

interest of justice. As an alternate holding, we reject the claim on the merits. The evidence was legally sufficient to support the convictions of second-degree criminal possession of a forged instrument under Penal Law § 170.25, which requires proof of possession of a forged instrument of a kind specified in Penal Law § 170.10. The counterfeit sporting event tickets in defendant's possession constituted instruments that "evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status" (Penal Law § 170.10 [1]; see *People v Lewis*, 50 AD3d 595 [1st Dept 2008]). A ticket to an event is the actual instrument, and normally the sole document, that grants the bearer a license to attend the event.

The court properly exercised its discretion in receiving evidence of defendant's convictions for prior similar crimes, because its probative value outweighed its potential for prejudice, which the court minimized by way of thorough limiting instructions. Given the defense theory that defendant had no knowledge that the tickets he possessed were counterfeit, evidence of defendant's prior convictions for possessing counterfeit tickets was highly probative of his intent and absence of mistake (see *People v Alvino*, 71 NY2d 233, 242 [1987]). We do not find that the quantity of evidence admitted

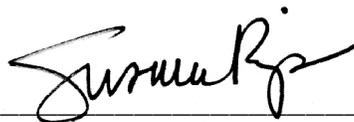
was excessive. It was clear from the outset of the trial that, regardless of what evidence the People introduced, the principal, if not the only issue in the case would be whether defendant knew the tickets were forgeries.

Although, at a charge conference, defense counsel raised some concerns about the court's anticipated interested witness charge, his remarks were insufficiently specific to preserve the arguments defendant makes on appeal (see *People v Wilson*, 93 AD3d 483, 484 [1st Dept 2012], *lv denied* 19 NY3d 978 [2012]), and we decline to review these claims in the interest of justice. As an alternative holding, we reject them on the merits. The court's interested witness instruction was not constitutionally deficient in any respect (see *People v Blake*, 39 AD3d 402, 403 [1st Dept 2007], *lv denied* 9 NY3d 873 [2007]; see also *Reagan v United States*, 157 US 301, 305-311 [1895]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 28, 2015



CLERK

Gonzalez, P.J., Mazzairelli, Renwick, Gische, JJ.

14930 In re Kevin Buist,
Petitioner,

Index 100952/13

-against-

New York City Housing Authority,
Respondent.

Gonzalez & Oberlander LLP, New York (Andrew A. Gonzalez of
counsel), for petitioner.

David Farber, New York (Elena Madalina Andrei of counsel), for
respondent.

Determination of respondent, dated March 6, 2013, which,
after a hearing, sustained charges that petitioner had conducted
himself in a manner prejudicial to or discrediting respondent,
left his assigned work area without authorization, and failed to
perform his assigned duties for part of the workday, and
terminated petitioner's employment, unanimously modified, on the
law, to the extent of annulling so much of the determination as
found that petitioner left his assigned work area without
authorization and failed to perform his assigned duties for part
of the workday, vacating the penalty of termination and remanding
the matter to respondent for the imposition of an appropriate
penalty, and the proceeding brought pursuant to CPLR article 78
(transferred to this Court by order of Supreme Court, New York

County [Michael D. Stallman, J.], entered November 26, 2013), otherwise disposed of by confirming the remainder of the determination, without costs.

The findings that petitioner left his assigned work area without authorization and failed to perform his assigned duties for part of the workday on the dates charged are not supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The director of respondent's Emergency Services Department, in which petitioner worked as a shift superintendent, testified that, if a shift superintendent leaves his or her post, he or she must request coverage in his or her absence, and cannot leave without such coverage. The director further testified that if a higher level employee is not available, an assistant superintendent may provide coverage.

The director acknowledged that another employee who had been an assistant shift superintendent and was being trained as a shift superintendent was on duty with petitioner on May 31, 2012, and was qualified to cover for petitioner when he left his post on that day. Regarding June 6, 2012, the director acknowledged that another shift superintendent was on duty with petitioner on that day. Although when the director tried calling their work

post, the call bounced to another location and he was informed that the shift supervisor was not there at the moment, respondent points to no evidence in the record that it was petitioner and not the other shift superintendent who left the post unattended.

In view of the foregoing, the matter is remanded to respondent for the imposition of an appropriate penalty on the sustained charge that petitioner conducted himself in a manner prejudicial to or discrediting respondent.

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

ENTERED: APRIL 28, 2015

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CLERK

Gonzalez, P.J., Mazzairelli, Renwick,, Gische, JJ.

14931-

14932 Evgeny F.,
Petitioner-Appellant,

-against-

Inessa B.,
Respondent-Respondent.

Blank Rome LLP, New York (Jeffrey C. Hoffman of counsel), for appellant.

Lee Anav Chung White & Kim LLP, New York (Judith E. White of counsel), for respondent.

Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about March 28, 2014, which, after a hearing, granted respondent mother's application for an interim award of attorney's fees in the amount of \$525,000 and expert's fees of \$38,000 from petitioner father, unanimously affirmed, without costs.

In this child custody proceeding, the court providently exercised its discretion in awarding respondent counsel fees and expert fees ``based on the relative financial circumstances of the parties and the circumstances of the case as a whole'' (*Matter of Feng Lucy Luo v Yang*, 104 AD3d 852, 852 [2d Dept 2013]; see *O'Shea v O'Shea*, 93 NY2d 187, 193 [1999]; Domestic

Relations Law §237[b]). The evidence established that petitioner is in a superior financial position and that he heavily litigated this matter to purposely delay the proceedings in an effort to cause respondent to spend her more limited resources on the case (see *O'Shea v O'Shea*, 93 NY2d at 194; *Sutaria v Sutaria*, 123 AD3d 908, 908 [2d Dept 2014]). Thus, under the circumstances, the Referee properly exercised her discretion in determining that respondent should be completely reimbursed for the legal and expert fees she incurred, which were supported by her attorney's testimony and records.

Contrary to petitioner's contention, the court's determination was not undermined by its reference to the "rebuttable presumption" language of Domestic Relations Law § 237(b), which petitioner maintains applies only when attorney's fees are sought by a "spouse." The statute expressly grants the court discretion to award attorney's fees in custody disputes to a "spouse or parent" (Domestic Relations Law § 237[b]).

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

ENTERED: APRIL 28, 2015

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CLERK

Gonzalez, P.J., Mazzairelli, Renwick, Gische, JJ.

14933 Dolores Connolly, et al., Index 150016/10
Plaintiffs-Appellants,

-against-

129 East 69th Street Corporation, et al.,
Defendants-Respondents.

Pollack, Pollack, Isaac & De Cicco, LLP, New York (Brian J. Isaac of counsel), for appellants.

Mischel & Horn P.C., New York (Naomi M. Taub of counsel), for 129 East 69th Street Corporation, respondent.

Rawle & Henderson LLP, New York (Robert A. Fitch of counsel), for Plaza Florist Too, Inc., respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Debra A. Adler of counsel), for Lawrence Friedland and Melvin Friedland, respondents.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered March 3, 2014, which granted the motions of defendants 129 East 69th Street Corporation, Plaza Florist Too, Inc., d/b/a Plaza Flowers, and Lawrence Friedland and Melvin Friedland dismissing the complaint, unanimously reversed, on the law, without costs, and the motions denied.

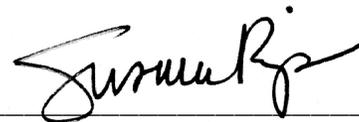
Supreme Court's individual part rules provided that motions for summary judgment were to be "filed" within 60 days of the filing of the note of issue. Since plaintiffs filed the note of

issue on July 10, 2013, the motions for summary judgment were due by September 9, 2013. While 129 East 69th Street Corporation (129 East) made (served) a motion for summary judgment on September 4, 2013, it did not file the motion until September 10, 2013, one day after the 60-day time period expired. Therefore, the motion was untimely (see *Corchado v City of New York*, 64 AD3d 429 [1st Dept 2009]). The other defendants' motions, having been filed after 129 East's motion, were also untimely.

We have considered the other arguments and find them unavailing.

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

ENTERED: APRIL 28, 2015

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CLERK

jurisdiction has an interest in adjudicating a matter involving harm to a Korean corporation; New York has no such interest (see *Phat Tan Nguyen v Banque Indosuez*, 19 AD3d 292, 295 [1st Dept 2005], *lv denied* 6 NY3d 703 [2006]). These factors outweighed the fact that defendants have a New York office and that certain documents and witnesses knowledgeable about the financial product at issue may be located in New York (see *Becker v Federal Home Loan Mtge. Corp.*, 114 AD3d 519, 520 [1st Dept 2014]; *cf. Ortho Tec, LLC v Healthpoint Capital, LLC*, 84 AD3d 702 [1st Dept 2011]). The motion court correctly rejected plaintiff's contention that the gravamen of the wrongs alleged involved a certain entity (REVE) that may have been structured by defendants in New York, aptly noting that plaintiff did not purchase that entity and that the only detailed allegations in the complaint relating to that entity were of conduct in Stamford, Connecticut.

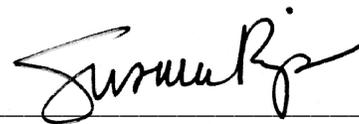
In addition, Korean law applies (see *FIMBank P.L.C. v Woori Fin. Holdings Co. Ltd.*, 104 AD3d 602 [1st Dept 2013]). Although such factor is not dispositive (see *Flame S.A. v Worldlink Intl. [Holding] Ltd.*, 107 AD3d 436, 438 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013]), Korea is an adequate alternative forum, its limitations on discovery notwithstanding, particularly in light of defendants' representation that they will submit to its

jurisdiction in the event of dismissal.

In view of the foregoing, it is unnecessary to address the other grounds urged for affirmance.

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

ENTERED: APRIL 28, 2015

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CLERK

Gonzalez, P.J., Mazzairelli, Renwick, Gische, JJ.

14936 Rosa Tucker, Index 113749/11
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

Friedman & Simon, L.L.P., Jericho (Lauren B. Cristofano of
counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J.
Lawless of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling,
J.), entered January 24, 2014, which granted defendant's motion
for summary judgment dismissing the complaint, unanimously
reversed, on the law, without costs, and the motion denied.

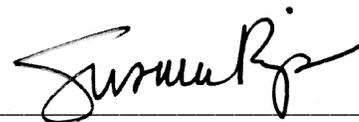
Defendant failed to establish entitlement to judgment as a
matter of law in this action where plaintiff alleges that she was
injured when, while descending the interior stairs of defendant's
building, she slipped on a wet step and fell down the stairs.
The evidence offered as to defendant's general cleaning and
inspection procedures did not constitute probative evidence of
the procedures actually performed on the day of the accident (see
Nelson v Metropolitan Transp. Auth., 122 AD3d 532 [1st Dept
2014]). The affidavit from defendant's maintenance caretaker,

which contradicted his deposition testimony as to whether he could recall the building in the housing complex he had been assigned to clean on the date in question, could not be relied upon to establish a prima facie case for summary judgment (see *Kistoo v City of New York*, 195 AD2d 403, 404 [1st Dept 1993]).

Even assuming that defendant met its prima facie burden, the record presents triable issues as to whether defendant created the wet stair condition (see e.g. *Velez v New York City Hous. Auth.*, 91 AD3d 422 [1st Dept 2012]). Plaintiff testified that she observed water on the stairs, that the water had dampened her back and pants in the process of her fall and that the staircase smelled like it had recently been cleaned. Moreover, a janitorial schedule for the building indicated that the subject staircase was to be mopped shortly before plaintiff's fall and the caretaker testified that he would have mopped the staircase around the time of the accident.

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

ENTERED: APRIL 28, 2015

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CLERK

specific performance of his plea agreement. We find no basis for such a reduction, because, after a thorough inquiry, the court properly concluded that defendant violated the agreement by failing to cooperate with the Probation Department (see *People v Valencia*, 3 NY3d 714, 715 [2004]). The court's finding was based primarily on its conclusion that defendant's version of events was incredible, and we find no basis to disturb that determination. We have considered and rejected defendant's remaining arguments.

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

ENTERED: APRIL 28, 2015


CLERK

Gonzalez, P.J., Mazzairelli, Renwick, Gische, JJ.

14938 Verizon New York Inc., Index 602171/08
Plaintiff-Appellant,

-against-

Consolidated Edison, Inc., et al.,
Defendants-Respondents.

O'Reilly Stoutenburg Richards LLP, New York (Michael S. O'Reilly of counsel), for appellant.

Office of David M. Santoro, New York (Stephen T. Brewi of counsel), for respondents.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 6, 2014, which, to the extent appealed from as limited by the briefs, granted defendants Consolidated Edison, Inc. and Consolidated Edison Company of New York, Inc.'s (Con Ed) motion for summary judgment dismissing the complaint as barred by the applicable statute of limitations, unanimously reversed, on the law, with costs, and the motion denied.

Plaintiff alleges that steam leaking from Con Ed's facilities damaged its underground facilities, resulting in property damage that cost over \$200,000 to repair. Plaintiff commenced this action to recover damages on July 24, 2008, alleging that it became aware of the damage no earlier than July 30, 2005, which was within the applicable three-year statute of

limitations (CPLR 214[4]).

Defendants moved for summary judgment dismissing the complaint as time-barred on the basis of a \$440 invoice from an outside contractor reflecting work completed in the area on July 21, 2005. They submitted the affidavit of a former employee of plaintiff, who explained that the invoice was tagged with the tracking number that plaintiff had assigned for the steam leak damage at issue in this action.

While defendants made a prima facie showing of entitlement to summary judgment based upon the invoice from the outside contractor, plaintiff raised a triable issue of fact in opposition by relying on contemporaneous documents that identified the discovery date of the property damage as August 1, 2005, and providing affidavits of employees with personal knowledge of the relevant documents. In particular, the employee charged with responsibility for collecting and assembling records in support of the property damage claim set forth an explanation for the mistaken inclusion of the outside contractor invoice, which plaintiff claims was unrelated to the damage that forms the

basis of this action. Thus, plaintiff produced evidentiary proof in admissible form sufficient to preclude the grant of summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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

ENTERED: APRIL 28, 2015

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CLERK

Corrected Order - May 26, 2015

Gonzalez, P.J., Mazzairelli, Renwick, Gische, JJ.

14939 Wendy Mathis, Index 21708/11E
Plaintiff-Respondent,

-against-

Zurich **American** Insurance Company,
et al.,
Defendants-Respondents.

White Fleischner & Fino, LLP, New York (Janet P. Ford of
counsel), for appellant.

Belovin & Franzblau, LLP, Bronx (David A. Karlin of counsel), for
respondents.

Order and judgment (one paper), Supreme Court, Bronx County
(Alexander W. Hunter, Jr., J.), entered March 11, 2014, awarding
plaintiff a sum of money, unanimously reversed, on the law,
without costs, plaintiff's motion for summary judgment denied,
and defendants' motion for summary judgment dismissing the
complaint granted. The Clerk is directed to enter judgment
dismissing the complaint.

Plaintiff failed to comply with the insurance policy's
notice of lawsuit requirement, a condition precedent to coverage
(see *Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332 [2005]).

The restrictions of Insurance Law § 3420(d) do not apply to this policy, which was not issued or delivered in the State of New York (see generally *FC Bruckner Assoc., L.P. v Fireman's Fund Ins. Co.*, 95 AD3d 556 [1st Dept 2012]). In any event, the insurer's disclaimer was timely.

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

ENTERED: APRIL 28, 2015


CLERK

[2013]). The search of the area under the car's center console came within the proper scope of a search pursuant to the automobile exception (see *People v Langen*, 60 NY2d 170, 180-182 [1983], *cert denied* 465 US 1028 [1984]), and was particularly reasonable in light of the officer's observation that the console appeared to have been altered to create a hiding place for drugs.

