

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

June 12, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6222            Joseph Schaefer, et al.,                                 Index 115693/04  
                  Plaintiffs-Appellants,

-against-

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

---

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Brian J. Shoot of counsel), for appellants.

Steve S. Efron, New York, for respondents.

---

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 4, 2010, which granted defendants' motion to set aside the jury verdict in plaintiffs' favor and directed that judgment be entered in favor of defendants, reversed, on the law, without costs, the motion denied, and the matter remanded for a collateral source hearing.

Defendants failed to preserve their argument that a particular ANSI/AMSE standard did not form a proper basis for liability under General Municipal Law § 205-e, and we decline to

review it in the interest of justice (*Harris v Armstrong*, 64 NY2d 700, 702 [1984]). Indeed, defendants not only failed to object to the trial court's charge regarding the subject standard before the jury rendered its verdict (see CPLR 4110-b), they actually argued that the standard should be given to the jury. Accordingly, the trial court erred in setting aside the verdict based on the unpreserved argument (see *Harris*, 64 NY2d at 702; *Kroupova v Hill*, 242 AD2d 218, 220 [1997], *lv dismissed in part and denied in part* 92 NY2d 1013 [1998]).

The awards for loss of earnings and benefits, and for future medical expenses, are not excessive. However, defendants timely moved for a collateral source hearing and therefore are entitled to that hearing (*Szpakowski v Shelby Realty, LLC*, 48 AD3d 268, 269-270 [2008], *lv denied* 12 NY3d 708 [2009]). We note, in regard to the dissent's position, that plaintiffs' briefs do not request a new trial on damages.

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

CATTERSON, J. (dissenting in part)

I must respectfully dissent in part since I agree with the majority in reinstating the verdict, but believe that a new trial on damages is warranted before proceeding to a collateral source hearing. Under the statutory scheme, the Legislature was clear that evidence on the issue of collateral source reimbursement should be introduced only *after* judgment in favor of the plaintiff has been awarded. As set forth more fully below, precedent is further clear that references to collateral sources at trial potentially prejudice the plaintiff insofar as a jury is likely to take them into account when assessing a negligent defendant's liability for damages. In this case, defense counsel repeatedly, impermissibly and over objection, questioned the plaintiffs' experts on collateral sources. Subsequently, the jury returned a verdict and award considerably lower than the losses projected by the plaintiffs' expert. Since it appears that the evidence adduced as to the plaintiffs' collateral source payments was indeed prejudicial, in my opinion, proceeding directly to a collateral source hearing would compound the error by reducing an award that may already have been reduced by the jury on the basis of the plaintiffs' collateral source payments.

This action for damages arises out of an incident occurring in Pennsylvania Station during the blackout of August 2003. The

plaintiff New York City Transit Authority police officer was injured in the course of rescuing two women trapped in an elevator. The plaintiffs sought recovery under General Municipal Law § 205-e alleging that the New York City Transit Authority violated a standard of the American Society of Mechanical Engineers (hereinafter referred to as "ASME"). Specifically, the plaintiffs alleged that the defendants failed to have proper tools and equipment on hand in the event of an emergency evacuation, including foldable ladders, lifelines and forcible entry tools.

The record reflects that doctors diagnosed the plaintiff police officer with complex regional pain syndrome, a pain syndrome that leaves a patient with abnormal sensations. By November, 2004, the NYPD formally deemed the plaintiff disabled. The plaintiff testified that, after the accident, he suffered from severe pain in his knee and that he underwent arthroscopic surgery followed by other treatments, but that nothing worked to alleviate his chronic knee pain. The plaintiff further testified that following the surgery, he continued to be in pain, and could only hope to bring the pain "sort of, under control," but there was no hope of eliminating it.

The plaintiff's prognosis was a lifetime of chronic pain that, at times, "may get worse and may get minimally better." In

addition to the chronic pain, the plaintiffs' medical expert testified that it was probable the plaintiff would suffer from depression as a result of his injury. The plaintiffs' economic expert projected a loss of income and benefits of more than \$4.1 million.

At trial, defense counsel was allowed, over the plaintiffs' objections, to extensively question the plaintiffs' economist as to the accidental disability benefits, patrolman benefit funds, and other funds that the plaintiffs were receiving. Additionally, defense counsel questioned the plaintiffs' expert as to why he had not deducted collateral source payments from his projections. The jury found the defendants liable for violating the ASME standard requiring "a rescue plan and suitable equipment" and that the violation caused the plaintiff police officer's injury. The jury awarded \$2,673,154 for lost income and benefits, and future loss of earnings. This constituted 65% of the loss projected by his economic expert. Additionally, the jury awarded \$500,000 in medical expenses, despite the plaintiffs' economic expert's estimate of \$707,076.

Nonetheless, the defendants argued in post-trial motions that (1) the jury award for future medical expenses and loss of earnings was excessive, and (2) that the ASME provision on which the jury had premised liability could not serve as a legally

viable GML § 205-e predicate. The trial court granted the defendants' motion on the ASME claim by setting aside the verdict.

On appeal, the plaintiffs assert that the verdict should be reinstated, that the jury award was not excessive, and that the defendants' argument was waived at trial when defense counsel failed to preserve the issue. The defendants argue that, should we reinstate the jury's verdict as the majority has done, the defendants are entitled to a collateral source hearing. For the following reasons, I would remand for a new trial on damages prior to a collateral source hearing.

CPLR 4545 provides, in general, for a reduction in an award of damages based on reimbursement to the plaintiffs from collateral sources. Specifically, section 4545 is titled "Admissibility of collateral source of payment," and it is therefore an evidentiary rule governing when such evidence may be presented: The provision is clear that "evidence [of collateral source payments] shall be admissible for consideration by the court" and that any collateral source deduction "shall be made by the trial court *after* the rendering of the jury's verdict" (emphasis added). CPLR 4545[a]; see also Wooten v. State of New York, 302 A.D.2d 70, 73, 753 N.Y.S.2d 266, 269 (4th Dept. 2002), lv. denied 1 N.Y.3d 501, 775 N.Y.S.2d 239, 807 N.E.2d 289 (2003),

citing Teichman v. Community Hosp. of W. Suffolk, 205 A.D.2d 16, 19, 617 N.Y.S.2d 338, 340 (1994), mod. on other grounds, 87 N.Y.2d 514, 640 N.Y.S.2d 472, 663 N.E.2d 628 (1996) ("the Legislature intended the statute to define an evidentiary rule which is to be applied only where the matter is tried and a judgment in favor of a plaintiff has been 'awarded'").

Because the requirement of deducting from the plaintiffs' award is left solely for the court, no evidence of collateral source payments should be presented to the jury. On the contrary, the jury should determine the plaintiffs' losses without reference to any reimbursement that the plaintiffs may have received. CPLR 4545 ("[t]he plaintiff may prove his or her losses and expenses at the trial irrespective of whether such sums will later have to be deducted from the plaintiff's recovery"); see Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4545:3; see also Kish v. Board of Educ. of City of N.Y., 76 N.Y.2d 379, 384, 559 N.Y.S.2d 687, 689, 558 N.E.2d 1159, 1161 (1990), citing Healy v. Rennert, 9 N.Y.2d 202, 213 N.Y.S.2d 44, 173 N.E.2d 777 (1961).

In Healy, the Court found that evidence of the plaintiff's collateral source payments which was submitted to a jury was prejudicial to the plaintiff since the jury "may well have considered that plaintiff had sustained no damage." Healy, 9

N.Y.2d at 207, 213 N.Y.S.2d at 47. Subsequently, in Kish, the Court elaborated on the theory underlying the collateral source rule by observing that "the damages recoverable for a wrong are not diminished by the fact the party injured has been wholly or partly indemnified for his loss." Kish, 67 N.Y.2d at 384, 559 N.Y.S.2d at 689. Thus, the Court held that "a negligent defendant should not, in fairness, be permitted to reduce its liability in damages by showing that the plaintiff is already entitled by contract or employment right to reimbursement." Id.

In this case, notwithstanding the statutory scheme as to inadmissibility of collateral source evidence at trial, defense counsel extensively questioned the plaintiffs' economist as to disability benefits, and why the plaintiffs' expert had not deducted those collateral sources from his projections. Over the plaintiffs' objections, the defendants continued to question the plaintiffs' economist about collateral source payments including social security payments received by his children. More egregiously, on summation, defense counsel concluded by telling the jury that the economist's failure to deduct for collateral source payments was "like cheating."

The jury awarded the plaintiffs 29 years of future expenses and \$500,000 in future medical expenses, despite uncontroverted testimony that the plaintiff police officer's life expectancy was

36.18 years, and an unrebutted projection of \$707,076 for future medical expenses. In my opinion, the only inference to be made from such a drastic reduction is that defense counsel's impermissible references to collateral source payments prejudiced the jury, and likely led to the reduction of the defendants' damages.

Thus, in my opinion, the plaintiffs would be severely prejudiced by a collateral source hearing that aimed to deduct the plaintiffs' collateral source payments from a jury award that in all likelihood already factored in those payments.

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

ENTERED: JUNE 12, 2012

  
CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6776            25 Avenue C New Realty, LLC, et al.,            Index 304108/09  
                        Plaintiffs,

-against-

Alea North America Insurance Company,  
Defendant-Respondent,

Merrimack Mutual Fire Insurance Company,  
Defendant-Appellant.

---

Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, New York (Erika L. Omundson of counsel), for appellant.

Kaufman Borgeest & Ryan, LLP, New York (Dennis J. Dozis of counsel), for respondent.

---

Order, Supreme Court, Bronx County (Stanley Green, J.), entered August 23, 2010, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment to the extent of declaring that defendant Merrimack Mutual Fire Insurance Company (Merrimack) is obligated to defend and indemnify plaintiffs in an underlying personal injury action, granted defendant Alea North America Insurance Company's cross motion for summary judgment dismissing the complaint and all cross claims against it, and denied Merrimack's cross motion for summary judgment, modified, on the law, to the extent of denying plaintiffs' motion for summary judgment, and granting defendant Merrimack's cross motion for summary judgment to the extent of

declaring that Merrimack is not obligated to defend and indemnify plaintiffs in the underlying personal injury action, and otherwise affirmed, without costs.

Plaintiffs are the owners and parties in interest to property located at 25 Avenue C in New York County. Defendant Merrimack insured this property under a liability policy that was in effect on June 27, 2003. Defendant Alea North America Insurance Company (Alea) insured this property under a liability policy that was in effect on June 27, 2005.

On June 27, 2005, Eamonn Grimes commenced an action against 25 Avenue C to recover for personal injuries allegedly sustained on that property. The complaint alleged that the date of the accident was June 27, 2005. Plaintiffs gave timely notice of the summons and complaint to Alea, and Claims Administration Corporation (CAC), Alea's third-party claims administrator, assigned the defense of this action to the Law Office of Jeffrey Samel (Samel).

In May 2007, an investigator from CAC discovered, after speaking with Grimes, that the accident actually occurred on June 27, 2003, not June 27, 2005 as stated in the complaint. In August 2007, Samel's office received a bill of particulars which alleged that Grimes's accident occurred on June 27, 2003. At the same time, it also received hospital records showing Grimes was

hospitalized from June 28 to July 8, 2003. On October 4, 2007, Samel's office took the deposition of a nonparty witness who testified that Grimes' accident occurred on June 27, 2003.

On May 15, 2008, CAC contacted plaintiffs to determine the name of the insurance carrier that insured the premises during 2003. Plaintiffs advised CAC that Merrimack was the insurer during that period. On May 23, 2008, Samel notified Merrimack that the actual date of the incident was June 27, 2003 and that Alea's policy was not in effect at that time. It tendered the defense of the Grimes action to Merrimack.

On July 8, 2008, Merrimack rejected Alea's tender on the ground that it had not been given timely notice of the claim. Alea advised plaintiffs on August 11, 2008 that it was declining coverage, as the actual date of the incident predated Alea's policy coverage.

