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The disposition is the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (see *Matter of Katherine W.*, 62 NY2d 947 [1984]), and the court properly exercised its discretion in declining appellant's request for an adjournment in contemplation of dismissal. Among other things, the underlying offense was violent, and appellant was again arrested for violent conduct

while this case was pending. Moreover, the court stated that it would consider sealing the case if appellant successfully completed probation.

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bears out these descriptions (see *Christopher V. v James A. Leasing, Inc.*, 115 AD3d 462 [1st Dept 2014]; *Sidibe v Cordero*, 79 AD3d 536 [1st Dept 2010]). In opposition, plaintiff failed to submit a recent photograph of the scar to rebut defendants' showing (see *Aguilar v Hicks*, 9 AD3d 318 [1st Dept 2004]).

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an allegation of "injury in fact" (see *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211-212 [2004]; *Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 318-319 [1st Dept 2011], *lv denied* 17 NY3d 717 [2011]).

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

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reporting the full details of her father's unlawful sexual conduct. Furthermore, other family members made observations that tended to corroborate the victim's testimony.

Defendant's claim that his counsel rendered ineffective assistance by failing to request submission of a lesser included offense is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (see *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of this claim 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]). Defendant has not shown that counsel's failure to request the submission was objectively unreasonable, that he was entitled to such submission, or that there is a reasonable possibility that such submission would have affected the outcome of the case.

The court properly received evidence of an incident that occurred while the family was on a vacation as direct evidence of the endangering the welfare of a child count, although it occurred two months after the time period had ended for the

charge of predatory sexual assault against a child.

Additionally, this evidence was properly admitted as uncharged crimes evidence relevant to the predatory sexual assault count, in order to complete the victim's narrative, place the events in a believable context and explain the victim's delay in reporting defendant's conduct (see *People v Leeson*, 12 NY3d 823, 827 [2009]; *People v Dorm*, 12 NY3d 16, 19 [2009]).

We perceive no basis for reducing the sentence.

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

14917 Surinder Singh, et al., Index 106146/09  
Plaintiffs-Appellants,

-against-

1221 Avenue Holdings, LLC, et al.,  
Defendants-Respondents,

Raised Computer Floors, Inc.,  
Defendant-Appellant.

- - - - -

L&K Partners, Inc., et al.,  
Third-Party Plaintiffs-Respondents,

-against-

Campbell and Dawes, Ltd.,  
Third-Party Defendant-Respondent,

Raised Computer Floors, Inc.,  
Third-Party Defendant-Appellant.

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The Feld Law Firm, P.C., New York (John G. Korman of counsel),  
for Surinder Singh and Rano Singh, appellants.

Gambeski & Frum, Elmsford (Malcolm Stewart of counsel), for  
Raised Computer Floors, Inc., appellant.

Boeggeman, George & Corde, P.C., White Plains (Karen A. Jockimo  
of counsel), for 1221 Avenue Holdings, LLC and L&K Partners,  
Inc., respondents.

Gallo Vitucci & Klar, LLP, New York (Kimberly A. Ricciardi of  
counsel), for Morgan Stanley & Co., Incorporated, respondent.

Fabiani Cohen & Hall, LLP, New York (Antonino Lugara of counsel),  
for Campbell and Dawes, Ltd., respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.),

entered on or about February 10, 2014, which, insofar as appealed from as limited by the briefs, granted the motions of defendants 1221 Avenue Holdings, LLC, Morgan Stanley & Co., Inc. and L&K Partners, Inc. for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against them, granted all defendants' motions for summary judgment dismissing the Labor Law § 241(6) claim predicated upon Industrial Code (12 NYCRR) § 23-1.7(e) (1) and (2), and denied the motion of defendant Raised Computer Floors, Inc. (RCF) for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against it, unanimously modified, on the law, to the extent of reinstating plaintiff's Labor Law § 241(6) claim based upon 12 NYCRR 23-1.7(e) (1), and dismissing the Labor Law § 200 and common-law negligence claims as against RCF, and otherwise affirmed, without costs.