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

ENTERED: APRIL 28, 2015



CLERK

nervous, "pulling his hand from his jacket, from the fold of his jacket." When the officer asked defendant what he "put in [his] jacket," defendant "mumbled something unintelligible or really didn't say much." The officer then reached into the car, "tapped" the pocket of defendant's jacket with the flashlight he was holding, and felt "something hard." Next, the officer ordered defendant out of the car and frisked him, feeling in his pocket a "cylinder type thing" and what felt like a large quantity of loose pills. He also felt what he believed was a large quantity of money. In response to the officer's question, defendant stated that he had medication, and that "some" of it belonged to him. The officer removed a black plastic bag from defendant's pocket and handcuffed him. Upon opening the bag, the officer found that it contained a large number of loose pills in several small sandwich bags, as well as pills in two bottles.

The officer's observations, up until the time he arrived at the passenger window, gave rise to founded suspicion that criminality was afoot, and so justified his question regarding what defendant had put in his pocket, which constituted a common-law inquiry (*see People v Hollman*, 79 NY2d 181, 184-185 [1992]). However, we find that the physical intrusion of tapping defendant's pocket was unauthorized. The circumstances did not

give rise to the reasonable suspicion required to authorize a frisk. Nor was the officer's conduct justifiable as a "minimal self-protective measure" (*People v Davis*, 106 AD3d 144, 151 [1st Dept 2013], *lv denied* 21 NY3d 1073 [2013]), which is permissible in furtherance of the common-law right of inquiry, where sufficient concerns for personal safety are present (see e.g. *People v Chin*, 192 AD2d 413 [1st Dept 1993], *lv denied* 81 NY2d 1071 [1993]). The circumstances, viewed as a whole, did not suggest any need for the officer to take such a precaution. At the time of the officer's intrusion, defendant was not reaching for an area where a weapon might be located, there was no suggestion that a weapon was present or that violence was imminent, and there was no other basis for a self-protective intrusion.

Because the ensuing frisk outside the car, and the resulting arrest, depended on the initial improper intrusion, they were

invalid as well. In any event, we also find that the search of the plastic bag following defendant's arrest was not supported by exigent circumstances (see *People v Jiminez*, 22 NY3d 717 [2014]).

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

ENTERED: APRIL 28, 2015


CLERK

Gonzales, P.J., Mazzairelli, Renwick, Gische, JJ.

14942-

Ind. 740/12

14942A The People of the State of New York,
Respondent,

5435/11

-against-

Jason Ramirez,
Defendant-Appellant.

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

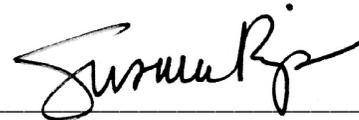
Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about September 12, 2012,

Said appeals 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: APRIL 28, 2015



CLERK

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

property, unanimously affirmed, with costs.

The motion court properly found that although the parties entered into a Memorandum of Understanding (MOU) in March 2008 providing for plaintiff MG West 100 LLC to develop a 72,000 square foot condominium building on property owned by defendant Church, plaintiffs are not entitled to specific performance. Religious Corporation Law § 12 precludes the Church from selling property without obtaining the consent of the bishop and the standing committee of the diocese prior to court approval of such sale (see *Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, of Brooklyn*, 54 NY2d 742, 744 [1981]).

In support of their argument that the church obtained the requisite approval, plaintiffs rely on double hearsay statements regarding what the bishop and the standing committee purportedly said to the former rector. The statements, which do not fall within any exception to the hearsay rule, are inadmissible (see *Kamenov v Northern Assur. Co. of Am.*, 259 AD2d 958, 959 [4th Dept 1999]). Accordingly, plaintiffs are not entitled to an injunction enjoining the Church from selling the property to anyone else and there is no basis to grant plaintiffs' request for reinstatement of the canceled notice of pendency.

Although plaintiffs are correct that the MOU is not void ab

initio since it did not violate RCL § 12 (*cf. Soho Ctr. for Arts & Educ. v Church of St. Anthony of Padua*, 146 AD2d 407, 411 [1st Dept 1989]; *Diocese of Buffalo v McCarthy*, 91 AD2d 213, 217 [4th Dept 1983], *lv denied* 59 NY2d 605 [1983]), this does not change the fact that they are not entitled to specific performance. The Church could not have applied for consent of the sale of the property until the transaction documents, including the contract of sale and the development agreements, were fully finalized and executed. It is undisputed that the parties never entered into the contract of sale or the development agreements.

The motion court properly dismissed plaintiffs' claims for unjust enrichment and quantum meruit since the existence of the MOU, a valid and enforceable written agreement governing the parties dispute, precludes recovery in quasi contract for events arising out of the same subject matter (*see Clark-Fitzpatrick, Inc. v Long Is. R.R.*, 70 NY2d 382, 388 [1987]).

Plaintiffs are not entitled to recover consequential damages. Any profits that plaintiffs may have made under the prospective contracts contemplated by the MOU cannot properly be awarded as damages (*see Goodstein Constr. Corp. v City of New York*, 80 NY2d 366, 374 [1992]). We find no evidence in the record that lost profits were within the contemplation of the

parties at the time of or prior to their execution of the MOU, since the MOU was merely a preliminary agreement by which the parties planned to proceed with their initial efforts on the construction project (see *id.*; *Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989]; *Brody Truck Rental v Country Wide Ins. Co.*, 277 AD2d 125 [1st Dept 2000], *lv denied* 96 NY2d 854 [2001]).

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

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

ENTERED: APRIL 28, 2015

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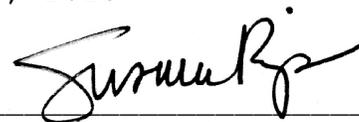
(see *Mehta v Chugh*, 99 AD3d 439 [1st Dept 2012]; *Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]). And even if plaintiffs' interpretation of prior orders was correct, and only the March 5, 2013 order contained conditional sanctions, they still failed to comply with that order, first serving discovery lists where the investors' names were intentionally redacted, and then, after the deadline, serving a list that Fletcher testified was incomplete.

Given the foregoing, the motion court correctly concluded that plaintiffs failed to comply with the terms of the March 5, 2013 order which provided that they were required to produce the list on or before March 19, 2013, with "any documents not produced by that date to be precluded" (see *McKanic v Amigos del Museo del Barrio*, 74 AD3d 639, 640 [1st Dept 2010], *appeal dismissed* 16 NY3d 849 [2011]).

We have considered the remainder of defendants contentions and found them unavailing.

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

ENTERED: APRIL 28, 2015



CLERK

to review defendant's unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits. By advising defendant that his plea could result in deportation, the court satisfied the basic requirement of *Peque* (*id.* at 176).

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

ENTERED: APRIL 28, 2015

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CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Gische, JJ.

14947N In re Tyrone Malcolm,
Petitioner,

-against-

Scott Stringer, etc., et al.,
Respondents.

Virginia & Ambinder, LLP, New York (Lloyd R. Ambinder of
counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Ronald E.
Sternberg of counsel), for Scott Stringer, respondent.

Cozen O'Connor, New York (Stuart Shorenstein of counsel), for
Allied Barton Security Services LLC and Allied Security, LLC,
respondents.

In this proceeding brought pursuant to CPLR article 78, the
petition challenging a release issued by the Office of the
Comptroller of the City of New York in connection with its final
determination, dated July 10, 2014, that, among other things,
respondent Allied-Barton Security Services LLC underpaid 143 of
its employees prevailing wages in the total amount of
\$1,238,976.39 for the time period October 2010 through March
2013, unanimously granted to the extent of declaring that the
release does not waive the right to pursue breach of contract
claims for underpaid prevailing wages under contract No. 06H9503
prior to October 2010, and otherwise denied, without costs.

The ambiguous release has the meaning given to it by its drafter, the Comptroller (see *Matter of Chesterfield Assoc. v New York State Dept. of Labor*, 4 NY3d 597, 604 [2005] [agency's determination and interpretation is entitled to deference]), and discharges any claims for the underpayment of prevailing wages concerning contract no. 06H9503 with respect to the October 2010 through March 2013 time period. Accordingly, petitioner is not barred from pursuing breach of contract claims against Allied for the period prior to October 2010.

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

ENTERED: APRIL 28, 2015

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CLERK

Gonzalez, P.J., Mazzairelli, Renwick, Gische, JJ.

14948N Stephen Sicilia,
Plaintiff,

Index 103443/03

-against-

City of New York, et al.,
Defendants-Appellants,

JB Electric LLC,
Defendant-Respondent.

Babchik & Young LLP, White Plains (Bryan J. Weisburd of counsel),
for appellants.

Morris Duffy Alonso & Faley, New York (Arjay G. Yao of counsel),
for respondent.

Order, Supreme Court, New York County (Michael D. Stallman,
J.), entered November 22, 2013, which, insofar as appealed from,
denied defendants City of New York, New York City Transit
Authority and Vertex Engineering Services's motion for summary
judgment on Vertex's cross claims against defendant JB Electric
LLC for contractual indemnification and breach of contract and
for leave to amend their answer to assert cross claims by the
City defendants against JB for contractual indemnification and
breach of contract, unanimously affirmed, without costs.

Summary judgment on Vertex's contractual indemnification
claim against JB is precluded by triable issues of fact whether

JB was responsible for providing temporary lighting in the elevator shaft where plaintiff tripped and fell and whether it caused the extension cord of the drop light in the shaft to become unplugged (see *Miano v Battery Place Green LLC*, 117 AD3d 489 [1st Dept 2014]; *Beltran v Navillus Tile, Inc.*, 108 AD3d 414, 416 [1st Dept 2013]).

The City defendants' proposed cross claims against JB for contractual indemnification and breach of a contractual obligation to procure insurance on their behalf "plainly lack[] merit" (*Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 170 [1989]). The contractual provisions on which they rely are found in a subcontract to which they are not signatories and that does not enumerate them as indemnitees. Moreover, the subcontract expressly precludes a finding that the City defendants are third-party beneficiaries (see *Naughton v City of New York*, 94 AD3d 1, 12 [1st Dept 2012]; *Adams v Boston Props. Ltd. Partnership*, 41 AD3d 112 [1st Dept 2007]).

The court correctly denied the City defendants and Vertex's motion for summary judgment on Vertex's cross claim against JB for breach of a contractual requirement to obtain insurance, since the separate "Construction Contract" pursuant to which the subcontract imposed the obligation was not submitted in support

of the motion. In any event, the evidence these defendants rely on - JB's vice president's testimony in response to a present-tense question about JB's general practice and a denial of coverage letter from the insurer - does not establish that JB failed to procure any required insurance (*see Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497 [1st Dept 2004]). Defendants-appellants improperly argue for the first time in their reply brief that the motion court should have considered a contract outside the record. Were we to consider this belatedly raised argument, we would find it unavailing.

Defendants-appellants contend that the motion court erred in denying their motion for summary judgment on their common-law indemnification and contribution claims. However, their motion papers demonstrate that they did not move for summary judgment on those claims.

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

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

ENTERED: APRIL 28, 2015



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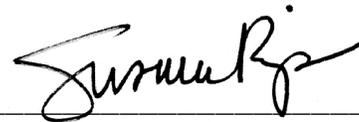
York City Human Rights Laws. Insofar as plaintiff was required by the State Human Rights Law to plead that he could perform the essential functions of the job if he were afforded reasonable accommodations, the complaint adequately alleges that gloves would have constituted a sufficient accommodation to enable plaintiff to perform the work. Whether DOS was nonetheless justified in considering plaintiff's psoriasis to disqualify him for the position, on the grounds that the condition would have prevented him from performing the essential functions of the position and no accommodation (including gloves) would have obviated the interference, cannot be determined from the face of the complaint and the documentary exhibits annexed thereto.

While DOS submitted evidence in support of its motion tending to show that plaintiff's condition rendered him incapable of performing the job of a sanitation worker, the motion, which was made and decided as one pursuant to CPLR 3211(a)(7), was never converted to a motion for summary judgment pursuant to CPLR 3211(c), and the parties did not otherwise "'deliberately chart[] a summary judgment course'" (*Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988], quoting *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]). Indeed, DOS itself never requested that its motion be treated as one for summary judgment, and in Supreme

Court plaintiff requested discovery in opposition to the motion. Accordingly, the motion to dismiss the complaint pursuant to CPLR 3211(a)(7) should have been denied.

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

ENTERED: APRIL 28, 2015

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CLERK

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

13773- Index 301864/10

13774 Laura Faustini Annunziata, et al.,
Plaintiffs-Appellants,

-against-

Quest Diagnostics Incorporated,
Defendant-Respondent,

Westchester-Bronx OB/GYN Group,
P.C., et al.,
Defendants.

Kramer & Dunleavy, LLP, New York (Denise M. Dunleavy of counsel),
for appellants.

Furman Kornfeld & Brennan LLP, New York (Thomas Combs of
counsel), for respondent.

Judgment, Supreme Court, Bronx County (Howard H. Sherman,
J.), entered June 4, 2013, dismissing the complaint as against
defendant Quest Diagnostics Incorporated, unanimously affirmed,
without costs. Appeal from order, same court and Justice,
entered April 8, 2013, unanimously dismissed, without costs, as
subsumed in the appeal from the judgment.

The issue before us is whether any claim by plaintiffs
against defendant Quest Diagnostics Incorporated is subject to
the three-year limitations period governing ordinary negligence
actions (CPLR 214) as opposed to the two and one-half year

limitations period governing medical malpractice actions (CPLR 214-a). Plaintiffs' claims against Quest, a provider of clinical laboratory services, stem from its alleged misreading of a Pap smear tissue sample. The complaint alleges that Quest was negligent in misreading the tissue sample. It is settled that a negligent act or omission "that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice" (see *Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]). Laboratory services, such as Quest's, performed at the direction of a physician are an integral part of the process of rendering medical treatment (see *Spiegel v Goldfarb*, 66 AD3d 873, 874 [2d Dept 2009], lv denied 15 NY3d 711 [2010]). Accordingly, a claim stemming from the rendition of such services is a medical malpractice claim (*id.*).

Plaintiffs however make additional claims that Quest failed to properly employ a plan for error reduction and failed to adequately implement, maintain or supervise quality assurance. These claims cannot be distinguished from allegations of medical malpractice. In applying the statute of limitations, courts must look to the reality or essence of a claim rather than its form (see *Matter of Paver & Wildfoerster [Catholic High Sch. Assn.]*, 38 NY2d 669, 674-675 [1976]). The critical factor in

distinguishing whether conduct may be deemed malpractice or ordinary negligence is the nature of the duty owed to the plaintiff that the defendant allegedly breached (see *Spiegel*, 66 AD3d at 874; *Pacio v Franklin Hosp.*, 63 AD3d 1130, 1132 [2d Dept 2009]). The additional claims put forth in this case would not be actionable in the absence of the misreading of the tissue sample, the basis of the malpractice claim. All of the regulatory infractions alleged by plaintiffs bear a substantial relationship to the rendition of medical treatment (see e.g. *Carter v Isabella Geriatric Ctr., Inc.*, 71 AD3d 443, 444 [1st Dept 2010], citing *Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 788 [1996]). *Rodriguez v Saal* (43 AD3d 272 [1st Dept 2007]), which plaintiffs cite, involves a claim against an organ procurement organization that “did not provide any type of medical treatment directly to [the] decedent” in that case (*id.* at 274). *Rodriguez* is distinguishable because, as plaintiffs conceded below, their claim that Quest misread the tissue sample sounds in medical malpractice. It necessarily follows from plaintiffs’ concession as well as *Spiegel* that Quest rendered medical services in this

case. Therefore, it cannot be argued that Quest's duty to plaintiffs stemmed from anything other than its role as a medical services provider. 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: APRIL 28, 2015

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CLERK

expired on November 12, 2012, and this proceeding seeking, inter alia, leave to serve a late notice was not commenced until January 9, 2013.¹ Anthony Gonzalez avers in his affidavit that petitioners were unable to meet with counsel to prepare a timely notice because Hurricane Sandy, which struck on October 29, 2012, prevented them from traveling from their home in Bayonne, New Jersey to their attorney's office in Brooklyn until November 20, 2012, ostensibly because they could not obtain gasoline for their vehicle. Time sheets submitted with the answering papers reveal that Anthony Gonzalez had regularly attended work at the Bronx railway yard where his injury was sustained during the period beginning October 31 and extending through November 16, 2012, and he does not dispute that he traveled by car. In addition, petitioners do not allege that they were prevented from using alternative methods of public transportation to reach their attorney's office. Petitioners, in Anthony Gonzalez's sworn affidavit, have boldly misrepresented their ability to travel into the City to meet with counsel and omitted that Anthony Gonzalez actually did travel into the City on numerous occasions

¹ Petitioners have abandoned their alternative ground for relief predicated on the Governor's Executive Order number 52, which does not apply to timely filing requirements that may be extended by the courts in the exercise of discretion.

in the weeks immediately prior to expiration of the time period for serving a notice of claim.