Plaintiffs thereafter commenced this action seeking a declaration that either Alea or Merrimack is obligated to defend and indemnify plaintiffs in the underlying personal injury action. All parties subsequently moved and cross moved for summary judgment. Supreme Court granted plaintiffs' motion against Merrimack, finding that Merrimack was obligated to defend and indemnify plaintiffs. It also denied Merrimack's cross motion for, among other things, a declaration that its disclaimer

was valid, finding that Merrimack "was notified within a reasonable time under the facts and circumstances and there is no apparent prejudice, as discovery is ongoing." Finally, the court granted Alea's cross motion for summary judgment dismissing the complaint and all cross claims against it.

Supreme Court properly found that there is no basis in equity for compelling Alea to continue defending and indemnifying plaintiffs. Since Alea's insurance policy was not in effect when the incident took place, equitable remedies cannot create insurance where none exists (*see Axelrod v Magna Carta Cos.*, 63 AD3d 444, 445 [2009]; *Wausau Ins. Cos. v Feldman*, 213 AD2d 179, 180 [1995]).

A different analysis is warranted with respect to the validity of Merrimack's disclaimer of coverage.

Initially, Merrimack was not required to demonstrate any prejudice resulting from the claimed untimely notice, as its policy predated the effective date of the amendments to Insurance Law § 3420(a)(5) that now requires such showing<sup>1</sup> (*Board. of Mgrs. of the 1235 Park Condominium v Clermont Specialty Mgrs., Ltd.*, 68 AD3d 496, 497 [2009]).

Although the court found that under the facts and

---

<sup>1</sup>L 2008, ch 388, § 2 (eff Jan. 17, 2009).

circumstances of this case, Merrimack was notified of the claim within a reasonable period of time, the record before us compels a different conclusion. There is no reasonable explanation for Alea's delay in notifying plaintiffs that their policy was not in effect at the time of the accident. Alea was aware as early as May 2007 that the date of the accident set forth in the complaint was incorrect. Even assuming Alea sought confirmation of that information, its attorneys were conclusively aware in August 2007 that the correct date of the accident was two years prior to the date set forth in the complaint. Moreover, this information was reconfirmed in October 2007 by Samel's deposition of a nonparty witness. Thus, Alea had numerous confirmations that the correct date of the accident was in June 2003, which date was prior to the issuance of its policy on plaintiffs' property.

Moreover, the record is devoid of any explanation as to why CAC, as agent of Alea, waited until May 15, 2008, some seven months after the nonparty deposition, to contact plaintiffs to determine which insurer covered the premises in June 2003.

There is no question that Merrimack was first put on notice of this accident by Alea's assigned defense counsel on May 23, 2008, almost five years after the accident occurred. Although this tender, made on behalf of the insured 25 Ave C, was sufficient to fulfill the policy's notice of claim requirements

so as to trigger the insurer's obligation to issue a timely disclaimer pursuant to Insurance Law § 3420(d) (see *J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d 266, 269 [2009], *lv dismissed* 13 NY3d 889 [2009]), the delay in giving such notice of claim is clearly unreasonable as a matter of law (see *Tower Ins. Co. of N.Y. v Classon Hgts., LLC*, 82 AD3d 632, 634 [2011] [five-month unexcused delay unreasonable as a matter of law]; *Juvenex Ltd. v Burlington Ins. Co.*, 63 AD3d 554, 554 [2009] [two-month delay inexcusable]).

We have repeatedly held that an unexcused delay in giving timely notice will relieve an insurer of its obligations to defend (see e.g. *Tower Ins. Co.*, 83 AD3d at 634; *Juvenex*,, 63 AD3d at 554; *Young Israel Co-Op City v Guideone Mut. Ins. Co.*, 52 AD3d 245, 246 [2008] [reversing motion court's finding that 40-day delay in giving notice was reasonable]).

Since the record is devoid of any valid excuse on Alea's part for delaying notification to plaintiffs and Merrimack for over a year in total from when it first became aware of the

correct date of the accident, under these circumstances,  
Merrimack properly disclaimed coverage on the basis of untimely  
notice.

All concur except Tom, J.P. and Sweeny, J.  
who concur in a separate memorandum by  
Sweeny, J. as follows:

SWEENEY, J. (concurring)

Although I concur with the ultimate result in this case, I write separately because, under the facts of this case, notification of the underlying incident by Alea to Merrimack does not fulfill the requirement that notice must be given by plaintiff.

I agree that there is no reasonable explanation for Alea's delay in notifying plaintiffs that their policy was not in effect at the time of the accident, and that the delay in giving notice to Merrimack of the underlying action was unreasonable as a matter of law. Where I part company with the majority is their conclusion that Alea's tender of the defense of the underlying action to Merrimack was sufficient to fulfill the policy's notice of claim requirements, since the ultimate duty of notification of the incident to the appropriate insurer rests with plaintiffs. There is no question that Merrimack was first put on notice of this accident by Alea's assigned defense counsel on May 23, 2008, almost five years after the accident occurred. However, "[t]he law is clear that an insured's obligation to provide timely notice is not excused on the basis that the insurer has received notice of the underlying occurrence from an independent source"

(*Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 43 [2002]; see also *American Mfrs. Mut. Ins. Co. v CMA Enters.*, 246 AD2d 373 [1998]).

*J.T. Magen v Hartford Fire Ins. Co.* (64 AD3d 266 [2009], *lv dismissed* 13 NY3d 889 [2009]) does not compel a different result. In *Magen*, the plaintiff was the construction manager on a job site and hired a subcontractor named Erath. The contract between the two contained a provision requiring Erath to indemnify and hold Magen harmless for personal injuries arising out of Erath's work. Erath secured an insurance policy from defendant Hartford to comply with this provision, naming the plaintiff as an additional insured (*id.* at 267). The underlying personal injury action involved a worker employed by Erath who was injured on the job site. The plaintiff timely notified its insurer (Travelers) of the commencement of the personal injury action. Travelers, in turn, notified defendant Hartford on June 24, 2005 of the action and requested Hartford to defend and indemnify the plaintiff as an additional insured under its policy with Erath. On August 10, 2005, Hartford asserted that it had not received a copy of the summons and complaint in the underlying action. Although it claimed a copy of the summons and complaint had been included in its tender letter, Travelers mailed another copy to Hartford on August 16, 2005. Fifty-one days later, by letter dated October

6, 2005 Hartford disclaimed coverage, alleging that plaintiff had failed to comply with the policy requirement that plaintiff give notice "as soon as practical" of any occurrence that might give rise to damages (*id.* at 268.)

We held that "the tender letter insurer Travelers wrote on behalf of [the] plaintiff and others to insurance carrier Hartford -- asking that their mutual insureds be provided with a defense and indemnity, as additional insured under the policy issued to Erath -- fulfills the policy's notice of claim requirements so as to trigger the insurer's obligation to issue a timely disclaimer" (64 AD3d at 269).

It is significant that *Magen* involved two insurers who simultaneously provided coverage to the same party, one as a principal insurer (Travelers) and one as the additional insurer (Hartford). There was no question that the plaintiff gave timely notice to Travelers, its principal insurer who in turn tendered defense of the action to Hartford pursuant to the policy terms naming the plaintiff as an additional insured. Hartford's disclaimer was properly found to be untimely as a matter of law. Since both insurers mutually insured plaintiff, timely notice by one carrier to the other fulfills the policy requirements that plaintiff give timely notice of claim.

Here, plaintiffs are not in the situation of a mutual

insured. Alea's policy was not in effect at the time of the incident. There is nothing in the record to indicate that plaintiffs ever gave notice of the incident to Merrimack after they became aware that Merrimack was the proper insurer. Rather, as their complaint alleges, "plaintiffs relied to their detriment on CAC/Alea NAIC's acts and omissions, including but not limited to Alea NAIC's delay in providing notice to Merrimack." Such reliance does not relieve plaintiffs of their duty under the policy to give timely notice of the incident to Merrimack. The failure to give such notice as required by the terms of the policy requires a declaration in favor of Merrimack.

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

ENTERED: JUNE 12, 2012

  
CLERK

Mazzarelli, J.P., Andrias, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

6926- Index 112959/05

6927 Tishman Construction Corp. of  
New York, et al.,  
Plaintiffs-Appellants,

-against-

Great American Insurance  
Company, et al.,  
Defendants-Respondents.

---

Jones Hirsch Connors & Bull P.C., New York (Richard Imbrogno of  
counsel), for appellants.

Hardin, Kundla, McKeon & Poletto, P.A., New York (Stephen P.  
Murray of counsel), for Great American Insurance Company,  
respondent.

Greenblatt Lesser LLP, New York (Judah D. Greenblatt of counsel),  
for Schiavone Construction Company, respondent.

---

Order, Supreme Court, New York County (Jane S. Solomon, J.),  
entered October 15, 2010, which to the extent appealed from as  
limited by the briefs, denied plaintiffs' motion for summary  
judgment seeking contractual indemnification, and order, same  
court and Justice, entered June 27, 2011, which, inter alia,  
granted defendant Schiavone Construction Company's motion to  
renew and reargue, and upon reargument, vacated that portion of  
its prior decision denying defendant Schiavone's motion for  
summary judgment seeking dismissal of the cause of action for  
contractual indemnification, granted the motion and declared that

Schiavone has no obligation to indemnify plaintiffs Tishman Construction Corp. and Carnegie Hall Corporation under the applicable insurance policies, unanimously affirmed, without costs.

Two employees of defendant Schiavone, a subcontractor performing work at a construction site owned by plaintiff Carnegie Hall and managed by plaintiff Tishman, sustained personal injuries when a replacement piston failed on a material hoist in which they were riding, causing it to collapse. One of the employees settled the litigation he commenced as a result of the injuries he suffered, and the other commenced litigation against Carnegie Hall and Tishman, as well as the hoist designer and manufacturer, and the manufacturer of the allegedly defective piston. Since Schiavone was not a party to that litigation, its liability was never determined, and it cannot now be bound by any testimony given by its employees therein (*see Riedel Glass Works, Inc. v Indemnity Ins. Co. of N. Am.*, 261 AD 886 [1941]), nor does that testimony fall within the parameters of CPLR 4517.

This conclusion is not altered by considering the offered testimony. The apportionment of responsibility between Carnegie Hall, Tishman and Schiavone was not determined in the underlying trial. More importantly, such apportionment is irrelevant to the instant dispute because there are enforceable waivers of

subrogation contained within the primary insurance policies issued to the respective parties (see *Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 232-33 [2006]). These waivers preclude recovery by the plaintiffs.

Finally, we reject plaintiffs' argument that the "cross liability" exclusion contained within the Great American excess policy issued to Schiavone was not a waiver of subrogation; that exclusion must be read together with the contractual indemnification coverage afforded by the underlying National Union policy (*cf. Twin City Fire Ins. Co. v Ohio Cas. Ins. Co.*, 480 F3d 1254 [11th Cir 2007]). Coverage under the Great American policy for "contractual liability" followed the underlying form, thereby incorporating National Union's waiver of subrogation provision (see *Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.*, 92 NY2d 363, 369 [1998]). In contrast, in *Twin City Fire Ins. Co.* (480 F3d 1254), the primary policy provided coverage.

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

ENTERED: JUNE 12, 2012

  
CLERK



respondent the License Division for a carry business handgun license, in connection with his business, Baraka Food Corp. As opposed to more restricted handgun licenses, a carry business license would have permitted petitioner to carry a concealed handgun on his person without restriction. An applicant for a carry business license must meet certain requirements, including showing that he is "of good moral character" and has no prior conviction "for a felony or other serious offense . . . or of a misdemeanor crime of domestic violence" (38 RCNY 5-02). The applicant must also establish "proper cause" based upon business necessity by showing, inter alia, exposure to "extraordinary personal danger" (38 RCNY 5-03; *see also* Penal Law § 400.00[2][f]).