Plaintiff's Labor Law § 241(6) claim predicated upon an alleged violation of 12 NYCRR 23-1.7(e) (2) was properly dismissed since the screw over which plaintiff tripped was an integral part of the raised tile floor system and other work performed on the renovation project (*see Zieris v City of New York*, 93 AD3d 479 [1st Dept 2012]). Although the court properly found that

plaintiff raised a triable issue as to whether his accident occurred in a "passageway" or an open area, it erred in dismissing the section 23-1.7(e)(1) claim on the ground that the screw constituted an integral part of the work being performed. Dismissal on such ground is warranted only to claims under section 23-1.7(e)(2) (see e.g. *Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421 [1st Dept 2013]).

The motion court properly dismissed plaintiff's Labor Law § 200 and common-law negligence claims as against Morgan Stanley, 1221 Avenue Holdings, and L&K Partners. Contrary to plaintiff's contention, the screw, which protruded about one inch above the floor tile, was not the result of an inherently dangerous condition at the work site, but rather, was due to the means and methods of the contracted work (see *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]). Thus, the determination to be made is whether defendants exercised supervision and control over plaintiff's work (see *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]), and here, there was a lack of evidence that these defendants exercised such supervision and control. Plaintiffs' argument

that defendants had the authority to stop the work and regularly inspected the job site, is unavailing. Regular inspection of the site to ensure that work is progressing according to schedule or the authority to stop any work perceived to be unsafe constitutes a general level of supervision that is not sufficient to warrant holding defendants liable under Labor Law § 200 (see *id.*; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007]).

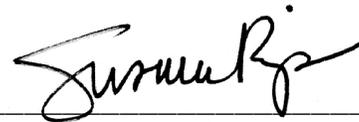
Dismissal of the Labor Law § 200 and common-law negligence claims as against RCF is also warranted since there was no evidence that this defendant supervised, directed or controlled the work plaintiff was performing at the time of the accident. Plaintiff testified that he received all of his instructions from his own employer's foreman, and that no personnel from any of the other defendants directed or supervised him in the performance of his duties. It is unknown which subcontractor failed to properly screw the floor tile down, and there was no evidence that RCF was responsible for ensuring that tiles were properly screwed down after they had been opened by another subcontractor performing

electrical or plumbing work.

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

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that petitioner characterized the 20% charge as a gratuity and directed its employee drivers to tell customers that the fee was a gratuity. Accordingly, the charge "purported to be a gratuity" within the meaning of section 196-d. Further, under the law in effect at the time of IBA's determination (see *Matter of Sadore Lane Mgt. Corp. v State Div. of Hous. & Community Renewal*, 151 AD2d 681, 682 [2d Dept 1989], *lv denied* 75 NY2d 703 [1990]), mandatory charges constituted gratuities within the meaning of the statute where, as here, it was shown that the employer represented or allowed its customers to believe that the charges were gratuities for its employees (see *Ramirez v Mansions Catering, Inc.*, 74 AD3d 490 [2010]; see also *Samiento v World Yacht Inc.*, 10 NY3d 70 [2008]).

The employee drivers did not waive their rights to the mandatory charges, since the purported waivers were not negotiated and there is no indication that the employees were aware of the statutory right being waived (see *Matter of American*

*Broadcasting Cos. v Roberts*, 61 NY2d 244, 249-250 [1984]).

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

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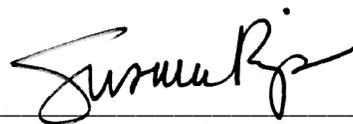
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were not remote, particularly since defendant spent approximately 6 of the 10 years between those offenses and the instant offense in prison or on probation supervision. Even while in prison, defendant violated prison rules by soliciting sex from another inmate. Defendant cites no mitigating factors which are not outweighed by his demonstrated propensity to commit sex crimes.

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*SAL* (20 NY3d 327 [2012]), plaintiffs argue that New York courts may exercise jurisdiction over defendants pursuant to CPLR 302(a)(1), based on defendants' use of correspondent accounts in New York to effectuate the wire transfers.

Unlike the Lebanese Canadian Bank (LCB), however, which was alleged to have "deliberately used a New York account again and again to effect its support" of a foundation through which money was funneled to a terrorist organization (*id.* at 340), defendants are alleged to have been "directed" by plaintiffs' former employees "to wire the bribe/kickback money to Citibank NA, New York, in favour of 'Pictet & Co. Bankers Geneva,' for the credit of" an account they controlled. Thus, unlike LCB, defendants merely carried out their clients' instructions and have not been shown to have "purposefully availed [themselves] of the privilege of conducting activities in New York" (*id.* at 336).