A late notice of claim will only be accepted "upon a showing of 'reasonable excuse' as that term has come to be defined" (*Boland v State of New York*, 30 NY2d 337, 346 [1972]). While the absence of support for a proffered excuse may be outweighed by other considerations (*see Matter of Ansong v City of New York*, 308 AD2d 333, 334 [1st Dept 2003]), petitioners' attempt to deceive the court as to why they were unable to file a timely notice of claim should not be condoned and alone warrants dismissal of the application.

As a matter of procedure, the motion court erred in entertaining arguments advanced for the first time in petitioners' reply papers and in accepting their offer of new proof, unnecessarily protracting summary proceedings. As succinctly stated by this Court:

"It is settled that a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment, requiring the court to decide the matter 'upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised'" (*Matter of Karr v Black*, 55 AD3d 82, 86 [1st Dept 2008], *lv denied* 11 NY3d 712 [2008], quoting CPLR 409 [b]; *Matter of Port of N.Y. Auth.* [62 *Cortlandt St. Realty Co.*], 18 NY2d 250, 255

[1966], *cert denied sub nom. McInnes v Port of N.Y. Auth.*, 385 US 1006 [1967]).

We further held that where, as here, a petition is unsupported by sufficient evidentiary proof, the petitioning party will not be entitled to remedy those deficiencies (*Karr* at 86), thereby extending a procedure providing for summary disposition through “unnecessary and unauthorized elaboration” (*Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]). We have consistently stated that in proceedings subject to summary determination, no consideration is to be accorded to novel arguments raised in reply papers (*Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 [1st Dept 1995]). That this Court may, in the exercise of discretion, entertain such arguments upon review (*see Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381-382 [1st Dept 2006]) does not endorse the unnecessary extension of summary proceedings. Under these circumstances, it was improvident to excuse petitioners’ deceit and grant their application to serve a late notice of claim.

Petitioners also failed to demonstrate that respondents acquired actual notice of the essential facts within 90 days after the claim arose or a reasonable time thereafter (*see Mehra*

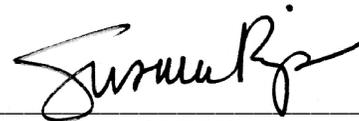
v City of New York, 112 AD3d 417, 417-418 [1st Dept 2013])).
Indeed, the workers' compensation form or "C-2" form regarding the accident does not set forth any facts suggesting that the claimed injuries were due to respondents' negligence; it merely states that Anthony Gonzalez was injured after he lost his footing while he was close to the edge of the train car while working, making no mention of petitioners' present claim that the railroad car had a bent edge and was not equipped with proper safety devices (see *Matter of Brennan v Metropolitan Transp. Auth.*, 110 AD3d 437 [1st Dept 2013]; *Matter of Casale v City of New York*, 95 AD3d 744, 745 [1st Dept 2012])).

In light of the foregoing factors, which heavily militate against granting the petition, we need not address the final criterion to be considered in assessing a late notice of claim - whether respondents have been substantially prejudiced by the delay - except to note that petitioners' assertion that the

alleged defective condition has remained unchanged since the accident is unsupported (see *Alladice v City of New York*, 111 AD3d 477, 478 [1st Dept 2013]; *Matter of Santiago v New York City Tr. Auth.*, 85 AD3d 628, 629 [1st Dept 2011]).

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

ENTERED: APRIL 28, 2015

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Mazzarelli, J.P., Sweeny, Renwick, Kapnick, JJ.

14237 Michael Flomenhaft,
Plaintiff-Appellant,

Index 156597/13

-against-

Andrew G. Finkelstein, et al.,
Defendants-Respondents.

The Flomenhaft Law Firm, PLLC, New York (Stephen D. Chakwin, Jr. of counsel), for appellant.

Finkelstein & Partners, LLP, Newburgh (Anna R. Johnson of counsel), for respondents.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about July 23, 2014, which granted defendants' motion to dismiss the complaint and to impose sanctions on plaintiff, and denied plaintiff's cross motion for leave to amend his summons with notice and/or the complaint, unanimously modified, on the law and the facts, to deny the motion insofar as it sought dismissal of plaintiff's slander per se cause of action and the imposition of sanctions, the slander per se cause of action reinstated, and otherwise affirmed, without costs.

Plaintiff is an attorney who, after dissolving his own practice, became associated with nonparty Jacoby & Meyers, LLP (Jacoby). Defendant Andrew Finkelstein (Finkelstein) is an attorney and is the managing partner of defendant law firm

Finkelstein & Partners, LLP (FLLP), and the sole shareholder of defendant Finkelstein, PC (FPC). FPC is a partner of both Jacoby and of FLLP. In April 2009, Jacoby assigned plaintiff to work on a personal injury action that had been commenced on behalf of nonparty Joel Harrison (Harrison) in Supreme Court, Broome County.¹ In December 2009, plaintiff resigned from Jacoby and re-formed his old practice. Harrison decided to have plaintiff continue his representation in the personal injury action and Jacoby caused the necessary consent to be executed and transferred the file. The retainer agreement between plaintiff and Harrison provided that plaintiff would advance all litigation expenses and would be reimbursed out of Harrison's recovery, if any. After the passage of only a few months, Harrison terminated plaintiff and re-retained Jacoby.

In August 2010, Harrison, represented by FLLP, commenced an action against plaintiff in Supreme Court, Broome County. The allegations in the complaint, most of which were made upon information and belief, revolved around the litigation expenses that had been discussed in the retainer agreement between the two

¹ In the absence of clarity in the record as to whether the attorney of record in Harrison's matter was Jacoby, FLLP or FP, we use Jacoby to refer to all three.

parties. Harrison asserted that, notwithstanding plaintiff's promise that he would advance litigation expenses, plaintiff told him that he would not do so and urged Harrison to borrow \$40,000 for the expenses from a litigation funding company. The complaint alleged, inter alia, that plaintiff directed the loan company to pay the proceeds to his law firm and that he failed to place them in an attorney escrow account. Harrison asserted causes of action for conversion, breach of fiduciary duty, legal malpractice, and fraud, and sought an accounting from plaintiff.

This action is based on a statement allegedly made by Finkelstein to Harrison concerning the loan. According to the complaint, Finkelstein told Harrison that plaintiff "took your money and used it for his personal use." Plaintiff claims that this statement constituted slander per se. He further asserts that Finkelstein was the source of the information that Harrison alleged in his complaint against plaintiff, that the information was patently false, and that as a result Finkelstein, FLLP and FPC are liable to him in fraud. Plaintiff also seeks punitive damages from defendants, based on the two causes of action asserted in the complaint, as well as defendants' conduct against him that was the subject of a separate litigation between him and defendants (*see Flomenhaft v Jacoby & Meyers, LLP*, 122 AD3d 422

[1st Dept 2014])). In that action, which was commenced in 2010, plaintiff claimed that defendants here, as well as others, defamed him when, after he left Jacoby, they informed clients on whose matters he had worked that he had declared personal bankruptcy.

This action was commenced by summons with notice and the complaint was served upon defendants' demand for it. The summons with notice stated that the action sounded in slander, and did not mention the fraud claim. Defendants moved to dismiss the complaint. They argued that plaintiff failed to state a cause of action for slander per se, because Finkelstein's statement did not constitute "publication" and because, even if it did, the statement was privileged as being pertinent to Harrison's action against plaintiff. The statement was pertinent to that litigation, defendants argued, since, according to them, it was made the day before Harrison's deposition in that case. Defendants further argued that the fraud claim should be dismissed for lack of jurisdiction, since it had not been mentioned in the summons with notice as required by CPLR 305(b). Alternatively, they sought dismissal of that claim for failure to state a cause of action, asserting that plaintiff was not entitled to rely on any misrepresentations made by defendants to

Harrison. They also claimed that the fraud claim was time-barred, since it was no more than a trumped-up defamation claim. Defendants also sought an order striking the claim for punitive damages, and an order awarding them costs and attorneys' fees based on their belief that the complaint was frivolous.

In opposition, plaintiff argued that Finkelstein's statement to Harrison was not privileged because the action brought against him by Harrison was a sham, contrived by defendants as a vehicle for defaming him. Indeed, plaintiff stated, Harrison, upon realizing that he had been used as a pawn by Finkelstein in an escalating war with plaintiff, discontinued the action against plaintiff, and commenced his own action against defendants and others, asserting a host of alleged wrongs against himself, including tortious interference with his relationship with plaintiff. Plaintiff further argued that, since defendants had agreed in a stipulation not to raise any jurisdictional defenses, they should be estopped from seeking dismissal of the fraud claim based on his failure to mention it in the summons with notice. Plaintiff did, however, cross-move to amend the summons to incorporate the fraud claim, arguing that such an amendment could not possibly prejudice defendants. As for the merits of the fraud claim, plaintiff contended that a

third party can rely on one person's misrepresentation to another. He also stated that the fraud claim departed significantly from the defamation claim, and that sanctions should not be imposed because the complaint was not frivolous.

The court granted defendants' motion in its entirety and denied the cross motion. It found that the complaint was facially deficient since it failed to establish both that the statement allegedly made by Finkelstein was not privileged, and that the Broome County action was commenced solely to defame plaintiff. The court rejected plaintiff's reliance on this Court's decision in *Halperin v Salvan* (117 AD2d 544 [1st Dept 1986]), which plaintiff argued stood for the "sham lawsuit" exception to the pertinency rule, finding that the case "appears to have waned in precedential value, and when it is cited, it is distinguished."

The court dismissed the cause of action for fraud, finding that plaintiff's omission of any notice of fraud in his summons with notice constituted a jurisdictional defect that could neither be corrected nor amended. The court further found that the stipulation by defendants not to raise jurisdictional defenses in their answer was inapplicable, since they did not file an answer but rather moved to dismiss.

The court found that sanctions were appropriate against plaintiff (personally, not against his counsel) because it “reasonably inferred” that plaintiff’s opposition to the motion to dismiss was “undertaken primarily to delay or prolong the instant litigation” and that the action was undertaken to harass or maliciously injure defendants. By a subsequent order, the court directed plaintiff to pay defendants’ costs and expenses in the amount of \$500.

Plaintiff does not, and cannot, contest that a statement that is pertinent to litigation is absolutely privileged and cannot form the basis of a defamation action. That principal of law was first stated by the Court of Appeals in *Youmans v Smith* (153 NY 214, 219 [1897]), and was recently reaffirmed by the Court in *Front, Inc. v Khalil* (24 NY3d 713 [2015]).² This Court has held that, where the privilege is invoked, “any doubts are to be resolved in favor of pertinence” (*Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 173 [1st Dept 2007], *abrogated on other grounds by Front, Inc. v Khalil*, 24 NY3d 713 [2015], *supra*). Further, the test to determine whether a statement is pertinent

² Although not relevant here, the Court in *Front, Inc.* narrowed the applicability of the absolute privilege to actual litigation or prelitigation matters where there was a good faith basis to anticipate litigation.

to litigation is “‘extremely liberal’” (*id.*, quoting *Black v Green Harbour Homeowners’ Assn., Inc.*, 19 AD3d 962, 963 [3d Dept 2005]), such that the offending statement, to be actionable, must have been “outrageously out of context” (*id.*, quoting *Martirano v Frost*, 25 NY2d 505, 508 [1969]).

This Court has recognized, however, that the privilege is capable of abuse and will not be conferred where the underlying lawsuit was a sham action brought solely to defame the defendant (see *Lacher v Engel*, 33 AD3d 10, 13-14 [1st Dept 2006]). *Lacher* derived this principle from *Halperin v Salvan* (117 AD2d at 544), in which this Court declined to dismiss a defamation claim based on the pertinency privilege where the context in which the allegedly offending statement was made was a litigation that the plaintiffs filed but never prosecuted. The existence of this “sham litigation” exception has been confirmed (but not applied) in other cases in this Department, including *Casa de Meadows Inc. (Cayman Is.) v Zaman* (76 AD3d 917, 920 [1st Dept 2010]) and *Sexter & Warmflash, P.C.*, 38 AD2d at 172, n 5). Accordingly, we disagree with Supreme Court’s statement that *Halperin* has “waned in precedential value.”

In *Halperin*, this Court noted that, on a motion to dismiss a defamation action because of the privilege, the complaint must be

construed in a light most favorable to the plaintiff and that where there is a question as to the applicability of the privilege, the issue should be decided at trial (117 AD2d at 548). Here, the complaint clearly alleges that Finkelstein made false representations to Harrison about plaintiff and that the statements were made specifically to induce Harrison to start an action against plaintiff. Defendants seek to distinguish *Halperin* by arguing that Harrison prosecuted his case against plaintiff. However, there is little in the record before us by which we can gauge to what extent the lawsuit was litigated. The only reference to any activity in that case is defendants' claim that the statement at issue was made before Harrison's deposition. Still, we have no way of knowing whether the deposition ever took place, or whether there was other discovery in the case, or even court conferences. Further, Harrison's complaint in the action he commenced against defendants after he discontinued the action against plaintiff supports plaintiff's claim that the lawsuit by Harrison against plaintiff was a sham. Harrison alleges therein that his belief that plaintiff converted the proceeds of the loan he procured was entirely based on false statements by Finkelstein. It can reasonably be inferred from that complaint that those false statements were, in turn, the

basis for Harrison's allegations against plaintiff, most of which were made upon information and belief. Furthermore, we fail to see why, as defendants argue, we must disregard that complaint, for purposes of considering this motion, because it is unverified. Accordingly, under the circumstances, the allegations in the complaint state a cause of action for slander per se.

Plaintiff further argues that, pursuant to CPLR 305(c), the court should have permitted amendment of his summons nunc pro tunc to give notice of his intention to plead a fraud claim against defendants. Defendants do not argue, as the court held, that amendment is unavailable as a matter of jurisdiction. Rather, they essentially claim that amendment would be futile because plaintiff cannot state a claim for fraud. Defendants focus on the justifiable reliance element necessary to the establishment of any fraud claim, and assert that plaintiff could not have relied on statements made not to him but to a third party, namely Harrison. Plaintiff claims this is not so, relying on *Buxton Mfg Co. v Valiant Moving & Stor.* (239 AD2d 452 [2d Dept 1997] ["(f)raud, however, may also exist where a false representation is made to a third party, resulting in injury to the plaintiff"]). Defendants, on the other hand, cite much more

recent cases, from this Court, which hold that a party may not rely on a misrepresentation to a third party (*Wildenstein v 5H&Co, Inc.*, 97 AD3d 488, 490 [1st Dept 2012]; *Briarpatch Ltd., L.P. v Frankfurt Garbus Klein & Selz, P.C.*, 13 AD3d 296, 297 [1st Dept 2004, *lv denied* 4 NY3d 707 [2005]]).

Even assuming that plaintiff's fraud claim is not barred solely because he was not the direct recipient of the alleged misrepresentations, we find that he was not entitled to rely on them. That is because, according to the complaint, the misrepresentations were made sometime after June 16, 2010, which was when Harrison re-retained Jacoby to handle his personal injury action. As admitted in the complaint herein, plaintiff learned on December 29, 2009, that he had already been the subject of separate statements by defendants which he alleged were defamatory (see *Flomenhaft v Jacoby & Meyers, LLP*, 122 AD3d at 423). Accordingly, knowing defendants were, according to him, bent on destroying his reputation, it was not justifiable for plaintiff to view the statements to Harrison as anything other than a further salvo in that campaign.