On June 17, 2009, the License Division denied petitioner's application, based on eight prior arrests, seven of which were dismissed and one that resulted in a 1997 disorderly conduct conviction, as well as a failure to show sufficient need for a handgun.

In November 2009, petitioner commenced this proceeding, seeking an order annulling the License Division's denial of his application for a carry business license. On February 1, 2010, the motion court denied the petition and dismissed the proceeding.

After petitioner moved to reargue, respondents agreed to issue a limited carry business license to him. That license would allow petitioner to carry a concealed handgun only from his business to the bank (see 38 RCNY 5-01[c]). On March 26, 2010, petitioner and respondents, through counsel, executed a stipulation of settlement, providing as follows:

"(2) The NYPD's License Division will grant petitioner a limited carry business license. The scope of the license will be governed by the terms of this stipulation. Petitioner will also be bound by any applicable laws, rules and regulations governing pistols and pistol licenses . . .

(5) Any violation of the specified provisions of this stipulation and all applicable laws, rules and regulation[s] is cause for revocation of the granted licenses."

On April 12, 2010, respondents notified petitioner that they could not proceed with the stipulation because they had overlooked an outstanding misdemeanor summons issued on December 18, 2009. Respondents, however, have since acknowledged that they had been aware of the pending charges when they had entered into the stipulation with petitioner.

It is well settled that a stipulation is a binding agreement that courts cannot set aside absent "fraud, collusion, mistake or accident" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]; see also *McCoy v Feinman*, 99 NY2d 295, 302 [2002] ["As with a contract, courts should not disturb a valid stipulation absent a

showing of good cause such as fraud, collusion, mistake or duress or unless the agreement is unconscionable or contrary to public policy"] [internal citations omitted]).

Accordingly, the stipulation binds respondents who, through counsel, entered into it with knowledge of petitioner's outstanding arrest (*see Hallock*, 64 NY2d at 230).

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

ENTERED: JUNE 12, 2012

  
CLERK



true intent when the retainer was executed" (*Demov, Morris, Levin & Shein v Glantz*, 53 NY2d 553, 557 [1981]). Accordingly, the motion court erred in failing to dismiss plaintiff's cause of action for fraudulent inducement against both the corporate and the individual defendant (*Kaplan v. Heinfling*, 136 AD2d 34, 39 [1988], *lv denied* 72 NY2d 810 [1988]).

The court correctly declined to dismiss the complaint pursuant to CPLR 3211(a)(4), because "[t]he three remedies of an attorney discharged without cause – the retaining lien, the charging lien, and the plenary action in quantum meruit – are not exclusive but cumulative" (see *Levy v Laing*, 43 AD3d 713, 715 [2007]), and the attorney "does not waive her right to commence an immediate plenary action for a judgment against her client by commencing a proceeding to fix the amount of her charging lien" (*Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218, 219 [1997]). Moreover, "an attorney may enforce his lien in a court other than that before which his services were rendered" (see *Nickel Rim Mines Ltd. v Universal-Cyclops Steel Corp.*, 202 F Supp 170, 176 [D NJ 1962]).

Contrary to the dissent's contention, the court also correctly declined to dismiss plaintiff's cause of action for quantum meruit pursuant to CPLR 3211(a)(7). Plaintiff alleges that it was terminated without cause by defendants, and received

no compensation whatsoever for the three years of work it performed on the case and the value it brought to the case. Specifically, within its complaint, plaintiff pleaded that it "fully and faithfully performed legal services for BanxCorp and Mehl," that when it "performed those legal services for BanxCorp and Mehl, it reasonably expected to be compensated for those services," that "BanxCorp and Mehl encouraged the [plaintiff] to provide them with legal services, participated in the [plaintiff's] provision of such services, and accepted the benefits of the legal services the [plaintiff] provided to them," and that the services "were rendered under circumstances in which BanxCorp and Mehl knew that the [plaintiff] expected to be compensated for those services." Since a plaintiff pleads a cause of action for quantum meruit when he alleges that (1) services were performed in good faith, (2) the acceptance of the services by the person to whom they were rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services (*Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487, 489 [2009]; *Nabi v Sells*, 70 AD3d 252, 252 [2009]; *Soumayah v Minnelli*, 41 AD3d 390, 391 [2007]), based on the foregoing, plaintiff has adequately pleaded a cause of action for quantum meruit against all the defendants. *Fulbright* doesn't avail Mehl since there we dismissed plaintiff's cause of action

for quantum meruit against the corporate defendant's president insofar as plaintiff in that case failed to allege three elements critical to a cause of action for quantum meruit (*Fulbright* at 489).

Defendants' attempt to disqualify plaintiff from representing itself in this fee dispute pursuant to the professional rules regarding conflict of interest is misplaced (see e.g. *Proskauer Rose v Koepfel*, 6 AD3d 174 [2004]). Further, a lawyer "is entitled to reveal the confidences of [a client] in [a] separate fee collection action, albeit only to the extremely limited extent necessary to establish and collect its fees" (*Feeley v Midas Props.*, 199 AD2d 238, 239 [1993]). Defendants' vague, general assertions that plaintiff "maliciously pierced their former client BanxCorp's privileged attorney-client confidential information," are insufficient to establish that plaintiff improperly divulged confidential information necessary to the current litigation.

Similarly, defendants have not identified any specific documents they seek to have sealed or redacted, or established good cause for requesting sealing or redaction (see 22 NYCRR 216.1[a]; *Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1, 6 [2000]). The documents as to which defendants moved for a protective order are relevant to this litigation, and the

request for their production was reasonable (see *Tornheim v Blue & White Food Prods. Corp.*, 73 AD3d 745 [2010]).

All concur except DeGrasse, J. who dissents in part in a memorandum as follows:

DEGRASSE, J. (dissenting in part)

The majority correctly concludes that the fraud cause of action should have been dismissed for failure to state a cause of action. Indeed, absent an agreement to the contrary, a discharged attorney's recovery, if any, from a former client is limited to quantum meruit (see *Levy v Laing*, 43 AD3d 713, 715 [2007]). I respectfully dissent, however, because I disagree with the majority's conclusion that a quantum meruit claim has been stated against defendant Norbert Mehl under the theory of piercing the corporate veil.

Plaintiff, a law firm, seeks to recover the reasonable value of services it rendered while representing defendant BanxCorp, the plaintiff in *BanxCorp v Bankrate, Inc.*, an antitrust action that was filed in the United States District Court for the District of New Jersey (Civil Action No. 07-3398). Plaintiff rendered its services pursuant to a written contingency fee agreement that was executed on behalf of BanxCorp by Mehl, its principal. The motion court declined to dismiss the complaint as against Mehl on the sole ground that "a corporate officer who participates in the commission of a tort can be held personally liable even if the participation is for the corporation's benefit." Although it might have applied to the now dismissed fraud cause of action, the motion court's reasoning has no

application to the quantum meruit claim, the only remaining cause of action. This is because quantum meruit is not a theory of tort liability.

Plaintiff's rationale for piercing BanxCorp's corporate veil is equally unavailing. "The party seeking to pierce the corporate veil must establish that the owners, through their dominion, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142 [1993]). An inference of abuse, however, does not arise "where a corporation was formed for legal purposes or is engaged in legitimate business" (*Credit Suisse First Boston v Utrecht-America Fin. Co.*, 80 AD3d 485, 488 [2011] [citation omitted]). Here, plaintiff makes no claim of such illegality or illegitimacy with respect to BanxCorp's formation or business. In fact, it is alleged in the antitrust complaint, drafted by plaintiff, that BanxCorp is in the business of providing bank rate tables listing interest rates for financial institutions (*see BanxCorp v Bankrate*, US Dist Ct, D NJ, 07 Civ 3398, Wigenton, J., 2008). Plaintiff seeks to pierce the corporate veil on the basis of assertions that Mehl dominated BanxCorp and used its credit lines for his personal needs. These allegations do not amount to

anything that can be construed as the use of BanxCorp's corporate form to perpetrate a wrong *against plaintiff*. This case is similar to *Fulbright & Jaworski, LLP v Carucci* (63 AD3d 487 [2009]), in which this Court found that a quantum meruit claim against its corporate client's president was not stated. Here, as in *Fulbright*, there is no allegation of facts from which it can be inferred that Mehl, as an individual, accepted services from plaintiff or that plaintiff had a reasonable expectation of compensation by Mehl. Without doubt, Mehl himself could not collect on any judgment that might be entered in favor of BanxCorp in the antitrust action as a result of plaintiff's services.

In addition, as acknowledged by the majority, plaintiff's remedies - a retaining lien, a charging lien and a plenary action to recover the reasonable value of its services are not exclusive but cumulative (*see Levy v Laing*, 43 AD3d at 715). In fact, NJSA § 2A:13-5, a statute cited by plaintiff, provides:

"After the filing of a complaint . . . the attorney or counsellor at law, who shall appear in the cause for the party instituting the action . . . shall have a lien for compensation, upon his client's action, cause of action . . . which shall contain and attach to a verdict, report, decision, award, judgment or final order in his client's favor, and the proceeds thereof in whose hands they may come. The lien shall not be affected by any settlement between the parties before or after judgment or final order, nor by the entry of satisfaction or cancellation of a judgment on the

record. The court in which the action or other proceeding is pending, upon the petition of the attorney or counsellor at law, may determine and enforce the lien."

Therefore, plaintiff can never lose the right to impose a charging lien against any judgment or settlement BanxCorp might obtain in the federal action. For this reason, equitable grounds for piercing the corporate veil have not been stated inasmuch as plaintiff's sole remedy, the right to be compensated for the reasonable value of its services, is unimpaired. I otherwise agree with the majority's opinion with respect to defendants' motion for a protective order and an order disqualifying counsel and sealing or redacting the record. I would, therefore, modify the order entered below to the additional extent of dismissing all of plaintiff's claims against Mehl.

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

ENTERED: JUNE 12, 2012

  
CLERK

CORRECTED ORDER - August 7, 2012

Gonzalez, P.J., Andrias, **Saxe**, DeGrasse, Román, JJ.

7763 Kathleen Rice, etc., Index 101207/05  
Plaintiff-Respondent, 590813/05  
590592/08  
-against- 590611/08  
590598/09

West 37th Group, LLC, et al.,  
Defendants-Appellants-Respondents,

Cord Contracting Co.,  
Defendant.

- - - - -

West 37th Group, LLC, et al.,  
Third-Party Plaintiffs-Appellants-Respondents,

-against-

Five Boro Associates,  
Third-Party Defendant-Respondent-Appellant.

- - - - -

West 37th Group, LLC, et al.,  
Second Third-Party  
Plaintiffs-Appellants-Respondents,

-against-

Joseph Carfi, M.D.,  
Second Third-Party Defendant-Respondent,

Bruce Herman, Ph.D.,  
Second Third-Party Defendant.

[And Other Actions]

---

Goldberg Segalla, LLP, White Plains (William T. O'Connell of  
counsel), for appellants-respondents.

McGaw Alventosa & Zajac, Jericho (Joseph Horowitz of counsel),  
for respondent-appellant.

Louis Grandelli, P.C., New York (Louis Grandelli of counsel), for  
Kathleen Rice, respondent.

Lewis Johs Avallone Aviles, LLP, Melville (Seth M. Weinberg of counsel), for Joseph Carfi, M.D., respondent.

---

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered July 13, 2011, which denied the motion of defendants/third-party plaintiffs West 37 Group, LLC and GJF Construction Corp. d/b/a Builders Group (collectively, West Group) for summary judgment dismissing the wrongful death cause of action, and denied the cross motion of third-party defendant Five Boro Associates (Five Boro) for summary judgment dismissing the wrongful death claim, and the fourth third-party complaint alleging claims for common-law indemnification and contribution, unanimously affirmed, without costs.

