SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 8, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5580-
5580A Carnegie Associates Ltd., Index 600109/08
Plaintiff-Appellant,

-against-

Eric J. Miller, et al.,
Defendants-Respondents.

- - - - -

Eric J. Miller, et al.,
Counterclaim Plaintiffs-Respondents,

-against-

Carnegie Associates Ltd., et al.,
Counterclaim Defendants-Appellants.

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Ohrenstein & Brown, LLP, Garden City (Michael D. Brown of counsel), for appellants.

Frankfurt Kurnit Klein & Selz P.C., New York (Ronald C. Minkoff of counsel), for respondents.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered October 25, 2010, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint and to strike the reply to their counterclaims, reversed, on the law, without costs, the motion denied, and plaintiff's complaint and reply to defendants' counterclaims

reinstated. Appeal from order, same court and Justice, entered December 16, 2010, which, inter alia, denied plaintiff's motion for renewal, dismissed, without costs, as academic.

The motion court erred in striking the complaint and reply to defendants' counterclaims since neither CPLR § 3126 nor 22 NYCRR 202.26(e) authorizes this sanction under the circumstances. While CPLR § 3126 authorizes the striking of a party's pleadings, this extreme sanction is only authorized when a party "refuses to obey an order for *disclosure* or willfully refuses to *disclose information* which the court finds ought to have been disclosed" (CPLR § 3126) (emphasis added). Thus, by its express terms the sanction prescribed by CPLR § 3126 is warranted only upon a party's failure to comply with discovery requests or court orders mandating disclosure (*Bako v V.T. Trucking Co.*, 143 AD2d 561, 561 [1988]; *Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374, 374-375 [1990] [dismissal of a party's pleading appropriate when a party "disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR"]; *Bassett v Bando Sangsa Co.*, 103 AD2d 728, 728 [1984]). Here, where plaintiff had already been sanctioned for its failure to provide discovery and where defendants premised the instant motion to strike plaintiff's pleadings primarily on plaintiff's failure to proceed with court-ordered mediation, CPLR § 3126 simply does not apply.

Similarly, despite plaintiff's conceded failure to proceed with the court-ordered mediation, it was also error to strike its pleadings pursuant to 22 NYCRR 202.26(e). While 22 NYCRR 202.26 authorizes the trial court to schedule pretrial conferences, a mediation, pursuant to Rule 3 of the Rules of the Commercial Division of the Supreme Court (22 NYCRR 202.70[g]), is not a pretrial conference. More importantly, even if this rule did apply, the only sanction authorized by 22 NYCRR 202.26(e) for a party's failure to appear at a pretrial conference is "a default under CPLR § 3404," which initially only authorizes the striking of the case from the court's trial calendar. Accordingly, here, striking plaintiff's pleadings, which by operation of law resulted in dismissal of this action, is not warranted pursuant to 22 NYCRR 202.26(e).

While we agree with the dissent that plaintiff's conduct was egregious, we nevertheless find that the sanction imposed by the motion court - notably the only sanction sought by the defendants - was not permitted. Defendants could have asked for a host of other legally cognizable sanctions, e.g., contempt or costs, but chose instead to pursue a sanction which is simply not authorized by law.

In support of its argument that the motion court's order was appropriate, the dissent partly relies on Rule 8(h) of the

Commercial Division, Supreme Court, New York County, Rules of the Alternative Dispute Resolution Program. However, the dissent alone raises this argument, one which has never been advanced by any of the parties, either on appeal or below. Therefore, we should not consider it (*Misicki v Caradonna*, 12 NY3d 511, 519 [2009] ["We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made"]). Moreover, contrary to the dissent's remaining position, 22 NYCRR 202.70(g) Rule 12 does not avail plaintiff since, like 22 NYCRR 202.26(e), the dismissal promulgated by Rule 12, which is made more clear by its reference to 22 NYCRR 202.27, is for the failure to appear at a conference and not for the failure to proceed to mediation.

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

All concur except Andrias, J.P. who dissents in a memorandum as follows:

ANDRIAS, J.P. (dissenting)

Because I believe that Supreme Court had the authority to sanction plaintiff for its failure to mediate as ordered, and that the striking of the complaint and the reply to counterclaims was a provident exercise of discretion, I respectfully dissent and would affirm the orders on appeal.