Finally, we decline to reinstate the punitive damages claim for the same reasons we stated in plaintiff's earlier defamation

action (122 AD3d at 423 ["Plaintiff's demand for punitive damages cannot be sustained, since the allegations do not rise to a level of such wanton dishonesty as to imply a criminal indifference to civil obligations"] [internal quotation marks omitted]).

However, we find that sanctions were not appropriately leveled because, as found herein, plaintiff stated a valid cause of action for slander per se.

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

ENTERED: APRIL 28, 2015

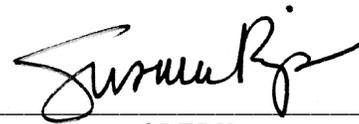
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CLERK

omitted significant exculpatory matter that he included in his trial testimony. Under the circumstances, this was an unnatural omission, and a permissible basis for impeachment (see *People v Savage*, 50 NY2d 673 [1980], *cert denied* 449 US 1016 [1980]; *People v Hightower*, 237 AD2d 166 [1st Dept 1997], *lv denied* 89 NY2d 1094 [1997]; *People v Foy*, 220 AD2d 220 [1st Dept 1995], *lv denied* 87 NY2d 901 [1995]).

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ENTERED: APRIL 28, 2015

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conflicting descriptions of the condition of the stairs, and that the only work order submitted by petitioner indicated that painting had been completed more than two weeks before the accident, the decision to deny petitioner ADR was supported by some credible evidence, and petitioner failed to establish that her fall was caused by the paint rather than her own misstep (see *Starnella v Bratton*, 92 NY2d 836, 839 [1998]; *Matter of Bisiani v Kelly*, 39 AD3d 261 [1st Dept 2007]).

Petitioner's contention that the court should have ordered respondents to disclose certain evidence is unpreserved (see *Matter of Khan v New York State Dept. of Health*, 96 NY2d 879 [2001]), and waived by her failure to submit a reply to respondents' answer (see *Matter of Shufelt v Beaudoin*, 116 AD2d 422, 425 [3d Dept 1986]; see also CPLR 7804[d]).

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

ENTERED: APRIL 28, 2015

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Tom, J.P., Sweeny, Manzanet-Daniels, Clark, Kapnick, JJ.

14951 In re Joele Z.F.,

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

Jacqueline M-F.,
Respondent-Appellant,

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

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

Zachary W. Carter, Corporation Counsel, New York (Kathy Chang
Park of counsel), for respondent.

Anne Reiniger, New York, attorney for the child.

Order of disposition, Family Court, New York County (Clark
V. Richardson, J.), entered on or about April 1, 2014, to the
extent it brings up for review a fact-finding order, same court
and Judge, entered on or about January 3, 2014, which found,
after a hearing, that respondent mother neglected the subject
child, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of
the evidence (see Family Ct. Act § 1046[b][i]). The record shows
that respondent's untreated mental illness created an imminent
risk of harm to the child (see *Matter of Ronald Anthony G.*
[Sammantha J.], 83 AD3d 608 [1st Dept 2011]). Although

respondent and the child were living in an apartment with broken windows, cabinets and drawers, and no working gas, respondent refused to grant access to the landlord or to Consolidated Edison to make repairs and restore the gas. This resulted in squalid living conditions, and eventually resulted in respondent and the child being evicted from the apartment (see *Matter of Immanuel C.-S. [Debra C.]*, 104 AD3d 615 [1st Dept 2013]). In addition, respondent's mental condition rendered her unable to provide the child with adequate supervision and guardianship, resulting in, among other things, the child being late to school an excessive amount of times, hindering his education, and causing him to be depressed, anxious and angry (see *Matter of Princess Ashley C. [Florida S.C.]*, 96 AD3d 682 [1st Dept 2012]).

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

ENTERED: APRIL 28, 2015

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CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Clark, Kapnick, JJ.

14952 In re Gilbert M.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Drake A. Colley of counsel), for presentment agency.

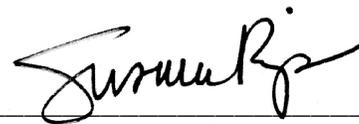
Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about February 21, 2014, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree, and placed him with the Administration for Children's Services' Close to Home program for a period of 18 months, unanimously affirmed, without costs.

The court properly denied appellant's motion to suppress physical evidence recovered from his apartment. There is no basis for disturbing the court's credibility determinations. The court properly found that the initial police entry into the apartment was made pursuant to appellant's mother's voluntary

consent, conveyed by her beckoning hand gesture inviting them into the apartment (see e.g. *People v Davis*, 120 AD2d 606, 606-07 [2d Dept], *lv denied* 68 NY2d 769 [1986]). The court likewise properly found that, after the police entered, appellant's aunt, the apartment's lessee, gave her voluntary and uncoerced consent to a search of the apartment by signing a consent form. We note that the aunt was expressly informed that she was not required to consent to the search.

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

ENTERED: APRIL 28, 2015

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Since defendant committed the crime before the effective date of legislation increasing the surcharge and crime victim assistance fee, his sentence is unlawful to the extent indicated.

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ENTERED: APRIL 28, 2015

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Declarations portion of this Policy" (bold and capitalization in original; italics added). The project described in the Declarations portion of the policy is the entire condominium complex of two connected buildings, not individual condominium units.

The delay-in-completion endorsement issued by defendant Lexington Insurance Company, which the other defendants (except Arch) adopted, covers "Delay in Completion Loss . . . incurred during the Delay." "Delay" is defined as "the period of time between the Scheduled Date of Completion . . . and the actual date on which commercial operations or use and occupancy commenced or could have commenced." It is true that the definition of "Delay" does not say, "the actual date on which commercial operations or use and occupancy *of the entire Insured Project* commenced or could have commenced." However, "[a]n omission . . . does not constitute an ambiguity" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001] [internal quotation marks omitted]). As plaintiff itself contends, courts should consider the entire contract, not isolated words (see e.g. *South Rd. Assoc.*, 4 NY3d at 277). Lexington's delay-in-completion endorsement contains a Period of Indemnity and a Waiting Period Deductible. Both of those terms are defined with

reference to the Insured Project, not individual condominium units.

The faulty workmanship exclusion is more specific than the protection-of-property provision which appears under "General Conditions." Hence, "the specific provision controls" (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]).

In opposition to defendants' summary judgment motion, plaintiff failed to identify any consequential damages, as such are defined by *Bi-Economy Mkt., Inc. v Harleystown Ins. Co. of N.Y.* (10 NY3d 187, 196 [2008]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 28, 2015


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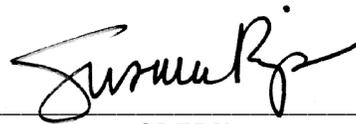
character standard, given the totality of the information submitted in connection with the application (see *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Petitioner's argument that the licensing eligibility standards in Penal Law 400.00, et seq., as applied herein, including the requirements of truthful entries on the license application and demonstration of good moral character, impermissibly impinge upon his Second Amendment right to have a firearm in his home, is unavailing. The licensing scheme at issue satisfies the requisite constitutional standard, intermediate scrutiny, as it serves a governmental interest in maintaining public safety (see *Kachalsky v County of Westchester*, 701 F3d 81, 94 n 17 [2d Cir 2012], cert denied __ US __, 133 S Ct 1806 [2013]; *The New York State Rifle & Pistol Assoc. v The City of New York*, 2015 WL 500172, *7, 2015 US Dist LEXIS 13956, *17-18

[SD NY 2015]).

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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costs.

In this declaratory judgment action, plaintiff insured seeks coverage in a third-party action commenced against it in 2010, for claims relating to an accident that occurred in 2005. Plaintiff maintains that it did not have any knowledge of the accident until 2008 when it received a nonparty subpoena in the underlying personal injury action. It further maintains that upon learning of the accident, it believed that it was not liable and had no reason to believe that it would be named as a party to the action. After receiving notice of the third-party action, defendant insurer denied coverage in letters dated June 21, 2010 and July 19, 2010, on the ground that plaintiff failed "to provide timely notice of the claim or suit as soon as practicable," set forth the policy notice provisions relied upon, and the factual basis for defendant insurer's position. The letters sufficiently apprised plaintiff that notice was considered untimely relative to both the date of occurrence and the receipt of the lawsuit (*see 24 Fifth Owners, Inc. v Sirius Am. Ins. Co.*, 124 AD3d 551 [1st Dept 2015]).

However, there is an issue of fact under the circumstances here as to whether plaintiff's belief in nonliability was reasonable (*see 24 Fifth Owners, Inc. v Sirius America Ins. Co.*,

124 AD3d 551 [1st Dept 2015]). In addition to the issue of plaintiff's knowledge of the accident or lack thereof, there are questions of fact as to whether, or to what extent, plaintiff had control over the subject area at the time of the accident. Accordingly, the motion for summary judgment was properly denied.

Plaintiff's bad faith claim should, however, have been dismissed. There is no evidence that defendants acted in "gross disregard" of plaintiff's interests (see *Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 453 [1993]), since they carried out an investigation, and disclaimed based on the facts then known and the applicable case law.

Equally unavailing is plaintiff's claim to recover defense costs for the declaratory action, since "[n]o fees are recoverable where, as here, it is the insured who initiated the legal action to determine its rights under the policy" (*Mazzuocolo v Cinelli*, 245 AD2d 245, 248 [1st Dept 1997]).

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ENTERED: APRIL 28, 2015



CLERK

differences between his actual appearance and a sketch that was believed to have been made as the result of an interview with the victim. When the victim unexpectedly testified that she did not recognize the sketch in evidence as the final sketch that she had approved, the sketch artist's testimony became material. However, even assuming that the artist's testimony would have been completely favorable to defendant, there is no reasonable possibility that it would have affected the verdict. In addition to the victim's identification, the overwhelming evidence included defendant's confession, the recovery of the victim's identifiable property from defendant, and various forms of persuasive circumstantial evidence. Moreover, any prejudice from the absence of the sketch artist was minimized by the parties' stipulation. Defendant did not preserve his claim that he was constitutionally entitled to the adjournment (see *People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we find, for the reasons already stated, that any error was harmless.

Defendant's claim that his trial counsel was ineffective because he failed to move to reopen the suppression hearing based on alleged discrepancies between hearing and trial testimony is unreviewable on direct appeal because it involves matters not

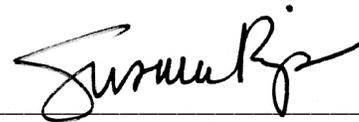
reflected in, or fully explained by, the record (see *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent 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]). Regardless of whether counsel should have moved to reopen the hearing, defendant has not shown that counsel's failure to do so deprived defendant of a fair trial or affected the outcome of the case.

Defendant did not preserve his claim that the lineup in which the victim identified him was unduly suggestive because it was preceded by her viewing of a photo array in which his photograph appeared, and the court did not "expressly decide[]" the issue "in [response] to a protest by a party" (CPL 470.05 [2]; see *People v Turriago*, 90 NY2d 77, 83-84 [1997]). We decline to review this unpreserved claim in the interest of

justice. As an alternative holding, we find it without merit (see *People v Ervin*, 5 AD3d 316 [1st Dept 2004], *lv denied* 3 NY3d 639 [2004]; *People v Cobb*, 294 AD2d 199 [1st Dept 2002], *lv denied* 98 NY2d 695 [2002]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Clark, Kapnick, JJ.

14958-		Index 102928/11
14958A	Mary Smith, etc.,	590529/11
	Plaintiff,	590626/11

-against-

Hunter Roberts Construction Corp.,
LLC, et al.,
Defendants-Respondents,

J. Petrocelli Contracting, Inc.,
Defendant-Appellant,

Gouverneur Healthcare Services, Inc.,
Defendant.

- - - - -

[And a Third-Party Action]

- - - - -

Hunter Roberts Construction Corp.,
LLC, et al.,
Second Third-Party Plaintiffs-
Respondents,

-against-

R. Smith Restoration, Inc.,
Second Third-Party Defendant-
Appellant.

Brody & Branch, LLP, New York (Mary Ellen O'Brien of counsel),
for J. Petrocelli Contracting, Inc., appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of
counsel), for R. Smith Restoration, Inc., appellant.

London Fischer LLP, New York (Scott M. Shapiro of counsel), for
respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 28, 2014, which, to the extent appealed from as limited by the briefs, granted defendants Hunter Roberts Construction Group LLC, Dormitory Authority of the State of New York, the City of New York, and New York City Health and Hospitals Corporation's (together, the moving defendants) motion for summary judgment on their cross claims against J. Petrocelli Contracting Inc. for contractual indemnification, and order, same court, Justice and entry date, which granted the moving defendants' motion for summary judgment on their third-party claims against third-party defendant R. Smith Restoration, Inc. (RSR) for contractual indemnification, unanimously reversed, on the law, without costs, and the motions denied.

The indemnification provisions at issue require defendant Petrocelli and third-party defendant RSR to indemnify the moving defendants for incidents arising from their work on a construction project at the Gouverneur Healthcare Services, Inc. (GHS) facility (the GHS Project). The moving defendants seek indemnification from Petrocelli and RSR for the death of Richard Smith, the principal of RSR, a subcontractor hired by Petrocelli on the GHS Project, when he fell from the roof of a building under construction. It is uncontested that Richard Smith's death

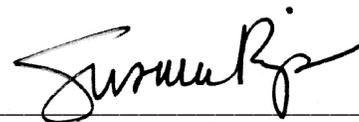
may have been suicide.

The IAS Court erred in concluding that moving defendants were entitled to summary judgment on the basis that Richard Smith's fatality occurred within the scope of his work. Even giving the indemnity provisions at issue the broadest possible construction, it cannot be said as a matter of law that the loss arose out of RSR's work on the project, especially given the testimony that RSR had ceased working on the GHS Project before the date of the incident. "The promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Republic Natl. Bank of N.Y. v Zimcor U.S.A. Corp.*, 203 AD2d 107, 110 [1st Dept 1994], quoting *Hooper Assocs. v AGS Computers, Inc.*, 74 NY2d 487, 491-492 [1989]).

We have considered the moving defendants' remaining contentions, and find them unavailing.

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

ENTERED: APRIL 28, 2015



CLERK

preobservation conferences required by respondent the Department of Education's (DOE) regulations did not, under the circumstances of this case, violate lawful procedure (see *Matter of Richards v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 117 AD3d 605, 606-607 [1st Dept 2014]). The record shows that petitioner received extensive professional support from two master teachers in the science department on a weekly basis from January to June 2012, that her March observation report detailed areas of improvement and made specific recommendations for addressing deficiencies, and that she met with the principal shortly after the March 2012 report. Despite some improvement, petitioner continued to demonstrate instructional deficiencies, as noted in the June 2012 report, leading to the conclusion that she could not meet the needs of the school's students.

Petitioner was not entitled to tenure by estoppel. The record shows that when petitioner resigned from a teaching position with the DOE, she was a probationary employee pursuant to an agreement extending the period of her probation. When the DOE rehired her as a teacher at a different school, the school at issue, she was subject to a new three-year term of probation, which was extended by another agreement. The DOE terminated her employment before the expiration of her extended term of

probation. Accordingly, petitioner never taught beyond the expiration of the probationary terms of her employment with the DOE (*see Matter of Juul v Board of Educ. of Hempstead School Dist. No. 1, Hempstead*, 76 AD2d 837 [2d Dept 1980] [the petitioner agreed to forgo any claim to tenure in exchange for the extension of his probationary employment], *affd* 55 NY2d 648 [1981]; *compare Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446 [1993] [the petitioner was entitled to tenure by estoppel where she obtained tenure in her first position and taught beyond the two-year period of her probation in her second position]).

The DOE did not breach the second agreement extending petitioner's probation. In the absence of a showing of bad faith, a violation of law, or a constitutionally impermissible purpose, the DOE could terminate petitioner's probationary employment for any reason or no reason at all (*see Kolmel*, 88 AD3d at 528).

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

ENTERED: APRIL 28, 2015



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Tom, J.P., Sweeny, Manzanet-Daniels, Clark, Kapnick, JJ.