Plaintiff was the wife of the decedent James Rice. On November 23, 2004, the decedent was employed by Five Boro as a steam fitter at a project owned and managed by West Group. The decedent sustained significant injuries when, while working 15 feet above ground on a ladder owned by defendant Cord Contracting Co., the ladder collapsed. This Court previously affirmed a finding of partial summary judgment as to liability on plaintiff's Labor Law § 240(1) claim (78 AD3d 492 [2010]).

As a result of the injuries he sustained from the worksite accident, the decedent began seeing a pain management physician, second third-party defendant, Joseph Carfi, M.D., and a

psychologist, second third-party defendant, Bruce Herman PhD. Two years after the accident, the decedent died, and the autopsy ruled the cause of death to be accidental due to an "acute intoxication due to combined effects of Fentanyl, Diazepam [Valium] and Alprazolam [Xanax]," with a contributing cause of "atherosclerotic cardiovascular disease."

We reject defendants' contention that the decedent's accidental overdose on two currently prescribed medications, and a third medication that may have been recently discontinued, was an extraordinary and unforeseeable occurrence as a matter of law. "Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

Accordingly, the issue of whether the accidental overdose of prescribed pain medication was a foreseeable consequence of the serious injuries suffered by plaintiff's decedent is a question for the trier of fact (*cf. Fuller v Preis*, 35 NY2d 425 [1974]; *Koren v Weihs*, 201 AD2d 268 [1994]). Defendants do not contest that the decedent suffered painful serious injuries, requiring him to take significant pain-killing drugs, each of which carry their own risks, and plaintiff proffered admissible evidence

showing that the decedent was not abusing his medication.

In view of the foregoing, Five Boro is not entitled to dismissal of the contribution and indemnity claims on the ground that the decedent did not suffer a "grave injury" within the meaning of Workers' Compensation Law § 11.

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

ENTERED: JUNE 12, 2012

  
CLERK



Defendant's occasional overnight stays at the apartment several years earlier were insufficient to establish that he had an expectation of privacy in the premises (*see People v Ramirez-Portoreal*, 88 NY2d 99, 108-109 [1996]; *People v Ortiz*, 83 NY2d 840, 842-843 [1994]).

Defendant's claim of standing relies heavily on the fact that defendant's parole officer had permitted defendant to stay temporarily at the friend's apartment. However, this did not establish standing in the absence of evidence that defendant availed himself of that opportunity. In any event, before the day of the search the parole officer had already informed defendant that he was no longer permitted to stay at his friend's apartment, because the friend was a codefendant in defendant's prior robbery case.

The record also supports the hearing court's alternative finding that the pistol was recovered as the result of a lawful security sweep of the apartment made after executing the arrest warrant (*see Maryland v Buie*, 494 US 325[1990]; *People v Andino*, 256 AD2d 153 [1998], *lv denied* 93 NY2d 922 [1999]). Under the circumstances, it was reasonable to move the couch to check if anyone was hiding behind or under it. We have considered and rejected defendant's remaining arguments concerning the suppression hearing.

The challenged portions of the prosecutor's summation were responsive to defense arguments, drew appropriate inferences from the evidence, and did not shift the burden of proof. To the extent there were any improprieties, they were not so egregious as to deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

The court properly imposed a consecutive term for defendant's conviction of second-degree weapon possession under Penal Law § 265.03(3) (possession outside home or place of business). We note that this crime has no intent element; accordingly, the issue of whether consecutive sentences require separate unlawful intents (*see e.g. People v Wright*, 87 AD3d 229 [2011], *lv granted* 2011 NY Slip Op 78815[U][2011]) is not implicated here. The evidence clearly established that defendant was carrying the weapon at the time he encountered and shot the victim. Accordingly, the act of possession was complete before the shooting (*see e.g. People v Mitchell*, 34 AD3d 358 [2006], *lv denied* 8 NY3d 988 [2007]), and consecutive sentences were authorized by Penal Law § 70.25(2). To the extent defendant is

raising a constitutional claim regarding the procedure by which the court imposed consecutive sentences, that claim is without merit (see *Oregon v Ice*, 555 US 160 [2009]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 12, 2012

  
CLERK

Saxe, J.P., Catterson, Acosta, DeGrasse, Richter, JJ.

7892- Cornelius James, Index 20797/06  
7892A Plaintiff-Respondent, 251212/08

Shariene James,  
Plaintiff,

-against-

Ann Farhood, et al.,  
Defendants-Appellants,

Garfield Huguley,  
Defendant-Respondent.

- - - - -

Anwar Mian,  
Plaintiff-Respondent,

-against-

Garfield Huguley,  
Defendant-Respondent,

Nicholas Farhood, et al.,  
Defendants-Appellants.

---

Rivkin Radler LLP, Uniondale (Merril S. Biscone of counsel), for appellants/appellants.

Ogen & Sedaghati, P.C., New York (Eitan A. Ogen of counsel), for Cornelius James respondent.

Martin, Fallon & Mullé, Huntington (Michael Jones of counsel), for Garfield Huguley, respondent.

Pollack Pollack Isaac & De Cicco, New York (Brian J. Isaac of counsel), for Anwar Mian, respondent.

---

Judgment, Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 30, 2011, after a jury verdict in favor of

plaintiff Cornelius James, inter alia, apportioning liability at 80% to defendants Ann Farhood and Nicholas Farhood (collectively Farhood) and 20% to defendant Garfield Huguley and awarding James the principal amounts of \$300,000 for past pain and suffering, \$500,000 for future pain and suffering over 30 years and \$295,000 in future medical expenses, unanimously modified, on the law, to reduce the award for future medical expenses to \$245,000, and otherwise affirmed, without costs. Order, same court and Justice, entered March 24, 2011, which, to the extent appealable, denied Farhood's motion to set aside the jury verdict awarding plaintiff Anwar Mian the principal amounts of \$200,000 for past pain and suffering and \$300,000 for future pain and suffering over 10 years, or, in the alternative to reapportion liability and/or to reduce the award of damages, unanimously affirmed.

The apportionment of liability of 80% to Farhood and 20% to Huguley was appropriate. Where there are numerous inconsistencies as to how an accident occurred, it is the jury which is in the best position to evaluate the credibility of the witnesses (see *Skibola v Structure-Tone, Inc.*, 16 AD3d 238 [2005]). Moreover, the jury's resolution of issues of credibility is entitled to deference (see *Cikoja v Elstein*, 81 AD3d 515 [2011]).

Here, notwithstanding the testimony of the nonparty witness, who confirmed Farhood's version of the accident and blamed

Huguley, the jury could have considered other evidence in finding Farhood primarily at fault. Following its contact with Huguley's vehicle, Farhood's vehicle left the road, continued to travel for 15 to 20 yards, and crossed the sidewalk before striking pedestrian James, and then striking Mian, who was sitting in a grassy area behind the sidewalk. Moreover, Farhood failed to produce photographs he took at the scene or call any of his passengers as witnesses. Thus, the jury could have reasonably concluded that Farhood was speeding and not in control of his vehicle at the time of the accident.

Farhood's challenge to the testimony of Mian's treating physician concerning the results of an EMG performed on Mian by another physician is unpreserved. The initial objection to the testimony was waived when Farhood consented to entering the records of that second physician, which included the EMG, into evidence.

James suffered herniations and bulges to all three spinal regions (cervical, thoracic and lumbar) resulting in both upper and lower radiculopathy. Thus, the jury's awards for past and future pain and suffering were not excessive (*see Spetter v Alliance Towing Corp.*, 58 AD3d 424 [2009]; *Sanabia v 718 W. 178th St., LLC*, 49 AD3d 426 [2008]; *Amonbea v Perry Beverage Distribs.*, 294 AD2d 285 [2002]).

Mian suffered multiple herniations and bulges to the spine, resulting in both upper and lower radiculopathy. Mian also suffered a full tear to his supraspinous tendon requiring surgical repair, which could not be performed due to Mian's heart condition. Mian testified that he can no longer work and that his wife must help him with basic hygiene and dressing. Accordingly, the awards for past and future pain and suffering did not deviate materially from what would be reasonable compensation (see e.g. *Spetter* at 424; *Amonbea* at 285; *Guillory v Nautilus Real Estate*, 208 AD2d 336 [1995], appeal dismissed and lv denied 86 NY2d 881 [1995]).

James' award for future medical expenses must be reduced by \$50,000 to \$245,000 by operation of Insurance Law § 5104(a) (see *Lloyd v Russo*, 273 AD2d 359, 360 [2000]).

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

ENTERED: JUNE 12, 2012



CLERK

Saxe, J.P., Catterson, Acosta, DeGrasse, Richter, JJ.

7893 Elizabeth Combier, Index 101748/05  
Plaintiff-Appellant,

-against-

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

El-Kam Realty Co.,  
Defendant-Respondent.

[And a Third-Party Action]

---

Elizabeth Combier, appellant pro se.

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

---

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered April 28, 2011, which, in an action for personal injuries sustained when plaintiff tripped and fell over fencing surrounding a tree well on the sidewalk abutting a building owned by defendant/third-party plaintiff El Kam Realty Co. (El Kam), granted El Kam's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

El Kam established its entitlement to judgment as a matter of law. El Kam submitted evidence showing that it did not install, maintain, control or repair the fencing around the tree

well which allegedly caused plaintiff's fall (see *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]). In opposition, plaintiff failed to raise a triable issue of fact. Although plaintiff argued that El-Kam contracted to have third-party defendant perform work to improve the subject tree well, plaintiff made no showing that El-Kam assumed any control over that work (see *Fernandez v 707, Inc.*, 85 AD3d 539 [2011]).

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

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

ENTERED: JUNE 12, 2012

  
CLERK

Saxe, J.P., Catterson, Acosta, DeGrasse, Richter, JJ.

7896 In re "Female" S., also known as  
Eileen S., etc.,

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

Victor C., etc.,  
Respondent-Appellant,

Graham-Windham Services to Families  
and Children,  
Petitioner-Respondent.

---

Geoffrey P. Berman, Larchmont, for appellant.

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

---

Order, Family Court, Bronx County (Anne-Marie Jolly, J.),  
entered on or about May 13, 2011, which, to the extent appealed  
from, after a fact-finding determination of abandonment,  
terminated respondent father's parental rights and committed  
custody and guardianship of the subject child to petitioner  
agency and the Commissioner of Social Services for the purpose of  
adoption, unanimously affirmed, without costs.

The agency established by clear and convincing evidence that  
the father failed to contact the child for six months preceding  
the filing of the petition (*see Matter of Annette B.*, 2 AD3d 721  
[2003], *affd* 4 NY3d 509 [2005]). The testimony concerning the  
father's two telephone calls to the agency concerning his

daughter as a possible resource for the child does not require a contrary finding (see *Matter of Baby Boy B.*, 262 AD2d 9 [1999]; *Matter of Dawntal Danielle C.*, 170 AD2d 375 [1991]).

The court properly found that termination of the father's parental rights was in the child's best interests in order to permit her to be adopted by her foster mother. The foster mother has had custody of the child since shortly after her birth and has provided her with excellent care. There is no presumption that the child's interests would be best served by placing custody with the father's daughter, who had limited contact with the child since placement (see *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]).

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

ENTERED: JUNE 12, 2012

  
CLERK



testified that the bus was crossing an intersection when a car, traveling in the opposite direction, crossed over the double yellow lines and cut in front of the bus in order to make a left turn, forcing the bus driver to apply the brakes. Plaintiff's testimony that the bus driver was "speeding" was insufficient to raise a triable issue of fact (*see Alston v American Tr., Inc.*, 82 AD3d 546, 547 [2011]).