Nor have plaintiffs shown that facts essential to

establishing jurisdiction may exist but cannot yet be stated;  
thus, dismissal without jurisdictional discovery is appropriate  
(see *Copp v Ramirez*, 62 AD3d 23, 31-32 [1st Dept 2009], *lv denied*  
12 NY3d 711 [2009]).

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employer never received, as required. Moreover, defendant made a damaging admission.

The court properly exercised its discretion in admitting uncharged crime evidence tending to show defendant's prior misappropriation of \$750 from his employer. Given the fact pattern, this evidence was probative of defendant's intent (see *People v Alvino*, 71 NY2d 233, 242, 245 [1987]). The evidence was also properly admitted since it tended to show a common scheme or plan (see *People v Kampshoff*, 53 AD2d 325, 335 [4th Dept 1976], *cert denied* 433 US 911 [1977]), and it demonstrated how defendant committed the charged crime. The probative value of this evidence exceeded any prejudicial effect.

Although the prosecutor's cross-examination of defendant about being in debt was inappropriate, we find the error to be harmless (see *People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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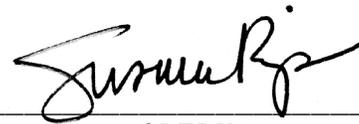


presence of firearms in defendant's apartment at the time of the warrant application. Accordingly, the facts in the supporting affidavit satisfied each of the two prongs of the *Aguilar-Spinelli* test (see *Spinelli v United States*, 393 US 410 [1969]; *Aguilar v Texas*, 378 US 108 [1964]).

We perceive no basis for reducing the sentence, including the five-year term of postrelease supervision.

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acknowledgment at his deposition that he had reviewed certain corporate tax returns filed by defendant's decedent in the 1980s, wherein she claimed to be the 100% owner of the family companies at issue. Rather, the evidence shows that the decedent had always had these tax returns in her possession, and thus should have offered them in support of her statute of limitations defense when she made the pre-answer motion to dismiss upon that ground in 2006 (*see id.*; *Briggs v Chapman*, 53 AD3d 900, 902 [3d Dept 2008]; *White v Murphy*, 290 AD2d 704, 705 [3d Dept 2002]).

We further find that even if the law of the case doctrine was inapplicable, defendant did not counter plaintiff's showing that such a late amendment prejudiced him (*see Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]). First, plaintiff's purported admissions were made during his deposition held in May 2009, yet defendant did not make the instant motion until June 2014, and has offered no justification for the five year delay. Second, discovery was nearly complete at the time defendant made this motion. Until then, plaintiff had sought discovery solely relating to decedent's defense that their parents had given the companies to her via several oral inter vivos gifts. Plaintiff was unable to elicit information from the decedent on this new defense because she died in April 2011, more

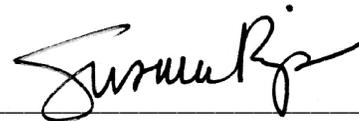
than three years before defendant raised this theory.

In any event, defendant did not make an adequate showing that the proposed defense had arguable merit (see *Sabo v Alan B. Brill, P.C.*, 25 AD3d 420, 421 [1st Dept 2006]).

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

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Wimpfheimer, pursuant to which he agreed to turn over to the estate the funds remaining in the account after he made certain agreed upon payments. Since Wolf has asserted as a defense that he was unaware of that agreement, Wimpfheimer has become a significant witness concerning the negotiation of the agreement and whether he had actual or apparent authority to enter into the agreement on behalf of Wolf (see *Tatalovic v Nightlife Enterprises, L.P.*, 69 AD3d 439 [1st Dept 2012]; *Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 82 AD3d 586 [1st Dept 2011]). We note that Wimpfheimer's testimony is likely to be prejudicial to Wolf, unless he testifies that he acted without his client's knowledge or authority in entering into the agreement (see Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7[b]).

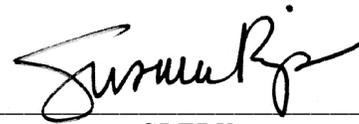
Appellants' assertion that Wimpfheimer cannot testify in the matter because Wolf would invoke the attorney-client privilege is without merit. Wolf waived the privilege by affirmatively placing the subject matter of his privileged communications (or lack thereof) concerning the agreement at issue in this litigation, "so that invasion of the privilege is required to determine the validity" of his defense, and "application of the

privilege would deprive the adversary of vital information"

(*Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63 [1st Dept 2007]).

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