14960 Dorothy Villalba, et al., Index 115799/06
Plaintiffs-Respondents,

-against-

New York Elevator and Electrical
Corporation, Inc.,
Defendant-Respondent-Appellant,

WSA Management Ltd, et al.,
Defendants-Appellants-Respondents.

Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel),
for appellants-respondents.

Geringer & Dolan, LLP, New York (Robert E. Coleman of counsel),
for respondent-appellant.

Daniel H. Gilberg, New York, for respondents.

Order, Supreme Court, New York County (Carol Robinson
Edmead, J.), entered May 1, 2014, which, to the extent appealed
from, denied that portion of defendant New York Elevator and
Electrical Corporation, Inc.'s (NYE's) motion for summary
judgment seeking dismissal of the complaint and cross claims
against it, and granted that portion of the motion seeking
summary judgment on its cross claim against defendants WSA
Management Ltd. and WSA Equities, LLC (collectively, WSA) for
breach of contract for failure to procure insurance, unanimously
affirmed, without costs.

Issues of fact exist as to whether prior malfunctions of the subject elevator provided notice of an unsafe condition that caused the malfunction resulting in plaintiff's injuries (see *Rogers v Dorchester Associates*, 32 NY2d 553, 559 [1973]). Although NYE's expert explained how construction dust may interfere with the operation of the elevator, he never stated the basis for his conclusion that the malfunction at issue was due to construction dust and not some other cause, and his conclusion was therefore speculative. Even if it was not speculative, the expert affidavit submitted by WSA raises issues of fact as to the cause of the elevator malfunction. We reject NYE's assertion that plaintiffs' claims that the elevator briefly dropped rapidly, reversed directions and ascended rapidly, multiple times, is physically impossible. Plaintiffs' description of the event presents an issue of credibility.

The evidence conclusively establishes that NYE was the successor to Gemini/Empire Elevator Company with whom WSA Management contracted for maintenance of the elevator that allegedly malfunctioned. WSA further admitted in a reply to NYE's notice to admit that, at the time of the malfunction, NYE was maintaining the elevator pursuant to the contract between

Gemini/Empire and WSA Management. Accordingly, the motion court properly granted NYE's motion for summary judgment on its cross claim against WSA for breach of contract for failure to procure insurance in accord with the provisions of the contract between Gemini/Empire and WSA Management.

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ENTERED: APRIL 28, 2015

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Tom, J.P., Sweeny, Manzanet-Daniels, Clark, Kapnick, JJ.

14961-		Ind. 4353/09
14962-		61310
14963	The People of the State of New York, Respondent,	1752/12

-against-

Darryl Williams,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of
counsel), for respondent.

Judgments, Supreme Court, Bronx County (Patricia Anne
Williams, J. at mistrial declaration; Robert Sackett, J. at
retrial, pleas and sentencing), rendered November 14, 2012, as
amended November 27, 2012, convicting defendant, after a jury
trial, of two counts of attempted robbery in the second degree,
and also convicting him, upon his pleas of guilty, of attempted
robbery in the third degree and assault in the third degree, and
sentencing him, as a second violent felony offender, to an
aggregate term of 7½ years, unanimously affirmed.

The first trial court properly exercised its discretion in
granting defense counsel's motion to be relieved, and defendant
was not denied his right to be represented by counsel of his own

choosing (*see generally People v Arroyave*, 49 NY2d 264, 270 [1980]). Defense counsel admitted he could not effectively represent defendant, the record demonstrates that counsel's concerns were genuine, and the court granted counsel's motion only after attempting to accommodate defendant's request to keep his retained counsel along with standby counsel to assist him, which ultimately proved impracticable. The court then properly concluded that a mistrial was necessary to protect defendant's right to effective assistance of counsel and there was no reasonable alternative. Thus, defendant's retrial was not barred by double jeopardy (*see People v Parker*, 61 AD3d 439 [1st Dept 2009], *lv denied* 13 NY3d 748 [2009]). The record does not support defendant's assertions that the court created the need for a mistrial or declared a mistrial because it believed that counsel had violated a ruling.

Defendant's remaining arguments involve events at his ultimate retrial. In each of the following instances, the court appropriately exercised its discretion, and there is no basis for reversal.

The court properly denied defendant's motion to discharge a deliberating juror (and to concomitantly declare a mistrial), based on the juror's claimed financial hardship (*see People v*

Hines, 191 AD2d 274, 276 [1st Dept 1993], *lv denied* 81 NY2d 1074 [1993]). After sufficient inquiry, the court ascertained that the juror's concern was limited to the daily cost of transportation fare to the courthouse, and that the juror was qualified to continue deliberating.

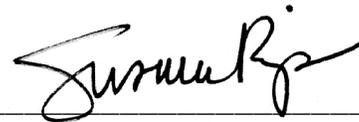
The court properly granted the People's challenge to a prospective juror who did not convey an unequivocal assurance that she would be able to render an impartial verdict (see *People v Johnson*, 94 NY2d 600, 614 [2000]). When a court disqualifies a venireperson, "the worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror" (*People v Culhane*, 33 NY2d 90, 108 n 3 [1973]).

The court's responses to two jury notes conveyed the proper legal standard for attempted second-degree robbery and adequately explained the meaning of being aided by another person actually

present (*see generally People v Almodovar*, 62 NY2d 126, 131-132 [1984]). The court was not obligated to add the additional language requested by defendant.

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

ENTERED: APRIL 28, 2015

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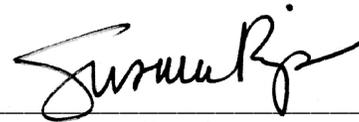
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evidence, as they ultimately did.

The court providently exercised its discretion in reopening the suppression hearing, after both sides had rested and presented oral argument but before any decision had been rendered, to allow the People to introduce additional testimony (see *People v McCorkle*, 111 AD3d 557 [1st Dept 2013], *lv denied* 24 NY3d 963 [2014]). Since the reopening occurred before the court had ruled on the motion, the restrictions on rehearings set forth in *People v Kevin W.* (22 NY3d 287, 289 [2013]) and *People v Havelka* (45 NY2d 636 [1978]) do not apply.

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ENTERED: APRIL 28, 2015

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CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Clark, Kapnick, JJ.

14966-

Index 652533/12

14967 Brian T. Egan, et al.,
Plaintiffs-Appellants,

-against-

Telomerase Activation
Sciences, Inc., et al.,
Defendants-Respondents.

Blau Leonard Law Group, LLC, Huntington (Steven Bennett Blau of
counsel), for appellants.

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

Order, Supreme Court, New York County (Eileen Bransten, J.),
entered September 17, 2014, which, upon reargument, denied on the
merits plaintiffs' motion for class certification, unanimously
affirmed, without costs. Appeal from order, same court and
Justice, entered May 5, 2014, which denied plaintiffs' motion for
class certification as untimely, unanimously dismissed, without
costs, as abandoned and superseded by the appeal from the order
granting reargument.

In this action asserting claims under General Business Law
§ 349, plaintiffs failed to make the required showing for class
certification under CPLR 901. In order to state a claim under
section 349, the transactions at issue must have occurred in

New York (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324-325 [2002]). Because plaintiffs failed to show that any other putative class members made the relevant transactions in New York, they failed to meet the numerosity requirement for class certification (*see CPLR 901[a][1]*). Plaintiffs also failed to show that common issues would predominate (*see CPLR 901[a][2]*), because they could not point to any specific advertisement or public pronouncement by defendants seen by all putative class members (*see Solomon v Bell Atl. Corp.*, 9 AD3d 49, 52-53 [1st Dept 2004]). Nor are the claims of the individual plaintiffs typical of those of the putative class (*CPLR 901[a][3]*). Plaintiff Egan never purchased the product, but ingested it at work while employed by defendants. Plaintiff Murray never saw any statement by defendant, but simply purchased a bottle of the product upon the recommendation of a friend (*cf. Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 22 [1st Dept 1991][the plaintiff's claims were typical since he alleged, as other members would, that he saw the same false and misleading prospectus]). Moreover, the individual plaintiffs are not adequate representatives of the proposed class (*CPLR 901[a][4]*). Egan previously sued defendants for their alleged discrimination, and he is subject to a defamation counterclaim in this action.

Murray appears to be involved in this action only because Egan is his friend. This raises questions as to whether they would pursue their own agenda, contrary to the interests of the class (see *Jara v Strong Steel Door, Inc.*, 20 Misc 3d 1135[A], 2008 NY Slip Op 51733, *18 [Sup Ct, Kings County 2008]). There is no basis to conclude that a class action is a superior method of proceeding (see CPLR 901[a][5]), given that none of the other prerequisites under CPLR 901 have been satisfied. Nor is it necessary to consider the factors set forth in CPLR 902 or the viability of plaintiffs' claims.

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

ENTERED: APRIL 28, 2015


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overcharge owed to plaintiff.

The motion court erred in dismissing plaintiff's complaint, and declaring that the apartment is not subject to the Rent Stabilization Law (see Administrative Code of City of NY § 26-504.2[a]). Although defendant was entitled to a vacancy increase of 20% following the departure of the tenant of record, the increase could not effectuate a deregulation of the apartment since the rent at the time of the tenant's vacatur did not exceed \$2,000 (see Rent Stabilization Code [9 NYCRR] §§ 26-504.2, 26-511[c][5-a]; *Roberts v Tishman Speyer Props., L.P.*, 62 AD3d 71, 77 [1st Dept 2009], *affd* 13 NY3d 270, 280 [2009]).

Contrary to defendant's contention, both the 2005 stipulation and the 2007 agreement are void and unenforceable as a matter of public policy (see *Drucker v Mauro*, 30 AD3d 37, 39-40 [1st Dept 2006], *lv dismissed* 7 NY3d 844 [2006]; *132132 LLC v Strasser*, 24 Misc3d 140(A) [App Term, 1st Dept 2009]). The 2005 stipulation "purported to fix rent at a sum that exceeded the legal limit" under the Rent Stabilization Code (RSL), since the monthly rent of \$2,488.62 exceeded the maximum allowable rent (*Jazilek v Abart Holdings, LLC*, 10 NY3d 943, 944 [2008]). Pursuant to the 2007 agreement, plaintiff agreed to "refrain from filing or making any claim of rent overcharge, fair market rent

appeal, and any and all other conceivable judicial or administrative proceedings challenging the non regulated status of the [apartment].” Since plaintiff was entitled to a rent-regulated apartment, he could not “waive the protections of the [RSL],” absent satisfaction of the conditions for deregulation (see *Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 199 [1st Dept 2011], *app withdrawn* 18 NY3d 954 [2012]).

Defendant’s counterclaims were properly dismissed since the record does not support a finding that plaintiff engaged in any “frivolous” conduct within the meaning of 22 NYCRR § 130-1.1(c)(1) to warrant the imposition of sanctions (see *Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999]), and in the absence of any valid agreement, there is no basis to support defendant’s fraud claim. We note, in any event, that punitive damages are generally not recoverable in an action for breach of contract, and may be awarded only where the complained of conduct

is directed at the public (see *Rocanova v Equitable Life Assur. Socy. of US.*, 83 NY2d 603, 613 [1994]).

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

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

ENTERED: APRIL 28, 2015

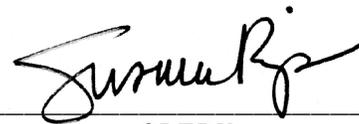
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perform work on the subject valve (see *Amini v Arena Const. Co., Inc.*, 110 AD3d 414 [1st Dept 2013]; *Jones v Consolidated Edison Co. of N.Y., Inc.*, 95 AD3d 659, 660 [1st Dept 2012])). Although Hallen contracted with defendant Con Ed to install subterranean gas service with a sidewalk valve near the preexisting service and valve, the "as constructed" diagrams of Con Ed show that the work did not involve the valve over which plaintiff tripped. Thus, Hallen had no obligations as to the subject valve, including ensuring that it was covered. Nor is there any evidence that Hallen ever removed the subject valve's cover in connection with its work (see *DeSilva v City of New York*, 15 AD3d 252, 254 [1st Dept 2005])).

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

ENTERED: APRIL 28, 2015

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

14972N Frances C. Peters,
Plaintiff-Appellant,

Index 600456/04

-against-

George Christy Peters, et al.,
Defendants.

- - - - -

UBS AG,
Nonparty-Respondent.

Leslie Trager, New York, for appellant.

Mayer Brown LLP, New York (Robert W. Hamburg of counsel), for
respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick,
J.), entered December 20, 2013, which, to the extent appealed
from, denied plaintiff's motion to compel nonparty witness UBS AG
to comply with a subpoena and instructed plaintiff to use the
Hague Convention on the Taking of Evidence Abroad in Civil or
Commercial Matters (Hague Convention) in order to seek the
documents at issue, unanimously modified, on the law and the
facts, to compel UBS to produce any responsive documents not
subject to Swiss banking confidentiality laws, and otherwise
affirmed, without costs.

In this action, plaintiff asserts causes of action against
her mother and brother for conversion, unjust enrichment, and

fraud in relation to the distribution of assets from the Greek estate of plaintiff's late aunt, which plaintiff believes her aunt intended her to receive. Plaintiff served a subpoena on UBS, the bank that held the assets of plaintiff's late aunt. UBS objected to the subpoena, conceding general jurisdiction, but arguing, in part, that the banking secrecy laws of Switzerland prevented it from producing certain documents. Plaintiff moved to compel compliance with the subpoena.

On appeal, UBS argues for the first time that, under the standard established by the United States Supreme Court in *Daimler AG v Bauman* __ US__, 134 S Ct 746 [2014]), which was decided after the court denied plaintiff's motion to compel, the court lacks personal jurisdiction over UBS and therefore cannot compel compliance with the subpoena. However, the *Daimler* decision supports plaintiff's position that *Daimler* did not establish a new rule, but "clarified" the general jurisdiction standard previously "set forth" in *Goodyear Dunlop Tires Operations, S.A. v Brown* __ US__, 131 S Ct 2846 [2011]) (*In re Roman Catholic Diocese of Albany, N.Y. Inc.*, 745 F3d 30, 37 [2d Cir 2014]), which was decided before plaintiff made its motion to compel. Under the standard first articulated in *Goodyear*, UBS did not contest in its motion papers that it is "essentially at

home" in New York __ US at __, 131 S Ct at 2851); therefore, it waived its objection based on personal jurisdiction.

The IAS Court providently exercised its discretion in directing plaintiff to use the Hague Convention to obtain any documents subject to Swiss banking secrecy laws. Although the documents sought are critical to the litigation, and the document requests are sufficiently specific, it is undisputed that the documents originated and reside in Switzerland (see *Tansey v Cochlear Ltd.*, 2014 WL 4676588, *2, 2014 US Dist LEXIS 132021, *7 [ED NY, Sept. 18, 2014, No. 13-CV-4628(SJF)(SIL)]). In addition, the interests of international comity, coupled with UBS's status as a nonparty in this litigation, weigh in favor of the application of the Hague Convention (see *id.*; see also *Tiffany [NJ] LLC v Qi Andrew*, 276 FRD 143, 157 [SD NY 2011], *affd* 2011 WL 11562419, 2011 US Dist LEXIS 158033 [SD NY 2011]). UBS presented a legal opinion that the disclosure of any confidential information about its customers in violation of Swiss law would subject its employees to potential criminal prosecution, fines, and even imprisonment (see *Motorola Credit Corp. v Uzan*, 2003 WL 203011, *7, 2003 US Dist LEXIS 1215, *20 [SD NY, Jan. 29, 2003, No. 02-Civ-666(JSR)(FM)]). Further, UBS's conduct in this litigation does not rise to the level of bad faith (see generally

Tansey, 2014 WL 4676588, *2, 2014 US Dist LEXIS 132021, *7).

Accordingly, considering all of the factors set forth in *Tansey* (see *id.*), the court properly required plaintiff to proceed first under the Hague Convention (see *Orlich v Helm Bros.*, 160 AD2d 135, 143 [1st Dept 1990]). However, the same concerns of international comity do not apply to any documents that are not subject to Swiss banking secrecy laws. Accordingly, UBS is directed to produce those documents, to the extent they exist, and if none exist, provide an affidavit in conformity with the CPLR.