Defendants also made a prima facie showing that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) by submitting expert medical reports finding normal ranges of motion in the claimed affected body parts and no objective evidence that any limitations resulted from the accident (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [2011]). The finding of a minor limitation in plaintiff's lumbar spine by one of defendants' physicians was "insignificant for purposes of Insurance Law § 5102(d)" (*Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [2010]). In opposition, plaintiff failed to raise a triable issue of fact, since she did not submit any objective evidence of limitations based on a recent examination of any of the subject body parts (*see Shu Chi Lam v Wang Dong*, 84 AD3d 515, 516 [2011]; *Townes v Harlem Group, Inc.*, 82 AD3d 583, 584 [2011]). The most current medical evidence upon which plaintiff relied was the affirmed report of one of her treating

physicians, outlining treatment she received in 2007, nearly three years before defendants' experts' findings of full range of motion (see *Zambrana v Timothy*, \_\_\_ AD3d \_\_\_, 943 NYS2d 92 [2012]).

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

ENTERED: JUNE 12, 2012

  
CLERK



We have considered plaintiff's remaining contentions, including that he himself had retained defendants, and find them unavailing.

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

ENTERED: JUNE 12, 2012

  
CLERK



In opposition, Davis raised an issue of fact by submitting affirmed MRI reports showing disc herniation at L5-S1 and multiple cervical disc bulges, an affirmed EMG report revealing radiculopathy, and an affirmation by her treating orthopedist, who repeatedly and recently measured her diminished ranges of motion (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 350-351 [2002]).

Davis also raised an issue of fact as to causation, with her treating orthopedist's opinion attributing her injuries to the accident (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Williams v Perez*, 92 AD3d 528, 529 [2012]). Moreover, Davis was relatively young at the time of the accident, and there is no evidence in the record that before then she had had any injuries or treatment (*see Vera v Islam*, 70 AD3d 525 [2010]; *June v Akhtar*, 62 AD3d 427 [2009]).

Plaintiff alleges that she was confined to home and could not work for over three months. She further alleges that her doctors told her she could not lift heavy items, which was a

required part of her job. Thus there are issues of fact as to her 90/180 day claim.

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

ENTERED: JUNE 12, 2012

  
CLERK

Saxe, J.P., Catterson, Acosta, DeGrasse, Richter, JJ.

7905 In re Domanick B.,

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.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for presentment agency.

---

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about September 7, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the first degree and sexual abuse in the third degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

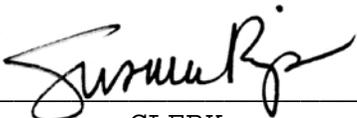
The court properly permitted the six-year-old victim to give sworn testimony. The victim's voir dire responses, when viewed as a whole, established that he sufficiently understood the difference between truth and falsity, the significance of an oath or promise to tell the truth, and the wrongfulness and consequences of lying (*see People v Nisoff*, 36 NY2d 560, 565-566

[1975]; *People v Cordero*, 257 AD2d 372 [1999], lv denied 93 NY2d 968 [1999]).

The court's finding was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility.

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

ENTERED: JUNE 12, 2012

  
CLERK

Saxe, J.P., Catterson, Acosta, DeGrasse, Richter, JJ.

7909N Pat Roddy, Index 113659/02  
Plaintiff,

-against-

Nederlander Producing Company  
of America, Inc., et al.,  
Defendants-Respondents,

Abhann Productions, Inc.,  
Defendant-Appellant.

- - - - -

The Gershwin Theatre,  
Third-Party Plaintiff-Respondent,

-against-

Abhann Productions, Inc.,  
Third-Party Defendant-Appellant.

---

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

Law Offices of Charles J. Siegel, New York (Robert S. Cypher of  
counsel), for respondents/respondent.

---

Order, Supreme Court, New York County (Louis B. York, J.),  
entered December 9, 2011, which denied third-party defendant  
Abhann Productions, Inc.'s (Abhann) motion to disqualify the Law  
Offices of Charles J. Siegel (the Siegel Firm) from representing  
defendants Nederlander Producing Company of America, Inc.  
(Nederlander) and The Gershwin Theatre (Gershwin), unanimously  
modified, on the law, to grant the motion insofar as it seeks  
disqualification of the Siegel Firm from the continued

representation of Gershwin, and otherwise affirmed, without costs.

Supreme Court correctly noted that a potential for a conflict exists resulting from the Siegel Firm's joint representation of both Gershwin and Nederlander, as each defendant has a competing interest in minimizing its proportional share of the damages. An attorney "'may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship'" (*Flores v Willard J. Price Assoc., LLC*, 20 AD3d 343, 344 [2005], quoting *Matter of Kelly*, 23 NY2d 368, 376 [1968]), and "'doubts as to the existence of a conflict of interest must be resolved in favor of disqualification'" (*Justinian Capital SPC v WestLB AG, N.Y. Branch*, 90 AD3d 585, 585 [2011], quoting *Rose Ocko Found. v Liebovitz*, 155 AD2d 426, 428 [1989]).

However, the court denied the motion on the ground that granting it would further delay the prosecution of the plaintiff's case. This decision would preclude Abhann, the contractual indemnitor of Gershwin in this matter, from exercising its right to properly defend the action in an effort to limit its exposure to Gershwin's proportional share of the liability. Abhann contends that the Siegel Firm, as staff

counsel to CNA Insurance, the primary insurer of Gershwin and Nederlander, could seek to improperly funnel liability from Nederlander to Gershwin. In support of this position, Abhann cites, *inter alia*, the fact that the Siegel Firm rejected Abhann's insurer's agreement to accept the defense and indemnity of Gershwin with the explanation that Abhann was also obligated to contractually indemnify Nederlander. We find that the Siegel Firm's stance is foreclosed by this Court's recent decision in this matter (93 AD3d 495 [2012]). Furthermore, Nederlander's contention that it, like Gershwin, also owns the premises, was waived by its denial of ownership in its answer to the complaint. This conduct by the primary insurer's house counsel, given the circumstance of these joint clients' divergent litigation strategies, sufficiently raises, as noted above, "doubts as to the existence of a conflict of interest [that] must be resolved in favor of disqualification." Denying the motion would reward the Siegel Firm's dilatory tactics at the expense of Abhann's rights.

To the extent Abhann argues that the Siegel Firm should also be disqualified from representing Nederlander on the ground that the Siegel Firm had obtained confidential information from Gershwin during its representation thus far, Abhann has failed to

identify what confidential information would have been imparted to the firm so as to warrant such disqualification (see *Pelligrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 98, 100 [2008]).

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

ENTERED: JUNE 12, 2012

  
CLERK



if plaintiff provided a reasonable excuse for her default, she failed to demonstrate that her action has merit (see *Carroll v Nostra Realty Corp.*, 54 AD3d 623 [2008], *lv denied* 12 NY3d 792 [2009]; see also *Vargas v Ahmed*, 41 AD3d 328, 329 [2007]). Indeed, her affidavit asserting the existence of bulging or herniated discs is not, in and of itself, "evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury" (*Rubencamp v Arrow Exterminating Co., Inc.*, 79 AD3d 509, 510 [2010]).

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

ENTERED: JUNE 12, 2012

  
CLERK



People would have had no reason to use defendant's acknowledgment of his name against him for any purpose.

In any event, it would be an exercise in futility for this Court to order a suppression hearing. At such a hearing the People would simply reiterate their present position that the only statement was defendant's name.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 12, 2012

  
CLERK



predecessor landlord had consented to the renovation, she successfully raised the defense of waiver (see *Haberman v Hawkins*, 170 AD2d 377 [1991]). As such, plaintiff is unlikely to succeed on the merits. Moreover, while plaintiff described hypothetical injury from the renovation, such as possible criminal liability, it failed to establish irreparable harm (see *Dua v New York City Dept. of Parks & Recreation*, 84 AD3d 596 [2011]).

The injunction was also properly denied as to the therapy practice. Plaintiff failed to articulate any injury it would suffer as a result of the continuation of the practice. In this connection, we note that the defendant's use of the apartment was not in violation of the zoning regulations.

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

ENTERED: JUNE 12, 2012

  
CLERK

Corrected Order - June 14, 2012

Tom, J.P., Mazzairelli, Moskowitz, Renwick, Abdus-Salaam, JJ.

7913-

7914           In re Malik A.,

A Person Alleged to be  
a Juvenile Delinquent,  
Appellant.

- - - - -

Presentment Agency

---

Elisa Barnes, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (**Daniel A. Pollak** of counsel), for presentment agency.

---

Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about August 4, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, jostling and menacing in the third degree, revoked appellant's probation and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court's finding was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. Appellant's participation in the robbery was

established by the testimony of police officers who observed the incident, and the victim's nonidentification of appellant was satisfactorily explained by the circumstances of the robbery.

The court properly exercised its discretion in qualifying a police witness as an expert on youth gangs and receiving his testimony at the dispositional hearing (*see generally People v Lee*, 96 NY2d 157, 162 [2001]). In any event, even without reference to the expert testimony, the disposition was appropriate, given that appellant committed a serious offense while already on probation.

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

ENTERED: JUNE 12, 2012

  
CLERK

CORRECTED ORDER - June 28, 2012

Tom, J.P., Mazzairelli, Moskowitz, Renwick, Abdus-Salaam, JJ.

7915-

7915A-

7915B Alexander Komolov, et al., Index 651626/11  
Plaintiffs-Appellants-Respondents,

-against-

David Segal, et al.,  
Defendants-Respondents-Appellants.

---

Mischel & Horn PC, New York (Scott T. Horn of counsel), for appellants-respondents.

Kathryn Bedke Law, New York (Kathryn L. Bedke of counsel), for respondents-appellants.

---

Appeals from order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 7, 2011, and amended order, same court and Justice, entered December 19, 2011, insofar as said orders granted defendants' motion to dismiss the complaint, deemed an appeal from judgment, same Court and Justice, entered December 29, 2011, and so considered, said judgment unanimously reversed, on the law, without costs, the judgment vacated and causes of action one through fifteen reinstated. The foregoing orders, insofar as they denied, sub silentio, defendants' request for sanctions, unanimously affirmed, without costs. Defendants' appeal from the judgment, unanimously dismissed, without costs.

Dismissal of this action on grounds of res judicata and

collateral estoppel, with the informal directive that plaintiffs seek relief to amend their pleadings by motion to renew before the court that presided over a prior action commenced by plaintiffs, was error. The dismissal of the prior action should have been without prejudice since the claims in that action were dismissed for pleading deficiencies and not on the merits (see *Avins v Federation Empl. & Guidance Serv., Inc.*, 67 AD3d 505 [2009]). While judicial economy and the discouragement of forum shopping would otherwise warrant dismissal of this action, since the prior action was dismissed with no indication that the dismissal was without prejudice or not on the merits, this action is not barred by res judicata or collateral estoppel (*id.*). Collateral estoppel does, however, bar plaintiffs' sixteenth cause of action alleging breach of contract in connection with the sale of a condominium since that claim was dismissed in the prior action for non-compliance with the statute of frauds.

The three-year statute of limitations applicable to the conversion claims (see CPLR 214[3]), was tolled when plaintiffs timely commenced this action within six months of the termination of the prior action (see CPLR 205[a]).

Defendants have not shown that the two actions commenced by plaintiffs are frivolous, or were brought solely to harass. Thus, there is no basis for us to find that the motion court's denial of defendants' request for sanctions constituted an

improvident exercise of discretion (see 22 NYCRR § 130-1.1[c][1], [2]; *Levy v Carol Mgt. Corporation*, 260 AD2d 27, 33-34 [1999]). Further, there is no evidence that plaintiffs engaged in a history of vexatious, frivolous litigation, that warrants enjoining them from commencing further litigation on the instant claims without prior court approval (see *Matter of Sud v Sud*, 227 AD2d 319 [1996]). Defendants' appeal from the judgment is dismissed, as defendants are not aggrieved thereby (CPLR 5511).

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

ENTERED: **June 12, 2012**

  
CLERK



door in the living room. However, the court properly determined that section 7.1 of the purchase agreement expressly disavows any representations about the condition of "Personalty," including air conditioning, and that the purchasers had inspected or waived inspection of such personalty, and took it "as is." Moreover, section 14.1 contains a merger clause, asserting that any prior oral or written agreements or representations merged into the contract, which alone expressed the parties' agreement. Although a general merger clause will not preclude parole evidence regarding fraud in the inducement or fraud in the execution (see *Magi Communications v Jac-Lu Assoc.*, 65 AD2d 727 [1978]; *Danann Realty Corp. v Harris*, 5 NY2d 317, 320 [1959]), where the parties expressly disclaim reliance on the particular misrepresentations, contrary parole evidence is barred (see *Citibank v Plapinger*, 66 NY2d 90, 94-95 [1985]; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [2005]; *O'Keefe v Hicks*, 74 AD2d 919 [1980]).

Even assuming that section 14.1, when read in conjunction with section 7.1, does not provide the requisite particular disclaimer of reliance regarding air conditioning, the court properly held that plaintiffs' fraud in the inducement claim fails for lack of justifiable reliance on the alleged

misrepresentation (see generally *Eurycleia Partners LP v Seward & Kissel, LLP*, 12 NY3d 553, 559-560 [2009]). "Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations" (*Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1997]; see *Joseph v NRT Inc.*, 43 AD3d 312 [2007]). Here, when told that the air conditioning unit was behind a particular cabinet door, plaintiffs failed to even open the door or inquire what was "thru-wall" air conditioning, or how it worked. It is not speculation to conclude that plaintiffs could have discovered the truth by use of ordinary intelligence, as plaintiff Lee Rosenblum's own affidavit, in opposition to defendants' motion for summary judgment, states that, after execution of the purchase agreement, when he visited the apartment and noticed that it was hot, he opened the cabinet door and "[t]here was nothing behind the door except a pipe. There was no air conditioning unit of any kind." Had plaintiffs simply opened the door when they inspected the unit prior to executing

the purchase agreement, at the very least they would have been put on notice of the need to inquire further regarding the lack of any air conditioning unit in that cabinet, as plaintiff's affidavit clearly states.

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

ENTERED: JUNE 12, 2012

  
CLERK



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]). There were reasonable explanations for trial counsel's decision not to call as witnesses three codefendants who had been convicted prior to defendant's trial (see *People v Smith*, 82 NY2d 731, 733 [1993]; *People v Pedraza*, 56 AD3d 390, 391 [2008], *lv denied* 12 NY3d 761 [2009]). In any event, defendant has not shown that she was prejudiced by this decision. The record does not establish that any of the codefendants "would have actually testified, that they would have given exculpatory testimony, or that the jury would have been likely to credit such testimony" (*People v Green*, 27 AD3d 231, 233 [2006], *lv denied* 6 NY3d 894 [2006]).

There is no merit to defendant's claim that counsel was ineffective for failing to request a missing witness charge regarding the prosecutor's failure to call the codefendants to testify for the People. Defendant would not have been entitled to such a charge, because these witnesses were not in the People's control for missing witness purposes. Former codefendants would not "naturally be expected to provide" testimony favorable to the People (see *People v Kitching*, 78 NY2d 532, 536 [1991]). Defendant's assertion that the People had

originally intended to call the codefendants as witnesses is based on a misreading of the voluntary disclosure form, which sets forth statement and identification evidence to be used against each of the four defendants, individually.

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

ENTERED: JUNE 12, 2012

  
CLERK

Tom, J.P., Mazzarelli, Moskowitz, Renwick, Abdus-Salaam, JJ.

7920-

7921 In re Isaiah M.,

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

Antoya M.,  
Respondent-Appellant,

Administration for Children's Services,  
Petitioner-Respondent.

---

The Bronx Defenders, Bronx (Mary Anne Mendenhall of counsel), and Proskauer Rose LLP, New York (David Munkittrick of counsel), for appellant.

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

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

---

Order of disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about October 27, 2009, which, upon a fact-finding determination of neglect, placed the subject child with petitioner until completion of the next permanency hearing, unanimously affirmed insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise dismissed as moot, without costs. Appeal from fact-finding order, same court and Judge, entered on or about August 24, 2009, unanimously dismissed, without costs, as superseded by the appeal from the order of disposition.

Contrary to appellant's contention, "[a] single incident 'where the parent's judgment was strongly impaired and the child exposed to a risk of substantial harm' can sustain a finding of neglect" (*Matter of Kayla W.*, 47 AD3d 571, 572 [2008], quoting *Matter of Pedro C. [Josephine B.]*, 1 AD3d 267, 268 [2003]; see *Matter of Zariyasta S.*, 158 AD2d 45 [1990]). Appellant testified that she was in a park with her son when she began to experience auditory hallucinations that were telling her that a demon wanted her to harm her son. After appellant stopped a passerby for help, she was taken to a hospital where she signed a temporary release allowing the Administration for Children's Services to take the child into its custody. Appellant, whose medical records show she has experienced delusions of demons since her childhood, was thereafter involuntarily committed for a month, during which time she continued to be extremely delusional and psychotic with bizarre behavior, and lacked insight into her mental illness.

The court's finding of neglect was supported by a preponderance of evidence that appellant's judgment was strongly impaired and that her lack of judgment exposed the child to a substantial risk of harm to his physical, mental, and emotional

health (see *Matter of Noah Jeremiah J. [Kimberly J.]*, 81 AD3d 37, 50 [2010]; *Matter of Zariyasta S.*, 158 AD2d at 48; *Matter of Jesse DD.*, 223 AD2d 929, 930-931 [1996], *lv denied* 88 NY2d 803 [1996]; see also Family Court Act § 1046 [b][i]).

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

ENTERED: JUNE 12, 2012

  
CLERK



advertising materials were conspicuously posted (GBL 397-a[1]; see generally *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]). The fact that petitioner's name and telephone number were affixed to the offending packages raised a statutory presumption that it should be liable for the violations (see GBL 397-a[3]).

Petitioner's contention that it should not be held liable for the acts of an independent subcontractor that it did not control is unavailing. Petitioner admitted that its name and telephone number are placed on its advertising materials in order to make itself accountable and in a position to remedy customer complaints. The record thus supports ECB's determination that petitioner retained at least some control over the manner in which its materials were distributed (see *Cheong Mei Inc. v Environmental Control Bd. of the City of N.Y.*, 81 AD3d 452 [2011]; see also *Smart Workout, Inc. v Environmental Control Bd. of the City of N.Y.*, 79 AD3d 492 [2010]).

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

ENTERED: JUNE 12, 2012

  
CLERK

Tom, J.P., Mazzairelli, Moskowitz, Abdus-Salaam, JJ.

7923-

7924           Fernando Mateo, et al.,  
                  Plaintiffs-Appellants,

Index 600955/09

-against-

Donna Baek,  
Defendant-Respondent.

---

Garvey Schubert Barer, New York (Andrew Goodman of counsel), for appellants.

Law Offices of Jonathan Y. Sue, PLLC, New York (Jonathan Y. Sue of counsel), for respondent.

---

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered September 13, 2011, after a nonjury trial, dismissing the complaint and awarding defendant \$175,000, plus costs and disbursements, and bringing up for review an order, same court and Justice, entered on or about September 12, 2011, which found in defendant's favor on her counterclaim for breach of contract, unanimously affirmed, without costs. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court's primary finding, that plaintiffs did not make diligent and good faith efforts to apply for a mortgage pursuant to the mortgage contingency clause in the parties' contract, is

amply supported by the evidence (*see generally Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). Indeed, there was no competent evidence that plaintiff submitted a mortgage application for the subject unit or received a denial from the institutional lender (*cf. Ruggeri v Brenner*, 186 AD2d 441 [1992], *lv denied* 81 NY2d 704 [1993]). The letter from plaintiffs' broker, stating that he had been informed that plaintiffs' mortgage application had been denied, was not admitted for the truth of the hearsay statements contained therein, and no employee from the institutional lender testified as to the purported denial.

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: JUNE 12, 2012

  
CLERK





four years from the date of the fire. Respondent's determination, that petitioner was ineligible for public housing because she was responsible for a fire in a prior residence, had a rational basis in the record, including a Fire Marshal's report stating that the fire in petitioner's prior apartment on April 30, 2009 was caused by an unattended candle left in combustible material on her kitchen table. There was no evidence before the agency that anyone other than petitioner or a member of her household was responsible for the fire. Petitioner's argument that her landlord was responsible for the fire was improperly raised for the first time in the article 78 proceeding (see *Matter of Yonkers Gardens Co. v State of N.Y. Div. of Hous. & Community Renewal*, 51 NY2d 966, 967 [1980]).

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

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

ENTERED: JUNE 12, 2012

  
CLERK



Westmore Fuel Company's (collectively Westmore) fuel tank facility. Westmore had retained defendant Diamondhead Construction & Maintenance Corp. (Diamondhead) to replace a rubber containment lining to prevent soil contamination from fuel leaks. Diamondhead subcontracted plaintiff's employer to perform the installation work.

The statutory protection of Labor Law § 241(6) extends to the activity in which plaintiff was engaged at the time of the accident, regardless of whether the backhoe was being brought from storage to the work site for use (*see Gherardi v City of New York*, 49 AD3d 280 [2008]), or taken away from the work site for storage at the end of the work day (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-882 [2003]; *Danielewski v Kenyon Realty Co.*, 2 AD3d 666 [2003]). However, 12 NYCRR § 23-9.4(a) is too general to support a Labor Law § 241(6) claim (*see Robinson v County of Nassau*, 84 AD3d 919, 921 [2011]; *Brechue v Town of Wheatfield*, 241 AD2d 935, 935 [1997], *lv denied* 94 NY2d 759 [2000]). 12 NYCRR §§ 23-1.7(b), 23-1.23(a), 23-9.2(h)(2), 23-9.2(i), 23-9.4(c), 23-9.4(h)(2), and 23-9.4(h)(4) are inapplicable to the circumstances here. The exception for "excavating machines used for material hoisting" under 12 NYCRR § 23-6.1(a) bars application of 12 NYCRR § 23-6.1(c) and 12 NYCRR § 23-6.1(i) (*see St. Louis v Town of N. Elba*, 70 AD3d 1250 [2010],

*affd* 16 NY3d 411 [2011]).

Nonetheless, we find that plaintiff has a claim under 12 NYCRR § 23-9.5(c), in view of plaintiff's testimony that he was not licensed or trained to operate a backhoe, and his foreman's testimony that plaintiff's responsibilities entailed primarily excavation work. Such evidence indicates that plaintiff was not part of the "operating crew" and thus, was not authorized to be on the backhoe while it was in motion or operation.

While plaintiff did not allege violation of 12 NYCRR § 23-9.2(b)(1) in his pleadings, he argues that this argument is raised in his expert affidavit. However, the court properly rejected the expert affidavit as inadmissible, given that the affidavit, which was notarized in New Jersey, was lacking a certificate of conformity (see CPLR 2309[c]), and that plaintiff did not disclose the expert until the filing of his affirmation in opposition, after the note of issue and certificate of readiness had been filed (see CPLR 3101[d][1][i]; *Colon v Chelsea Piers Mgt., Inc.*, 50 AD3d 616 [2008]; *Safrin v DST Russian & Turkish Bath, Inc.*, 16 AD3d 656 [2005]; cf. *Baulieu v Ardsley Assoc., L.P.*, 85 AD3d 554, 555 [2011]). In any event, 12 NYCRR § 23-9.2(b)(1) is a mere general safety standard that is insufficiently specific to give rise to a nondelegable duty under

the statute (see *Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004, 1005 [2009]; *Berg v Albany Ladder Co., Inc.*, 40 AD3d 1282, 1285 [2007], *affd* 10 NY3d 902 [2008]).