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

ENTERED: APRIL 28, 2015

A handwritten signature in black ink, appearing to read "Susan R.", written over a horizontal line.

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13290-

Index 115155/08

13291 Scholastic Inc.,
Plaintiff-Appellant,

-against-

Pace Plumbing Corp.,
Defendant-Respondent,

PJP Mechanical Corp., et al.,
Defendants.

Finazzo Cossolini O'Leary Meola & Hager, LLC, New York (Robert M. Wolf of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for respondent.

Judgment, Supreme Court, New York County (Debra A. James, J.), entered October 23, 2013, reversed, on the law, without costs, the complaint reinstated, and the matter remanded for further proceedings in accordance with this decision. Appeal from the order, same court and Justice, entered August 14, 2013, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Acosta, J. All concur except Friedman, J.P. and Sweeny, J. who concur in a separate Opinion by Friedman, J.P.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny
Rolando T. Acosta
David B. Saxe
Sallie Manzanet-Daniels, JJ.

13290-13291
Index 1155155/08

x

Scholastic Inc.,
Plaintiff-Appellant,

-against-

Pace Plumbing Corp.,
Defendant-Respondent,

PJP Mechanical Corp., et al.,
Defendants.

x

Plaintiff appeals from the judgment of the Supreme Court, New York County (Debra A. James, J.), entered October 23, 2013, dismissing the complaint as against defendant Pace Plumbing Corp., and from the order, same court and Justice, entered August 14, 2013, which granted Pace's motion for summary judgment.

Finazzo Cossolini O'Leary Meola & Hager, LLC,
New York (Robert M. Wolf and Robert F.
Cossolini of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York
(Daniel S. Kotler and Harry Steinberg of
counsel), for respondent.

ACOSTA, J.

The fundamental question in this appeal is whether defendant properly pleaded an affirmative defense based on the statute of limitations, where the defense was concealed within a boilerplate, catchall paragraph containing 15 other affirmative defenses and an attempt to plead and reserve every other conceivable affirmative defense. We hold that defendant's statute of limitations defense was inadequately pleaded because of its failure to separately state and number the defense and that plaintiff was prejudiced by the defective pleading. However, because the prejudice is curable by permitting discovery on the statute of limitations issue, we remand to the motion court to allow defendant to correct its defective pleading and plaintiff to obtain the needed discovery.

I. Facts and Background

On June 1, 2006, plaintiff, Scholastic, Inc., suffered more than \$1.5 million dollars worth of water damage due to a water pipe breakage in the first-floor ceiling of its mixed-use building in Manhattan. It was discovered that a Victaulic coupling had come loose and ultimately caused the piping to

separate and water to flood the building.¹

Defendant Pace Plumbing Corp. (Pace) is the plumbing subcontractor that installed the Victaulic piping, fittings, and couplings at the time the building was constructed. Prior to the accident, there had not been any leaks in the Victaulic plumbing system. The pipes passed water pump compression tests after Pace completed its plumbing installation.

Once the breakage was discovered, Scholastic arranged for nonparty PAR Plumbing to shut down the building's water supply and immediately repair the separated piping. Photographs of the point of separation were taken before repairs began. Metal rod bracing was added along the length of the horizontal first-floor ceiling pipe, including the joint areas, to stabilize the pipe from vibrations that were caused when the building's water pump system turned on and off. PAR Plumbing's worker did not take the time to inspect the coupling, but he decided against reusing it

¹ Victaulic piping is assembled by connecting pipe lengths and/or elbows using rubber gasket wraps, over which heavy metal couplings are clamped into place using a bolt/nut tightening system. The pipe pieces are held together by the couplings' compression force, rather than by soldering the pipes together. A coupling consists of two solid, half-circle metal ring bands, which are tightened together by torqueing (turning) the bolts on either side of the half-moon metal rings. The bolts are screwed into nuts to tighten the metal coupling around the pipe. The coupling at issue, which joined a 4-inch diameter pipe to a 90-degree elbow, weighed approximately 10 pounds.

in case it had failed; after he placed the coupling in the ankle deep water, a cleaning crew inadvertently disposed of it as they were removing water and debris from the area.

Scholastic's insurer paid the property damage claim of \$1,554,096.23 and is subrogated to Scholastic's rights.

In November 2008, Scholastic commenced this action against Pace - and other defendants who are not parties to this appeal - alleging negligence and breach of contract in connection with the installation and maintenance of the Victaulic plumbing system.

Pace served an answer that included an affirmative defense that read as follows:

"That the answering defendant not being fully advised as to all the facts and circumstances surrounding the incident complained of hereby asserts and reserves onto [sic] itself the defenses of accord and satisfaction, arbitration and award, discharge of bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or an affirmative defense which further investigation of this matter may prove applicable herein."

Following discovery, Pace moved for summary judgment dismissing Scholastic's complaint. Pace argued initially that Scholastic's action was time-barred because it was commenced more than six years after the cause of action accrued, noting that the accident

occurred in June 2006 and the alleged negligent work by Pace was completed between 1999 and 2001. Pace further argued that the action should be dismissed as a sanction for Scholastic's spoliation of evidence insofar as Scholastic failed to preserve the coupling, thus leaving the door open to speculation as to whether the coupling was defective or had been improperly installed. In support of its argument on the merits of the negligence cause of action, Pace argued that its expert, Philip Sharff, concluded to a reasonable degree of engineering certainty that the uneventful passage of six years, from the time Pace completed its plumbing work to the point when the pipe joint failed, indicated that the piping was properly installed. Sharff explained that had the coupling been improperly installed, it would have been more likely to fail immediately.

In opposition to Pace's motion for summary judgment, Scholastic argued, *inter alia*, that Pace failed to adequately plead a statute of limitations defense; that Pace's spoliation argument was unavailing because the coupling was discarded in the midst of emergency repair and because Scholastic had taken photographs of the coupling and pipes at the time of the accident; and that an affidavit by Scholastic's engineering expert, Julius A. Ballanco, raised issues of fact because it conflicted with Pace's expert by stating that the coupling

separated because of Pace's failure to sufficiently tighten one of the bolts. Ballanco's affidavit further stated that the photographs indicated that the coupling was in good condition and that if the coupling was defective, the initial high-pressurized testing of the piping system would have made that evident.

The motion court found that Pace failed to sufficiently plead its statute of limitations defense, but granted Pace's motion for summary judgment on the merits. Plaintiff appeals.

II. Discussion

a. Defendant's failure to separately state and number its statute of limitations defense

Defendant failed to properly plead the statute of limitations, because its inclusion of the defense within a laundry list of predominantly inapplicable defenses did not provide plaintiff with the requisite notice (see CPLR 3013; CPLR 3014; *Matter of Kowalczyk v Monticello*, 107 AD3d 1365 [3d Dept 2013]). The "statute of limitations" was included towards the end of a list of 15 other affirmative defenses, including "accord and satisfaction, arbitration and award, . . . duress, . . . [and] fraud," defenses for which there appears to be no basis to raise in this case. In fact, defendant's fifteenth affirmative defense was so broad as to render it entirely defective. "[A] party cannot employ a catch-all provision in an attempt to

preserve any and all potential defenses/objections for future use without affording notice to the opposing party" (*Kowalczyk*, 107 AD3d at 1366). Moreover, neither plaintiff nor the court ought to be required to sift through a boilerplate list of defenses, or "be compelled to wade through a mass of verbiage and superfluous matter" (*Barsella v City of New York*, 82 AD2d 747, 748 [1st Dept 1981]), to divine which defenses might apply to the case.

The result of defendant's failure to comply with CPLR 3014 is that its statute of limitations defense lay buried within a paragraph of mostly irrelevant, and conclusory, defenses. Although plaintiff could have moved to compel separate numbering (see Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3014:3, citing *Weicker v Weicker*, 26 AD2d 39 [1st Dept 1966]; *Wolf v Wolf*, 22 AD2d 678 [1st Dept 1964]), it was not required to make such a motion because defendant's answer did not necessitate a responsive pleading (see CPLR 3018; CPLR 3024). Thus, plaintiff cannot be forced to accept the defective answer simply because it declined to make a motion to compel separate numbering.

Further, we have no doubt that defendant was permitted to plead its affirmative defenses hypothetically - which it apparently attempted to do by "reserving" those defenses unto itself - but only insofar as those defenses were concise,

separately numbered, and sufficiently stated (CPLR 3013; CPLR 3014). A permissive hypothetical pleading does not extend so far as to authorize a defendant to plead each and every affirmative defense that might exist without regard to its relevance to the cause(s) of action presented by the complaint. Permitting such conduct here would effectively sanction deception on the part of defendant, whether intentional or not, thereby avoiding the CPLR's notice requirement. In other words, defendant's formulation of its laundry list of defenses in hypothetical terms does not exempt it from the other requirements of CPLR 3014.

The question, therefore, becomes one of prejudice. That is, the CPLR directs us to construe a defendant's answer liberally and disregard defects unless a substantial right of the plaintiff would be prejudiced (see CPLR 3026). This must be done in light of the overarching directive that the CPLR "be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding" (CPLR 104). "[W]e must literally apply the mandate [to construe pleadings liberally] as directed and thus make the test of prejudice one of primary importance" (*Foley v D'Agostino*, 21 AD2d 60, 66 [1st Dept 1964]).

A party suffers prejudice where he or she "has been hindered in the preparation of his [or her] case or has been

prevented from taking some measure in support of his [or her] position'" (*DiMauro v Metro. Suburban Bus Auth.*, 105 AD2d 236, 240 [2d Dept 1984], quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]). Plaintiff argues that defendant's defective pleading induced plaintiff to forgo targeted discovery on the statute of limitations issue, and that plaintiff's right to pursue such discovery would thus be prejudiced - and, perhaps, its claim ultimately barred - by allowing the defect to stand. We agree. Although "the burden is expressly placed upon one who attacks a pleading for deficiencies in its allegations to show that he [or she] is prejudiced" (*Foley*, 21 AD2d at 65), plaintiff has carried its burden here. If this Court simply ignores defendant's defective pleading, plaintiff will not be able to fully contest the statute of limitations defense and, as a result, its action might be precluded based on insufficient evidence.² The motion court recognized this prejudice, remarking that "had Scholastic been given adequate notice that Pace would rely on the six-year limitations period, it would have had notice to seek discovery with respect to the factual basis for such affirmative defense." In this manner, defendant's defective

² Because of our finding that discovery on this issue was inadequate, we do not address the merits of the statute of limitations defense.

pleading "prevented [plaintiff] from taking some measure in support of [its] case" (*DiMauro*, 105 AD2d at 240).

Nevertheless, dismissing the statute of limitations defense, or treating the defense as waived, as we might otherwise do (see CPLR 3018[b]; CPLR 3211[e]; *Horst v Brown*, 72 AD3d 434 [1st Dept 2010], *appeal dismissed* 15 NY3d 743 [2010]), would be an excessively severe result. Instead, the prejudice can be cured by allowing defendant to amend its pleading (CPLR 3025[b]) and then allowing plaintiff to conduct discovery on the statute of limitations issue, particularly to determine when Pace completed its work on the Victaulic plumbing system (see Patrick M. Connors, *Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3026:1* [If the prejudice caused by a defect "is curable by an amendment or something equally facile, then it should not be visited with a penalty any greater. . . . Frequently, . . . the disclosure devices can avoid any prejudice."]). In the circumstances of this case, remanding to the motion court is the best vehicle by which to satisfy the dictates of CPLR 104. If the statute of limitations defense is meritorious, a determination of that issue would result in a speedy and less expensive conclusion to otherwise protracted litigation. Moreover, given the public interest in repose and judicial economy (see *Britt v Legal Aid Socy.*, 95 NY2d 443, 449 [2000]),

it would be inappropriate to deem the defense as waived if plaintiff had, in fact, commenced the action after the period of limitations expired and Pace had attempted to raise the defense in its answer (see *534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011] ["In deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed"]). Therefore, in order to ensure the rights of both parties, we remand for an adequate determination of the date on which Pace completed its work.

- b. CPLR particularity requirements, Official Form 17, and the import of *Immediate v St. John's Queens Hosp.*

The motion court, in addressing the parties' dispute regarding the particularity of Pace's statute of limitations defense - assuming defendant had complied with CPLR 3014 by including the defense in a separately numbered paragraph - also determined that its conclusory pleading of the defense (i.e., a bare assertion of the "statute of limitations") was insufficiently particular to comport with CPLR 3013. The court reached this conclusion without addressing controlling Court of Appeals precedent, *Immediate v St. John's Queens Hosp.* (48 NY2d 671 [1979]), a decision the parties debated before the motion court but perplexingly omitted from their briefs on appeal. The

concurrency believes that this longstanding decision - a cursory, unsigned memorandum that held, inter alia, that a defendant's bald statute of limitations defense "was sufficient under CPLR 3013" because the defendant "was not required to identify the statutory section relied on or to specify the applicable period of limitations" (48 NY2d at 673) - would be dispositive of the particularity issue. Nevertheless, because we perceive a lack of clarity concerning whether a conclusory statute of limitations defense is adequate in all cases, we think this issue is one that the Court of Appeals should revisit.

The *Immediate* Court did not explain its rationale or cite any authority in deciding that a conclusory statute of limitations defense was sufficiently pleaded, and it apparently ignored the model statute of limitations defense embodied in Form 17 of the Official Forms. The Official Forms promulgated by the state administrator pursuant to CPLR 107 "shall be sufficient under the [CPLR] and shall illustrate the simplicity and brevity of statement which the [CPLR] contemplate[s]" (CPLR 107).³ Official Form 17's exemplary statute of limitations defense states, "The cause of action set forth in the complaint did not

³ Originally, the forms "were promulgated in the 1960s by the Judicial Conference. Today, the power to promulgate forms is in the Chief Administrator of the Courts" (Siegel, NY Prac § 210 n 1 [5th ed]).

accrue within six years next before the commencement of this action" (Siegel, NY Prac § 228 [5th ed]). This example, by specifying the period of limitation on which the defense relies, sets forth the defense with greater particularity than the conclusory assertion of the defense accepted in *Immediate*. Moreover, it indicates the Judicial Conference's obvious determination that the "simplicity and brevity" contemplated by the CPLR would be best achieved by a statute of limitations defense that included the period of limitations; presumably, if the Conference had thought a defendant's conclusory assertion of the defense would suffice, it would have excluded the period of limitations from its illustration of the defense. Yet, contrary to the concurrence's assertion that "*Immediate* establishe[d] that the Official Form 17 provides more information than is necessary" when pleading a statute of limitations defense, the Court's brief decision did not mention Official Form 17 at all, nor did it give the issue a thorough treatment. As a result, courts and the bar are left to guess whether *Immediate* is universally applicable, or whether courts should decide which of two standards applies to a case given its circumstances: the *Immediate* standard (which deems sufficient a plain assertion of the "statute of limitations") or the Official Form 17 standard (which suggests that defendants plead the applicable period of limitations).

It seems clear that a court cannot require a level of particularity beyond that outlined by the Official Forms; to do so would contravene CPLR 107's command that pleadings that comply with the forms are sufficient as a matter of law (see *Pritzker v Falk*, 58 Misc 2d 989, 990 [Sup Ct, Queens County 1969], cited in Joseph M. McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C107:1]). Thus, the most that a court could require of a defendant pleading the statute of limitations is to state the applicable period of limitations, as set forth in Official Form 17. We acknowledge that Official Form 17 establishes a ceiling, not a floor. To be sure, a defendant whose answer pleads the "statute of limitations" and includes the applicable period of limitations will necessarily be in compliance with the official form, and courts must deem that pleading sufficient pursuant to CPLR 107 and CPLR 3013. However, we disagree with our concurring colleague's belief that *Immediate* intended for all courts, in all cases involving a statute of limitations defense, to accept the least particular pleading possible. Thus, contrary to the concurrence, we are not advocating for a "new pleading requirement," nor are we suggesting that defendants be required to plead "factual particulars" aside from the period of limitations upon which a statute of limitations defense is based. Rather, we are

questioning whether *Immediate* was intended to entirely obviate the Official Form 17 standard (which preceded *Immediate*, and reflected the Judicial Conference's opinion that a statute of limitations defense that includes the relevant period of limitations strikes the right balance between particularity and brevity to comport with the CPLR).⁴

Interestingly, no department of the Appellate Division that has followed *Immediate* has previously raised this question, or explained why the statute of limitations should be treated differently from other affirmative defenses in allowing it to always be pleaded in a conclusory fashion, seemingly in violation of CPLR 3013 (*cf. Commissioners of the State Ins. Fund v Ramos*, 63 AD3d 453, 453 [1st Dept 2009] [affirmative defense stating merely that "plaintiff's claims are barred by the equitable doctrine of laches" was correctly dismissed "as pleading only a

⁴ While we agree with the concurrence that Official Form 17's inclusion of the period of limitations "does not logically imply that pleadings containing less information are necessarily insufficient," the concurrence overlooks that not only "shall [the official forms] be sufficient," they also "shall illustrate the simplicity and brevity of statement which the [CPLR] contemplate[s]" (CPLR 107). The drafters of Official Form 17 necessarily believed that the form properly illustrated that "simplicity and brevity." If they had determined that a simpler and briefer statute of limitations pleading was preferable, they could have drafted Form 17 differently. Therefore, although courts *may* accept the minimal pleading allowed in *Immediate*, we do not think the Judicial Conference envisioned such an approach.

bare legal conclusion without supporting facts”] [internal quotation marks omitted]); and each case appears to follow *Immediate* without regard as to whether the holding was limited to that case and closely analogous cases (see e.g. *Cadlerock, L.L.C. v Renner*, 72 AD3d 454 [1st Dept 2010]; *Youssef v Triborough Bridge & Tunnel Auth.*, 24 AD3d 661 [2d Dept 2005]; *DeSanctis v Laudeman*, 169 AD2d 1026 [3d Dept 1991]).⁵ Moreover, secondary sources accepting *Immediate*'s broad applicability have accorded it scant analysis, if any (see e.g. Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3018:19 [assuming that, in light of *Immediate*, a statute of limitations defense “can be adequately probed in a bill of particulars or through the disclosure devices”]; Siegel, NY Prac § 223 at n 26 and related text [5th ed]; 2 NY Prac, Com. Litig. in New York State Courts § 7:108 at n 5.50 and related text [3d ed]; 2B Carmody-Wait 2d § 13:520 at n 1 and related text). Therefore, to suggest any specific rationale underlying the Court of Appeals'

⁵ Curiously, the Second Department, more than a decade after *Immediate* but without addressing that case, dismissed a conclusory statute of limitations defense because of the defendant's failure to state the period of limitations on which it relied (*Propoco, Inc. v Birnbaum*, 157 AD2d 774, 776 [2d Dept 1990], abrogated on other grounds by *Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]). Although *Youssef*'s holding is contrary to *Propoco*, the Second Department has not expressly overruled *Propoco*.

decision in *Immediate* is mere speculation.

Perhaps the Court determined - as the concurrence postulates in the first treatment of *Immediate* that attempts to explain the Court of Appeals' reasoning - that a statute of limitations defense will necessarily relate back to the transaction or occurrence alleged in a given complaint and will consequently give the plaintiff notice of the transaction or occurrence at issue and the material elements of the defense; or perhaps the Court deemed the statute of limitations defense sufficient because, unlike here, the date of accrual of the plaintiff's cause of action was apparent on the face of the complaint, as the verified record in that case demonstrates, and because it was clear which period of limitations applied to the plaintiff's cause of action. In any event, the Court's reasoning remains unknown to us, and we question whether the concurrence's explanation will hold true in every case.

Assuming, in light of *Immediate*, that courts have the authority to accept a less particular statute of limitations defense than Official Form 17 suggests - where, for example, the answer simply states, "Plaintiff's action is barred by the statute of limitations" - such an approach may not be wise in all cases. Instances might arise where a plaintiff will be prejudiced by a defendant's failure to plead the applicable

period of limitations. For instance, a complaint might state multiple causes of action (against the same defendant) arising from different transactions or occurrences, as the plaintiff is permitted to plead (CPLR 601[a]).⁶ In such a case, how is a plaintiff to discern which transaction or occurrence a defendant's "bare bones" statute of limitations defense addresses, particularly where the various causes of action may be governed by different periods of limitation? Furthermore, and perhaps more importantly, it is not enough that a defendant's pleading give plaintiff notice of the transaction or occurrence at issue; it must also be sufficient so as to give a plaintiff notice of the "material elements" of the defense (see CPLR 3013). Unless the material elements of the defense are obvious on the face of the complaint or in the body of the answer (see *534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541 [1st Dept 2011]; see also *Foley v D'Agostino*, 21 AD2d 60, 63 [1st Dept 1964] [noting that "the essential facts required to give 'notice' must be stated" and that "a party may supplement or round out his pleading by conclusory allegations . . . if the facts upon which

⁶ The complaint in *Immediate* involved three causes of action, but each of them arose from the same transaction or occurrence (the plaintiff's emergency room visit) and was asserted against the same defendant, as illustrated by the verified complaint in that case.

the pleader relies are also stated”]), a conclusory pleading of the “statute of limitations,” which omits the applicable period of limitation, might fail to provide a plaintiff adequate notice under CPLR 3013. Perhaps the material elements of a statute of limitations defense - which, pursuant to Official Form 17, include the applicable period of limitations - will be obvious in some cases by referring to the complaint, but not in “every case” as the concurrence suggests.

Again, prejudice is the critical concern. If a defendant is required to plead the applicable period of limitations (as illustrated by Official Form 17), then the plaintiff will have notice of the defense and be prompted to tailor discovery accordingly. Without such notice of the period of limitations on which a defendant relies, a plaintiff may conduct discovery with one period of limitations in mind regardless of whether the defendant intends to assert the defense based on another period of limitations (and, possibly, a different accrual date). The plaintiff would therefore be prejudiced by an inability to pursue adequate discovery to rebut the defense.⁷ If the prejudice is

⁷ Indeed, plaintiff argued before the motion court that it was prejudiced by defendant’s conclusory pleading, because plaintiff initially believed that a three-year period of limitation applied (for negligence actions, under CPLR 214[4], running from the date of injury), and defendant argued that the six-year period of limitation applied (running from the date

curable, it is possible that, as in the instant case, permitting further discovery will appropriately resolve the problem. Nonetheless, because a defendant bears the burden of pleading and proving its affirmative defenses (Siegel, NY Prac § 215 [5th ed.]; 75A NY Jur 2d Limitations and Laches § 369; accord *Bano v Union Carbide Corp.*, 361 F3d 696, 710 [2d Cir 2004]), it is more sensible to require defendants to plead the statute of limitations with as much particularity as illustrated by Official Form 17, at least in cases where, as here, the plaintiff states multiple causes of action and the accrual date is absent from the face of the complaint (or the body of the answer).⁸

These issues merit further consideration by the Court of Appeals, due to the ambiguity that has arisen from one of its

defendant completed its construction, under CPLR 213[2]). Plaintiff argued that it would have sought discovery on the date of completion had it known defendant was relying on the latter period of limitation. The parties now agree that the six-year period applies.

⁸ While the concurrence is correct that a plaintiff “does not require advice from the defendant concerning the applicable statute of limitations or the criteria for determining the date of accrual” for his own purposes (e.g. determining whether and when to commence an action), it is the defendant’s burden to plead and prove the defense. A defendant, therefore, need not “advise” the plaintiff, but must give the plaintiff notice of the material elements of the defense. Although we would not require defendant to affirmatively state the date on which plaintiff’s cause of action accrued, his pleading of the defense by stating the applicable period of limitations on which he relies would (implicitly) give plaintiff notice of the date of accrual.

decisions (*Immediate*) and subsequent case law. Because “litigants, and the bar, deserve a greater level of certainty” (*SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 99 [1st Dept 2014]), we see no reason why this issue should not be given a second look, particularly in order to harmonize *Immediate* with Official Form 17.⁹ That courts have followed *Immediate* without question is not a reason to continue on that path in the face of new issues that the Court may not have considered at the time of its decision. Although the concurrence apparently thinks that the dearth of analysis or critique of *Immediate* means the decision is unassailable, it is the same unquestioning application of the decision to subsequent cases – regardless of whether they are distinguishable and without acknowledging the discord with respect to Official Form 17 – that illustrates the need to reassess the issue of whether a conclusory statute of limitations defense is sufficient under CPLR 3013 in all cases.

⁹ While the concurrence “fail[s] to see how [the Court of Appeals’ reconsideration of *Immediate*’s import vis-à-vis Official Form 17] will enhance either the efficiency or the fairness of our civil justice system,” we similarly fail to see how efficiency and fairness would be negatively affected by a clarification of the law. In other words, the obscurity that the concurrence would allow to stand does no service to the bar or to litigants. The Court of Appeals can easily resolve this issue in a future case by illuminating whether *Immediate* was meant to render Official Form 17’s exemplary statute of limitations defense obsolete.

c. Issues of fact arising from the "battle of the experts"

Next, the experts' conflicting opinions as to the cause of the water pipe failure raise issues of fact that preclude summary judgment to any party (see *Ho v Greenwich Ins. Co.*, 104 AD3d 601 [1st Dept 2013]; *Melendez v Dorville*, 93 AD3d 528 [1st Dept 2012]; *Madden v New York Hosp.*, 235 AD2d 245 [1st Dept 1997]). Plaintiff's expert based his opinion not on speculation but on his knowledge of the Victaulic plumbing system's parts and their functions, documentary evidence, witnesses' deposition testimony, and reasonable inferences drawn from photographs taken of the plumbing system at the scene of the failure.

d. Spoliation

Lastly, with respect to defendant's argument on spoliation, to the extent it is established that plaintiff's repairman negligently discarded the coupling inextricably tied to the plumbing failure, a lesser sanction than dismissal (e.g. an adverse inference) might be appropriate if sought at trial (see e.g. *Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15, 25-26 [1st Dept 2013]; *Alleva v United Parcel Serv., Inc.*, 112 AD3d 543 [1st Dept 2013]). The coupling itself is not "the sole source of the information and the sole means by which [defendant] can establish [its defense]" that the coupling failed due to a manufacturing defect rather than to negligent installation

(*Alleva*, 112 AD3d at 544).

III. Conclusion

Accordingly, the judgment of the Supreme Court, New York County (Debra A. James, J.), entered October 23, 2013, dismissing the complaint as against defendant Pace Plumbing Corp., should be reversed, on the law, without costs, the complaint reinstated, and the matter remanded for further proceedings in accordance with this decision. The appeal from the order, same court and Justice, entered August 14, 2013, which granted Pace's motion for summary judgment, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur except Friedman, J.P. and Sweeny, J. who concur in a separate Opinion by Friedman, J.P.

FRIEDMAN, J.P. (concurring)

I concur in the majority's reversal of the judgment, including the remand to allow defendant Pace Plumbing Corp. (Pace) to replead its statute of limitations defense in proper form and for further discovery on that issue. The inclusion of the statute of limitations in the middle of a list of 16 different affirmative defenses that Pace purported to "assert[] and reserve[] onto [sic] itself," in a single one-sentence paragraph in its answer, was plainly inconsistent with the statutory requirement that "[s]eparate causes of action or defenses . . . be separately stated and numbered" (CPLR 3014). This manner of pleading failed to give opposing parties the requisite notice that the statute of limitations defense was actually in play in the litigation. I therefore agree with the majority that, upon remand, Pace should have an opportunity to replead the statute of limitations in the form prescribed by CPLR 3014 and, thereafter, the parties should have an opportunity to conduct discovery on that defense.

Notwithstanding my concurrence in the result the majority reaches, I cannot join the majority's writing, because I disagree with its call for the Court of Appeals to "revisit" the question — one not heretofore thought worthy of substantial debate by either legal scholars or the appellate courts of this state — of

"whether a conclusory [pleading of the] statute of limitations defense is adequate in all cases." Notwithstanding that the Court of Appeals expressly held more than 30 years ago that the CPLR does *not* require the pleading of the statute of limitations to specify "the statutory section relied on or . . . the applicable period of limitations" (*Immediate v St. John's Queens Hosp.*, 48 NY2d 671, 673 [1979]), the majority suggests a new requirement that an answer pleading the statute of limitations specify the applicable limitation period. The majority bases this suggestion on Official Form 17 promulgated pursuant to CPLR 107 (reproduced at Marino, 1B West's McKinney's Forms Civil Practice Law & Rules § 4:231, 91-93, and at Siegel, NY Prac § 228 at 390 [5th ed 2011]), an illustration of an answer that, while specifying a particular limitation period, contains no other particulars about the defense.¹

The majority expresses a concern that "courts and the bar are left to guess whether *Immediate* is universally applicable, or whether courts should decide which of [the] two standards [*Immediate* or Official Form 17] applies to a case given its circumstances . . ." However, any appearance of a conflict

¹The paragraph of Official Form 17 pleading the statute of limitations states in its entirety: "The cause of action set forth in the complaint did not accrue within six years next before the commencement of this action."

between *Immediate* and Official Form 17 – and I see none – is completely illusory. As the majority itself acknowledges, “Official Form 17 establishes a ceiling, not a floor,” for proper pleading. While CPLR 107 provides that pleadings conforming to “[f]orms adopted pursuant to this section *shall be sufficient*” (emphasis added), that does not mean that pleadings providing somewhat less information than those in the forms necessarily fall short of what the CPLR requires. In the case of the statute of limitations, *Immediate* establishes that the Official Form 17 provides more information than is necessary.

I fail to see what problem the majority believes would be solved by requiring defendants to specify a period of limitation in pleading a statute of limitations defense. The specification of the applicable limitation period is a legal conclusion that conveys no factual information about the case, and therefore does not help the plaintiff in framing discovery requests. Further, contrary to the majority’s assertion, neither does the pleading of a particular limitation period tell the plaintiff the date from which the limitation period began to run, or how to ascertain that date. More fundamentally, to require the defendant to plead the length of the applicable limitation period, like the identification of the statute providing that limitation period, is to require the defendant to advise the

plaintiff on the law applicable to the plaintiff's own cause of action. Why plaintiffs should be entitled to look to their adversaries for such advice is a question the majority does not answer. In my view – and, more importantly, in the view of the Court of Appeals as expressed in *Immediate* – it should suffice for the defendant, through the answer, to give the plaintiff fair notice that the statute of limitations will be a live issue in the case. Each side can then do its own research, and reach its own conclusions, on which limitation period applies, and the time from which it runs, and proceed to factual discovery relevant to this issue.²

Although the majority denies that it is “suggesting that defendants be required to plead ‘factual particulars’ aside from the period of limitations upon which the statute of limitations defense is based,” at certain points in its writing the majority appears to advocate just that. For example, the majority states

²Because this is true regardless of the number of causes of action asserted by the plaintiff, I fail to understand why the majority places such emphasis on the possibility that different limitation periods may apply to different causes of action in the same case. It is the plaintiff, not the defendant, who has put those claims, and the facts underlying them, at issue in the first place, and, so far as I know, it is not the defendant's job to advise the plaintiff which statute of limitations applies to which of the plaintiff's own claims. Further, where it is possible that different claims accrued at different times, discovery on the different times of accrual, as on other issues, may proceed simultaneously.

that "it is not enough that a defendant's pleading give plaintiff notice of the transaction or occurrence at issue; it must also be sufficient so as to give a plaintiff notice of the 'material elements' of the defense." Why such notice is needed in the case of a statute of limitations defense is not clear to me. The defense of the statute of limitations necessarily refers back to the causes of action framed by the complaint (the statute or statutes of limitations applicable to which should already be known to counsel who drafted the complaint) and to the very same "transactions, occurrences, or series of transactions or occurrences" (CPLR 3013) alleged in the complaint in support of those causes of action. Thus, the pleading of the statute of limitations defense – to which no responsive pleading is required – need not be accompanied by factual particulars to give the court or the other parties notice of the matters at issue; in every case, such notice will already have been given by the complaint.