The court also properly denied plaintiff's request to amend the bill of particulars to allege violation of 12 NYCRR § 23-9.4(h)(5), as such request, made after the note of issue was filed, was untimely and prejudicial (see *Reilly v Newireen Assoc.*, 303 AD2d 214, 218 [2003], *lv denied* 100 NY2d 508 [2003]; *Del Rosario v 114 Fifth Ave. Assoc.*, 266 AD2d 162 [1999]). Further, the request, made in a footnote in plaintiff's opposition papers, was procedurally defective, as plaintiff was required to serve a notice of cross motion (CPLR 2215). In any event, the provision is inapplicable.

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

ENTERED: JUNE 12, 2012

  
CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, JJ.

7932N Ernest Milchman, et al., Index 20431/00  
Plaintiffs-Respondents,

-against-

Steven Lipkin,  
Defendant-Appellant.

---

William M. Ezersky, Kew Gardens, for appellant.

Konstantin Burshteyn, White Plains, for respondents.

---

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered August 29, 2011, which, insofar as appealed from as limited by the briefs, denied defendant's motion to pay \$200,000 under the parties' stipulation of settlement, and allowed plaintiffs to reschedule a sheriff's sale of defendant's property unless defendant paid \$352,250 to plaintiffs by the time the new sale date was set, unanimously affirmed, with costs.

Stipulations of settlement made in open court are strictly enforced, in the absence of cause sufficient to invalidate a contract (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]). Here, defendant does not present any grounds for not enforcing the so-ordered stipulation of settlement, nor does he dispute that he failed to comply with several of its provisions. Defendant, among other things, failed to timely tender the payment of \$200,000 required by the parties' stipulation of

settlement, and failed to timely apply for an extension of the period in which to do so in accordance with the stipulation. Thus, the court properly denied defendant's request to permit him to settle all claims by tendering such payment.

The subject stipulation provided that, in the event of defendant's default, plaintiffs could execute on defendant's property and collect on a reinstated 2002 judgment, which awarded plaintiffs \$299,275.21 plus interest. In accordance with those provisions, the court properly authorized plaintiffs to reschedule the property sale unless defendant tendered payment in the amount of \$352,250.

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

ENTERED: JUNE 12, 2012

  
CLERK

Tom, J.P., Moskowitz, Renwick, Abdus-Salaam, JJ.

7933N-

7934N Leah Vinik,  
Plaintiff-Respondent,

Index 305322/11

-against-

Steven Lee,  
Defendant-Appellant.

---

Stein Riso Mantel, LLP, New York (Kevin M. McDonough of counsel),  
for appellant.

Goldweber Epstein LLP, New York (Nina S. Epstein of counsel), for  
respondent.

---

Order, Supreme Court, New York County (Saralee Evans, J.),  
entered July 27, 2011, which, to the extent appealed from as  
limited by the briefs, upon plaintiff's motion for pendente lite  
relief, ordered defendant to pay \$6,000 per month in unallocated  
interim support, and awarded plaintiff \$25,000 in counsel fees,  
and order, same court and Justice, entered on or about November  
16, 2011, which, to the extent appealed from as limited by the  
briefs, denied defendant's motion to renew plaintiff's motion,  
and awarded plaintiff an additional \$25,000 in counsel fees,  
unanimously affirmed, with costs.

While the parties' premarital agreement limits their rights  
to obtain spousal support and waives their rights to counsel  
fees, "it does not bar temporary relief, including temporary

maintenance [and] interim counsel fees" (*Solomon v Solomon*, 224 AD2d 331, 331 [1996]; see also *Tregellas v Tregellas*, 169 AD2d 553 [1991]). "The best remedy for any perceived inequities [in the amount of the pendente lite award] is a prompt trial" (*Anonymous v Anonymous*, 241 AD2d 353 [1997]).

Since the parties' agreements do not address custody and child support, the waiver of counsel fees does not apply to counsel fees related to litigating child custody and support issues (see *Kessler v Kessler*, 33 AD3d 42, 45 [2006], *lv dismissed* 8 NY3d 968 [2007]; *Alvares-Correa v Alvares-Correa*, 285 AD2d 123, 128 [2001], *lv denied* 97 NY2d 608 [2002]). If Illinois law, which governs the parties' agreement, were applied, the result would be the same. Illinois courts have held that a ban on a counsel fee award in a premarital agreement is not enforceable as to child-related issues because it violates public policy (see *In re Marriage of Best*, 387 Ill App 3d 948, 901 NE2d 967 [2009], *lv denied* 232 Ill 2d 577, 910 NE2d 1126). Illinois law also permits an interim counsel fee award where the parties have waived counsel fees in an agreement (see *In re Marriage of Rosenbaum-Golden*, 381 Ill App 3d 65, 74, 884 NE2d 1272, 1281 [2008], *lv denied* 229 Ill 2d 659, 897 NE2d 263 [2008]).

The award of counsel fees to plaintiff was based on a proper consideration of "the financial circumstances of both parties

together with all the other circumstances of the case" (see *DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881-882 [1987]; Domestic Relations Law § 237). Further, the court properly considered the fees necessitated by defendant's litigation tactics to ensure that the litigation was not "shaped . . . by the power of the bankroll" (see *O'Shea v O'Shea*, 93 NY2d 187, 192 [1999]).

Defendant's motion to renew plaintiff's motion for pendente lite relief, which was premised on his fear that he could lose his job, offered no new facts that had not been offered on the original motion (CPLR 2221[e]). Although defendant claimed in his reply that he had been terminated from his employment, he provided no objective proof thereof. Defendant's remedy is to move to modify the support award based on the alleged change of circumstances.

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

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

ENTERED: JUNE 12, 2012

  
CLERK



prohibited from applying for any new or replacement passports, and that petitioner arrange for electronic monitoring at her expense and wear an electronic monitoring device upon her release.

After reviewing the entire record and considering the factors set forth in CPL 510.30(2)(a), we find that the amount of bail set by the trial court was unreasonable and an abuse of discretion, and that, taking into account the risk of petitioner's flight, bail in the reduced amount indicated is sufficient to ensure petitioner's attendance (*see e.g. People ex rel. Robinson v Warden*, 135 AD2d 421 [1987]). Among other factors, we note that notwithstanding the notoriety of this case, petitioner is charged with a class D, nonviolent felony and she has no criminal record. In addition, she is a long-term resident of Orange County, is married, and is the mother of four children, including a nine-year-old child, who are United States citizens.

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

ENTERED: JUNE 12, 2012

  
CLERK

Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6461- Index 603766/08

6462-

6463-

6464-

6465-

6466N JP Morgan Chase & Co., et al.,  
Plaintiffs-Appellants,

-against-

Indian Harbor Insurance Company, et al.,  
Defendants,

Arch Insurance Company, et al.,  
Defendants-Respondents.

- - - - -

JP Morgan Chase & Co., et al.,  
Plaintiffs-Respondents,

-against-

Indian Harbor Insurance Company, et al.,  
Defendants-Appellants,

Arch Insurance Company, et al.,  
Defendants.

---

Proskauer Rose LLP, New York (John H. Gross of counsel), for JP Morgan Chase & Co., JP Morgan Chase Bank, N.A., and J.P. Morgan Securities Inc., appellants/respondents.

Troutman Sanders LLP, New York (Matthew J. Aaronson of counsel), for Indian Harbor Insurance Company, appellant.

Melito & Adolfsen PC, New York (S. Dwight Stephens of counsel), for Houston Casualty Company, appellant.

Kaufman Borgeest & Ryan LLP, Valhalla (Scott A. Schechter of counsel), for Travelers Indemnity Company, appellant, and for Arch Insurance Company and St. Paul Mercury Insurance Company, respondents.

Akin Gump Strauss Hauer & Feld LLP, New York (Mitchell P. Hurley of counsel), for Twin City Fire Insurance Company, respondent.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Stephanie A. Nashban of counsel), for Lumbermens Mutual Casualty Company, respondent.

Caughlin Duffy LLP, New York (Robert J. Kelly of counsel), for Swiss Re International SE, respondent.

---

Orders, Supreme Court, New York County (Barbara R. Kapnick, J.), entered May 31, 2011, affirmed, with costs. Order, same court and Justice, entered on or about May 31, 2011, affirmed, with costs.

Opinion by DeGrasse, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.  
Richard T. Andrias  
Leland G. DeGrasse  
Rosalyn H. Richter  
Sheila Abdus-Salaam, JJ.

6461-6462-6463-  
6464-6465-6466  
Index 603766/08

x

---

JP Morgan Chase & Co., et al.,  
Plaintiffs-Appellants,

-against-

Indian Harbor Insurance Company, et al.,  
Defendants,

Arch Insurance Company, et al.,  
Defendants-Respondents.

- - - - -

JP Morgan Chase & Co., et al.,  
Plaintiffs-Respondents,

-against-

Indian Harbor Insurance Company, et al.,  
Defendants-Appellants,

Arch Insurance Company, et al.,  
Defendants.

x

---

Appeals from orders of the Supreme Court, New York  
County (Barbara R. Kapnick, J.), entered May  
31, 2011, which granted the motions by Arch  
Insurance Company, St. Paul Mercury Insurance  
Company, Twin City Fire Insurance Company,  
Lumbermens Mutual Casualty Company and Swiss

Re International SE for summary judgment dismissing the amended complaint as against them with prejudice, and from an order, same court and Justice, entered on or about May 31, 2011, which denied the motion by Indian Harbor Insurance Company, Houston Casualty Company and Travelers Indemnity Company to compel production of certain documents.

Proskauer Rose LLP, New York (John H. Gross, Steven E. Obus, Seth B. Schafler, Francis D. Landrey, Michelle R. Migdon, and Lauren J. Rabinowitz of counsel), for JP Morgan Chase & Co., JP Morgan Chase Bank, N.A., and J.P. Morgan Securities, Inc., appellants/respondents.

Troutman Sanders LLP, New York (Matthew J. Aaronson of counsel), Troutman Sanders LLP, Washington, DC (John R. Gerstein, of the bar of the District of Columbia and the State of Maryland, admitted pro hac vice, of counsel), and Troutman Sanders LLP, Chicago, IL (David F. Cutter, of the bar of the States of Illinois and Maryland and the District of Columbia, admitted pro hac vice, of counsel), for Indian Harbor Insurance Company. appellant.

Melito & Adolfsen PC, New York (S. Dwight Stephens of counsel), for Houston Casualty Company, appellant.

Kaufman Borgeest & Ryan LLP, Valhalla (Scott A. Schechter of counsel), for Travelers Indemnity Company, appellant, and for Arch Insurance Company and St. Paul Mercury Insurance Company, respondents.

Akin Gump Strauss Hauer & Feld LLP, New York (Mitchell P. Hurley, Elizabeth J. Young, and Isabelle R. Liberman of counsel), for Twin City Fire Insurance Company, respondent.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Stephanie A. Nashban of counsel), for Lumbermens Mutual Casualty Company, respondent.

Caughlin Duffy LLP, New York (Robert J. Kelly of counsel), for Swiss Re International SE, respondent.

DEGRASSE, J.