In this case, the complaint identifies "the transactions, occurrences, or series of transactions or occurrences" (CPLR 3013) underlying the causes of action for negligence and breach of contract against Pace as (1) Pace's work as a plumbing contractor in the construction of plaintiff's building at 557 Broadway in Manhattan and (2) the flood that occurred in that

building on June 1, 2006, allegedly as a result of the failure of a pipe coupling installed by Pace. A simple, forthright assertion of the statute of limitations defense in Pace's answer (which I agree Pace failed to make), without any additional factual detail, would have given plaintiff fair notice that a key issue in the action would be the determination of the time as of which its causes of action against Pace accrued and the limitation period began to run. As the Court of Appeals has plainly held (and as any lawyer could determine through a minimal amount of research), that time was the date on which Pace completed its work in the construction of the building (see *City School Dist. of City of Newburgh v Stubbins & Assoc.*, 85 NY2d 535 [1995]). The determination of that date would then be an evidentiary issue to be determined through bills of particulars, discovery and, ultimately, summary judgment motion practice or trial, not through the pleadings. As the late Professor David D. Siegel observed, the disclosure devices of the CPLR "enable the parties to probe their adversaries' positions more incisively than pleadings ever could" (Siegel, NY Prac § 207 at 356 [5th ed 2011]).

As should be evident from the foregoing, had Pace's answer plainly asserted (in a separately numbered paragraph, as required by CPLR 3014) that the claims against it were barred by the

statute of limitations, the embellishment of that paragraph with the additional factual detail would not have given plaintiff notice of any new matter it needed to know before proceeding with the litigation.³ And, in fact, *Immediate* establishes that such superfluous factual particularity is *not* required for pleading the statute of limitations. The record of *Immediate* shows that the defendant stated in support of its second affirmative defense nothing more than the following: "That the plaintiff's cause of action is barred by the Statute of Limitations." Nonetheless, the Court of Appeals rejected the plaintiff's contention that the statute of limitations defense had not been sufficiently pleaded, explaining: "It was sufficient under CPLR 3013 that respondent pleaded the 'statute of limitations' as a defense; it was not required to identify the statutory section relied on or to specify the applicable period of limitations" (48 NY2d at 673).

The Court of Appeals' 35-year-old holding in *Immediate* — that all a defendant need say in its answer to preserve the statute of limitations defense is to plead, like the *Immediate* defendant, that the plaintiff's claim "is barred by the statute

³Again, at the risk of repeating the obvious, the facts relevant to the defense would be ascertainable through discovery. Further, plaintiff was not entitled to rely on Pace's answer to direct its attention to the applicable statute of limitations or the criteria for determining when the limitation period began to run.

of limitations,” without setting forth any factual particulars or identifying either the governing statute or the applicable limitation period – has been followed consistently by this Court and by the other two departments of the Appellate Division that have had occasion to consider the requirements for pleading this defense (save, as the majority notes, for one deviating, and now implicitly overruled, 25-year-old precedent in the Second Department). This Court faced the issue most recently in *Cadlerock, L.L.C. v Renner* (72 AD3d 454 [1st Dept 2010]), where, as revealed by the record, the defendant’s answer said nothing more than the following about the statute of limitations defense: “This action is time-barred by the applicable Statute of Limitations.” Citing *Immediate*, we held that this undeniably conclusory sentence “sufficiently pleaded [the] statute of limitations affirmative defense” (72 AD3d at 454).

Thirty years before *Cadlerock*, we reached exactly the same conclusion in *Montes v Manufacturers Hanover Trust Co.* (78 AD2d 786 [1st Dept 1980]), where, as revealed by the record, the answer pleaded the statute of limitations with this single, factually unadorned sentence: “The cause of action alleged in the complaint herein is time barred by the statute of limitations.” Holding that this pleading was sufficient, we reversed an order dismissing the defense of the statute of limitations, explaining:

"In pleading an affirmative defense based upon the Statute of Limitations, it is unnecessary for defendant Manufacturers to identify the statutory sections relied upon or to specify the applicable period of limitations (*Immediate v St. John's Queens Hosp.*, 48 NY2d 671, 673). Therefore, its affirmative defense is properly pleaded" (78 AD2d at 786).

The Second and Third Departments have also followed *Immediate* in holding sufficient unparticularized and conclusory pleadings of the statute of limitations defense. In *Youssef v Triborough Bridge & Tunnel Auth.* (24 AD3d 661 [2d Dept 2005]), the paragraph of the defendant's answer asserting the statute of limitations, besides omitting any factual detail, actually cited the wrong statutory provision. Nonetheless, the Second Department held that the defense had been adequately pleaded and, reversing Supreme Court, granted the defendant's motion to dismiss the complaint as time-barred. The *Youssef* court explained:

"We agree with the Authority that it did not waive the statute of limitations defense despite the fact that it didn't plead the correct statutory provision. The mere statement 'statute of limitations' was sufficient to raise the defense since a defendant is not required to identify the statutory provision or specify the period of limitations" (*id.* at 661, citing *Immediate*, *inter alia*).

Further, the Second Department rejected the *Youssef* plaintiffs'

claim that they had been prejudiced by the answer's citation of the wrong statute because "the pleaded defense sufficiently provided them with notice of the matters intended to be proved" (*id.* at 662) – despite the absence of any factual allegations from the paragraph of the answer that asserted the defense.⁴

The Third Department followed *Immediate* in *DeSanctis v Laudeman* (169 AD2d 1026 [3d Dept 1991]), where the defendant pleaded the statute of limitations defense as follows: "That the Cause of Action set forth in plaintiff's complaint, is barred by plaintiff's failure to commence this action within the Statute of Limitations as prescribed in the CPLR." The plaintiff, who was suing as the executor of a decedent's estate, argued that the answer's incorrect reference to the CPLR, rather than the EPTL, as the source of the applicable limitation period rendered the

⁴As revealed by the record on which *Youssef* was decided, the answer in that case pleaded the statute of limitations defense as follows: "That plaintiff(s) have failed to commence this action within the statute of limitations provided by § 1212(2) of the Public Authorities Law. Accordingly, the complaint herein should be dismissed as the action is time barred." As noted by the majority, in a 1990 case, the Second Department had, without taking notice of *Immediate*, and relying on pre-*Immediate* authority, dismissed a statute of limitations defense for the answer's "fail[ure] to set forth the prescribed period or periods of limitation" (*Propoco, Inc. v Birnbaum*, 157 AD2d 774, 776 [2d Dept 1990], abrogated on other grounds by *Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]). Even in *Propoco*, however, the Second Department did not suggest that a statute of limitations defense should be pleaded with factual particularity.

assertion of the defense a “nullity” and resulted in its waiver. The Third Department rejected this argument, noting, with a citation to *Immediate*, that “[t]he Court of Appeals has ruled that a simple statement of ‘statute of limitations’ as a defense is sufficient to raise and preserve it” (169 AD2d at 1026). Accordingly, the *DeSanctis* court held that “the [statute of limitations] issue was properly preserved by defendant” (*id.* at 1027).

As the majority recognizes, scholarly works on New York procedure have recognized that *Immediate* establishes that the requirements for the pleading of a statute of limitations defense are minimal and do not include factual detail. In his above-cited treatise on New York civil practice, Professor Siegel wrote: “The Court of Appeals has held that the phrase ‘statute of limitations’ is a sufficient pleading of that defense” (Siegel, *New York Prac* § 223 at 383 [5th ed 2011], citing *Immediate*). Similarly, the Practice Commentaries to the CPLR note that, under *Immediate*, a “terse statement of ‘statute of limitations’ is sufficient to raise and preserve a timeliness defense,” and the particulars relevant to the defense “can be adequately probed in a bill of particulars or through the disclosure devices” (Patrick M. Connors, *Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3018:19*). A leading litigation form book advises

the bar that, “[a]s a general rule, in pleading an affirmative defense, one should specifically identify the affirmative defense (e.g., *statute of limitations* or absence of personal jurisdiction or absence of rem jurisdiction), *but not the basis for the defense*” (Marino, 1B West’s McKinney’s Forms Civil Practice Law & Rules § 4:229, at 82 [2011] [emphasis added]), lest the specification of certain bases for the defense be found to have waived unspecified alternatives.

In suggesting that the “conclusory” pleading of the statute of limitations, as approved by the Court of Appeals in *Immediate*, might sometimes result in “a plaintiff . . . [being] prejudiced,” the majority concedes that it has been unable to locate any support in case law or scholarly commentary for its view that the Court of Appeals should reexamine the *Immediate* holding. Instead of taking this absence of support as an indication that the bench, bar and scholarly community are united in seeing no problem needing to be solved by the imposition of a new pleading requirement, the majority dismisses past discussions of this issue as “hav[ing] accorded it scant analysis.” As for *Immediate*, the majority appears to seek to diminish its precedential effect with the remark that “[t]he *Immediate* Court did not explain its rationale or cite any authority” for its holding on the pleading issue, and professes to “perceive a lack

of clarity [under existing law] concerning whether a conclusory [pleading of a] statute of limitations defense is adequate in all cases.”⁵ The majority proceeds to posit hypothetical cases distinguishable from *Immediate* – for example, where the time from which the limitation periods begins to run may not be discernable from the face of the complaint – and constructs an argument that a conclusory pleading of the statute of limitations in such cases, without specification of the applicable limitation period, might somehow “prejudice” the plaintiff by “fail[ing] to provide [the] plaintiff adequate notice under CPLR 3013.” I fail to see any such potential for “prejudice.”

The majority argues that in this case, purportedly unlike *Immediate*, the date of the action’s accrual cannot be determined from the complaint, and suggests that this means that, here, a conclusory pleading of the statute of limitations will not give the plaintiff notice of the “material elements” of the defense.

⁵The majority, while insisting that we can only “speculat[e]” about the unstated reasoning of *Immediate*, inconsistently attributes to the body that promulgated Official Form 17 the judgment (entirely unexpressed) that the pleading of the statute of limitations defense should include a statement of the applicable limitation period. In fact, the promulgation of Official Form 17 expresses no such judgment, since the forms promulgated pursuant to CPLR 107 are only illustrative of pleadings that “shall be sufficient,” which does not logically imply that pleadings containing less information are necessarily insufficient. Thus, I repeat that Official Form 17 and *Immediate* are *not* in conflict.

This overlooks that the material elements of a statute of limitations defense are the same in every case – that a period of time exceeding the applicable limitation period elapsed between the date on which the claim accrued and the date on which the action was commenced. Since the causes of action have been framed by the plaintiff, the plaintiff does not require advice from the defendant concerning the applicable statute of limitations or the criteria for determining the date of accrual. Further, the remedy the majority suggests – requiring the defendant to plead the limitation period, or periods, on which the defense relies – will not give the plaintiff the information that is the subject of the majority's concern. To reiterate, reciting the applicable limitation period – which, as the majority concedes, is the most that could be required consistent with Official Form 17 – would not tell the plaintiff anything about the date from which that period is measured other than that the defendant believes that a period of time longer than the limitation period has elapsed since that date. Nor would pleading of the limitation period inform the plaintiff of the criteria for determining the time at which the cause of action accrued. Again, I see no reason why a plaintiff should be entitled to rely on the defense for advice about legal principles governing the case that should be ascertained through preparatory

research before the plaintiff's lawyer even begins to draft the complaint.

While it is of course true that in certain cases, as here, the complaint will not set forth the particular date on which the claim accrued, I fail to see what problem the majority believes would be solved by putting the onus on the defendant to plead a particular limitation period in its answer. Plainly, the plaintiff will not suffer any prejudice from the omission of this legal conclusion from the answer. In particular, I do not follow the majority's reasoning when it expresses the worry that a plaintiff may not know how to "tailor discovery" in response to a statute of limitations defense pleaded in conclusory fashion. As previously discussed, the statement of a limitation period does not furnish the plaintiff with any factual information useful for "tailor[ing] discovery." Moreover, the complaint will in every case, and with respect to every separately pleaded cause of action, identify the "transactions, occurrences, or series of transactions or occurrences" (CPLR 3013) on which the claim is based, so there is no need for the answer to provide additional factual detail in support of a statute of limitations defense for the parties to proceed to discovery on that issue. Where the date from which the limitation period ran cannot be determined from the face of the complaint, the parties will know from the

complaint – in every case, and regardless of how many causes of action are asserted – which “transactions, occurrences, or series of transactions or occurrences” require exploration and development, through bills of particulars and the CPLR’s familiar discovery devices, to flesh out the facts relevant to the statute of limitations defense, along with the facts relevant to all of the other issues in the litigation.⁶ To expect litigants to proceed in this routine manner with respect to the statute of limitations defense – which is clearly the teaching of *Immediate* – is hardly unfair to plaintiffs, contrary to the majority’s concern.

The majority posits the case of a hypothetical plaintiff who “conduct[s] discovery with one period of limitations in mind,” only to learn subsequently that the defense had a different

⁶In this case, for example, had the answer contained a simple statement in a separately numbered paragraph that the claims against Pace were barred by the statute of limitations, plaintiff’s counsel would have had fair notice that the date on which Pace completed its work in the building (from which the limitation period ran) would be an issue in the action. Again, there is no reason to require Pace, through its answer, to give plaintiff advice on such easily answered legal questions as the limitation period applicable to plaintiff’s own claims or the criteria for determining the time from which the limitation period ran. While plaintiff legitimately complains of Pace’s defective pleading of the statute of limitations as one item on a catch-all laundry list, it is not Pace’s fault that, as the majority notes, plaintiff apparently assumed the applicability to its claim of the wrong limitation period and the wrong time of accrual.

limitation period (the correct one) in mind. In this situation, it would hardly be the fault of the defense that the plaintiff, having been given fair notice that the statute of limitations defense was in play, had litigated the case assuming the applicability of the wrong statute of limitations to its own cause of action. The same applies to a mistake as to the legal criteria for determining the time of the action's accrual (which mistake, as previously noted, would not necessarily be corrected by identification of the correct limitation period).⁷

In sum, the new pleading requirement suggested by the majority is a solution in search of a problem or, stated otherwise, an answer to a question that has already been definitively answered by the Court of Appeals. While the majority laments the "obscurity" that it believes to exist as to the standard for pleading the statute of limitations in the absence of "clarification" by the Court of Appeals, the only "obscurity" surrounding this issue has been created by the majority itself through its suggestion of a supposed conflict between Official Form 17, on the one hand, and, on the other

⁷While the majority correctly points out that it is "the defendant's burden to plead and prove" a statute of limitations defense, I also note that it is the plaintiff who "bears the burden of proving those facts which will support the application of one of the rules tolling or barring the statute of limitations" (1B NY PJI3d 2:149 at 40 [2015]).

hand, *Immediate* and its progeny. As previously discussed, no such conflict exists. Further, the majority's discussion of the perceived need to "harmonize" *Immediate* with Official Form 17 is irrelevant to the disposition of this appeal, in which we all agree that, although the pleading of the statute of limitations was defective because it was not "separately stated and numbered" as required by CPLR 3014, the case should be remanded for further proceedings, including factual discovery, on the merits of that defense. Moreover, while the majority denies that it intends to change existing law as established by *Immediate*, its decision will inevitably lead to the proliferation of motion practice and appeals on the issue of the sufficiency of the pleading of the statute of limitations defense. In the face of the majority's call for the Court of Appeals to "revisit" *Immediate*, counsel for plaintiffs may be expected routinely to move to strike the statute of limitations defense, not only for failure to plead a period of limitation, but also for arguably pleading the wrong period, in the hope of preserving the issue for the reconsideration of the Court of Appeals to which the majority

looks forward. I fail to see how this development will enhance either the efficiency or the fairness of our civil justice system. Accordingly, I concur in the majority's result only, and respectfully decline to join in the majority's writing.

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

ENTERED: April 28, 2015


CLERK