Plaintiff alleges that defendants breached their contractual obligations to provide indemnification under excess insurance policies they issued. Plaintiff's predecessor, Bank One Corporation, purchased \$175 million in "claims made" bankers professional liability insurance and securities action claim coverage for the period October 1, 2002 to October 1, 2003. Bank One's insurance program was structured as a tower of follow-the-form coverage in excess of a self-insured retention. Defendant Indian Harbor Insurance Company was the primary carrier while defendants Houston Casualty Company, Arch Insurance Company, St. Paul Mercury Insurance Company, Twin City Fire Insurance Company, Lumbermens Mutual Insurance Company, Swiss Re International SE and nonparties Federal Insurance Company, American Zurich Insurance Company and Gulf Insurance Company provided excess coverage. The carriers and the tiers of coverage they provided are listed in descending order as follows:

<b>Tier/ Insurance Company</b>	<b>Coverage Limits</b>
Seventh Excess - Swiss Re	\$50 million in excess of \$150 million
Sixth Excess - Federal	\$10 million in excess of \$140 million

Fifth Excess - Lumbermens, St. Paul and Arch	\$30 million in excess of \$110 million, with a "quota share" apportionment of \$10 million among the three carriers
Fourth Excess - Twin City	\$15 million in excess of \$95 million
Third Excess - Zurich	\$15 million in excess of \$80 million
Second Excess - Gulf	\$15 million in excess of \$65 million
First Excess - Houston	\$15 million in excess of \$50 million
Primary - Indian Harbor	50% of loss up to \$50 million subject to a maximum coverage limit of \$25 million

In November 2002, actions were brought against Bank One and some of its affiliates in connection with their roles as indenture trustee and otherwise with regard to certain notes issued by NPF XII, Inc. and NPF VI, Inc. Plaintiff's entities (the JP Morgan entities) were defendants in some of the actions as well as other related actions in which the Bank One entities were not defendants. Between July and November 2004, while the

NPF litigation was still pending, the Bank One entities were merged into the JP Morgan entities. Between February 2006 and March 2008, plaintiff settled six actions that were part of the NPF litigation for an aggregate of \$718 million. Plaintiff's theory of recovery in this action is that the portion of the settlement attributable to claims made against the heritage Bank One entities, as opposed to claims based on the conduct of the premerger JP Morgan entities, exceeded the combined limits of the policies in the Bank One tower of insurance.

Before bringing this action, plaintiff settled with Federal for the sum of \$17 million. That settlement agreement covered Federal's liability under the Bank One program as well as claims under separate policies issued by Federal's affiliate, Executive Risk Indemnity, Inc., under a different insurance program. The agreement provided for no allocation of the settlement as between plaintiff's claims against Federal and those against Executive Risk. As shown above, Swiss Re is the only carrier that was higher than Federal in the Bank One tower.

After commencing this action, plaintiff entered into another \$17 million settlement, this time with Zurich and its affiliate, Steadfast Insurance Company. This settlement covered plaintiff's \$15 million claim under Zurich's policy in the Bank One tower as well as a \$13.4 million claim against Steadfast under separate

insurance covering unrelated litigation. After that settlement, plaintiff amended the complaint so as to drop Zurich as a defendant.

Twin City moved for summary judgment, asserting that plaintiff could not establish the occurrence of express conditions precedent to coverage under Twin City's policy. Invoking their own policy provisions, Swiss Re, Lumbermens, St. Paul and Arch also moved for summary judgment on similar grounds. The motion court granted all of the motions for summary judgment on the basis of its construction of the various policies. We affirm.

The parties agree that Illinois law governs the disposition of the motions for summary judgment. Under the law of that state, the construction of an insurance policy is a question of law that requires a court to ascertain the intent of the parties to the contract (*Outboard Marine Corp. v Liberty Mut. Ins. Co.*, 154 Ill 2d 90, 108, 607 NE2d 1204, 1212 [1992]). Accordingly, insurance policies are construed like any other contract (*Putzbach v Allstate Ins. Co.*, 143 Ill App 3d 1077, 1082, 494 NE2d 192, 196 [1986]).

The Twin City policy provided "that liability for any loss shall attach to [Twin City] only after the Primary and Underlying Excess Insurers shall have duly admitted liability and shall have

paid the full amount of their respective liability."

Hence, by the plain language of this attachment provision, the underlying insurers' admission of liability and the payment of the full amount of their liability were conditions precedent to Twin City's liability under its policy. "A condition precedent is defined as an event which must occur or an act which must be performed by one party to an existing contract before the other party is required to perform" (*Vuagniaux v Korte*, 273 Ill App 3d 305, 309 [1995] [internal quotation marks omitted]).

The first condition was not met because Zurich, the insurer directly beneath Twin City in the Bank One tower, did not admit liability when it settled with plaintiff. In fact, the settlement agreement between Zurich and plaintiff provided that "the negotiation, execution and performance of this Agreement shall not constitute, or be construed as, an admission of liability or infirmity of any defense or claim whatsoever by any Party." Moreover, there is no way to determine that Zurich paid the full amount of its liability under its Bank One tower policy because the settlement provided for no allocation of the \$17 million payment between Zurich and Steadfast. Therefore, the second condition set forth in Twin City's attachment provision was not met either. For reasons that follow, conditions precedent to liability under the remaining movants' excess

policies have not been met either.

Lumbermens' policy provided that the insurance afforded thereunder "shall apply only after all applicable Underlying Insurance with respect to an Insurance Product has been exhausted by actual payment under such Underlying Insurance . . ." St. Paul's policy provided that "[St. Paul] shall only be liable to make payment under this policy after the total amount of the Underlying Limit of Liability has been paid in legal currency by the insurers of the Underlying Insurance as covered loss thereunder." Similarly, the insurance coverage afforded by Arch's policy applied "only after exhaustion of the Underlying Limit solely as a result of actual payment under the Underlying Insurance in connection with Claim(s) and after the Insureds shall have paid the full amount of any applicable deductible or self insured retentions" (emphasis omitted). Swiss Re's liability under its policy attached "only when the Underlying Insurer(s) shall have paid or have been held liable to pay, the full amount of the Underlying Limit(s) . . ."

The foregoing attachment provisions are analogous to two attachment provisions that were at issue in *Great American Ins. Co. v Bally Total Fitness Holding Corp.* (US Dist Ct, ND Ill, 06 Civ 4554, Andersen, J., 2010). Under one such provision in *Great American*, excess coverage became applicable "only after all

Underlying Insurance has been exhausted by payment of the total underlying limit of insurance" (*id.* at \*1). Pursuant to the other excess policy before the *Great American* court, liability for covered losses attached "only after the insurers of the Underlying Policies shall have paid, in the applicable legal currency, the full amount of the Underlying Limit and the insureds shall have paid the full amount of the uninsured retention, if any, applicable to the primary Underlying Policy" (*id.*). We are persuaded by *Great American's* holding that the excess policies before the court unambiguously required the insured to collect the full limits of the underlying policies before resorting to excess insurance (*id.* at 5).

We are also persuaded by the Fifth Circuit's reasoning in *Citigroup Inc. v Federal Ins. Co.* (649 F3d 367 [2011]) in which it was held that under Texas law "settlement for less than the underlying insurer's limits of liability does not exhaust the underlying policy" (*id.* at 373). In this case, summary judgment was properly granted because the aforementioned combination of plaintiff's settlements with Zurich and Steadfast preclude any determination of whether Zurich's policy limits were reached as required by the policies issued by Twin City, Lumbermens, St. Paul, Arch and Swiss Re. Plaintiff's pre-action settlement with Federal and Executive Risk had the same effect on Swiss Re's

liability because there was no allocation of the settlement between the two underlying carriers.

Plaintiff seeks refuge in language in a maintenance provision of Twin City's policy which provided that the insured's failure to maintain all of the underlying policies in full effect would not invalidate the policy. "If the words in the policy are unambiguous, a court must afford them their *plain, ordinary and popular meaning*" (*Outdoor Marine Corp.*, 154 Ill 2d at 108). Guided by *Outdoor Marine Corp.*, we reject plaintiff's argument that its settlement with Zurich can be construed as a failure to maintain the underlying policies within the contemplation of the maintenance provision. In addition, Twin City does not challenge the validity of its policy. It simply maintains that conditions precedent to coverage were not met. As stated above, its premise is that conditions precedent to its liability have not been met. Therefore, the maintenance provision is irrelevant to Twin City's motion.

Plaintiff also relies on *Zeig v Massachusetts Bonding & Ins. Co.* (23 F2d 665 [2d Cir 1928]). In *Zeig*, an insured who settled with his primary carriers for less than their policy limits, sued his excess carrier, seeking indemnification for the amount of his loss exceeding the underlying policy limits (*id.* at 665). The policy in *Zeig* provided that the excess insurance thereunder

"shall apply and cover only after all other insurance herein referred to shall have been exhausted in the payment of claims to the full amount of the expressed limits of such other insurance" (*id.*). The Second Circuit found this provision ambiguous, reasoning that "payment" as used therein could refer to "the satisfaction of a claim by compromise, or in other ways" in addition to "payment in cash" (*id.* at 666). The *Zeig* court, nevertheless, recognized that parties are free to impose any condition precedent to liability upon a policy as they choose (*id.*). Here, Twin City's attachment provision stands apart from the one before the court in *Zeig* because of its exacting requirement that the underlying carriers shall have admitted and paid the full amounts of their respective liabilities. For reasons already stated, the attachment provisions of the other policies before this Court are also distinguishable from the one before the *Zeig* court. Like the court in *Great Am. Ins. Co. v Bally Total Fitness Holding Corp.* (US Dist Ct., ND Ill, 06 Civ 4554, Andersen, Jr., 2010, *supra*), we find no ambiguity in any of the policies that would make *Zeig* controlling (*id.* at \*5). We further note that the United States District Court for the Northern District of Illinois, interpreting Illinois law, found *Zeig* to be contrary to Seventh Circuit precedent insofar as it stands for the proposition that "'exhaustion' of the primary

policies' payments does not require collection of the primary policies as a condition precedent to the right to recover excess insurance" (see *Premcor USA, Inc. v Am. Home Assur. Co.*, 2004 WL 1152847, \*8 US Dist LEXIS 9275, \*22 [ND Ill 2004], *affd* 400 F3d 523 [7th Cir 2005]). Plaintiff's reliance on *Hasemann v White* (177 Ill 2d 414 [1997]) is misplaced because that case involved the interpretation of a statutory provision as opposed to an insurance policy.

By its own terms, the attachment provision of Swiss Re's policy was subject to Condition 3 of the policy, which provided that

"[i]n the event of erosion or exhaustion of the aggregate limit of liability on the Underlying Insurer(s) policy by reason of loss(es), this Policy shall

(a) if erosion be partial, pay the excess of the reduced Underlying Limit(s) of the Policy(ies) of the Underlying Insurer(s), or

(b) if exhaustion be complete, continue in force in place of such Policy(ies) of the Underlying Insurer(s)."

In *Qualcomm, Inc. v Certain Underwriters at Lloyd's, London* (161 Cal App 4th 184 [2008]) the court distinguished *Zeig* and held that a "paid or have been held liable to pay" provision required primary insurance to be exhausted or depleted by actual payment of losses by the underlying insurer (*id.* at 195, 198-200). Like the *Qualcomm* court, we reject the notion that "when

an insured settles with its primary insurer for an amount below the primary policy limits but absorbs the resulting gap between the settlement amount and the primary policy limit, primary coverage should be deemed exhausted and excess coverage triggered, obligating the excess insurer to provide coverage under its policy" (*id.* at 188). Accordingly, we are still not persuaded by plaintiff's argument that there was an exhaustion under the Swiss Re policy.

The motion court correctly applied New York law in deciding the discovery motion. The law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding, is applied when deciding privilege issues (*People v Greenberg*, 50 AD3d 195, 198 [2008], *lv dismissed* 10 NY3d 894 [2008]). As the motion court found, the cooperation clauses in the insurance policies did not operate as waivers of plaintiff's attorney-client and work-product privileges (*see Gulf Ins. Co. v Transatlantic Reins. Co.*, 13 AD3d 278, 279-280 [2004]). We have considered the appealing parties' remaining contentions for affirmative relief and find them unavailing.

Accordingly the orders of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered May 31, 2011, which granted the motions by Arch, St. Paul, Twin City, Lumbermens and Swiss Re for summary judgment dismissing the amended complaint as against them

with prejudice, should be affirmed, with costs. The order of the same court and Justice, entered on or about May 31, 2011, which denied the motion by Indian Harbor, Houston and Travelers to compel production of certain documents, should be affirmed, with costs.

ALL Concur.

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

ENTERED: JUNE 12, 2012

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

CLERK