In January 2010, Supreme Court declined to strike plaintiff's pleadings but sanctioned it for "unnecessary and perhaps egregious [discovery] delay[s]." By so-ordered stipulation dated March 18, 2010, the parties agreed to "mediation through the Commercial Division ADR [Alternative Dispute Resolution] process."

The mediation was scheduled for April 20, 2010, but was postponed when plaintiff's counsel, Jonathan Abraham, confirmed that Sherwood Schwarz, a necessary decision maker for plaintiff, would not attend. The mediation was rescheduled for July 26, 2010, but was cancelled because Mr. Abraham failed to file a mediation statement on plaintiff's behalf. Consequently, the mediator asked that the matter be reassigned because he had "formed a bias against plaintiff's lawyer" due to the latter's failure to communicate and his "extraordinarily cavalier attitude . . . toward the mediation process, the Court, and [the mediator]."

Pursuant to CPLR 3126 and 22 NYCRR 202.26(e), defendants moved to strike the complaint and the reply to counterclaims based on plaintiff's failure to mediate. Supreme Court granted the motion, finding that plaintiff, despite narrowly escaping dismissal for discovery violations, had continued to proceed in this litigation in a manner that could only lead to a conclusion that its conduct was willful and contemptuous.

"If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Brill v City of New York*, 2 NY3d 648, 653 [2004], quoting *Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). While neither CPLR 3126 nor 22 NYCRR 202.06(e) expressly gives the court the authority to strike a party's pleadings based on the failure to mediate, plaintiff did not raise that objection in its opposition to defendants' motion or in its motion to renew, and the issue is not preserved. Should we consider the issue, which raises a pure question of law, for the first time on appeal, it is appropriate that we determine whether there is any statute or rule that empowers the court to strike plaintiff's pleadings based on its failure to mediate as ordered.

Rule 3 of the Rules of the Commercial Division (*see* 22 NYCRR 202.70[g]), provides that "[a]t any stage of the matter, the

court may direct . . . the appointment of an uncompensated mediator." Rule 12 thereof provides that "[t]he failure of counsel to appear for a conference may result in a sanction authorized by section 130.2.1 of the Rules of the Chief Administrator or section 202.27 of this Part, including dismissal, the striking of an answer, an inquest or direction for judgment, or other appropriate sanction."

The majority is of the belief that Rule 12 is inapplicable because a mediation under the Commercial Division's ADR process is not a "conference." However, Rule 12 is included in the same section as Rule 3, which empowers the court to direct mediation, and the Supreme Court, New York County, "Guide to the Alternate Dispute Resolution Program" defines "mediation" as "[a] process in which a Neutral attempts to facilitate a settlement of a dispute by conferring informally with the parties, jointly and in separate 'caucuses,' and focusing upon practical concerns and needs as well as the merits of each side's position" (available at http://www.nycourts.gov/courts/comdiv/ADR_guide.shtml at 2). Further, Rule 8(h) of the Commercial Division, Supreme Court, New York County, Rules of the Alternative Dispute Resolution Program, provides that "[t]he Justice may impose sanctions or take such other action as is necessary to ensure respect for the court's Order and these Rules."

On the record before us, striking the complaint and the reply to counterclaims was a provident exercise of discretion. "[M]ediation procedures were established to resolve cases expeditiously and conserve judicial resources," and a party's failure to abide by the directives of a mediator evidences willful and contumacious conduct (*Perez-Wilson v McPhee*, 23 Misc 3d 1053, 1055 [Sup Ct NY County 2009]). Continued noncompliance with court orders also gives rise to an inference of willful and deliberate behavior (*see Jones v Green*, 34 AD3d 260 [2006]). Here, despite the fact that it had previously been sanctioned for discovery delays and had its note of issue stricken, plaintiff demonstrated utter disregard for the court, the appointed mediator, and for opposing counsel by its failure to make Mr. Schwarz available for more than three months after the mediation order was entered, failure to submit a mediation statement, and failure to tell either the mediator or the defendants that it would not file until after the deadline passed.

Plaintiff's motion for renewal on the ground that it should not be sanctioned for its counsel's misconduct was correctly denied. Plaintiff did not submit adequate documentation of the alleged lack of communication between it and Mr. Abraham and the court properly denied plaintiff an adjournment to cure this

deficiency (*see Wolosin v Campo*, 256 AD2d 332 [1998]; *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 561-562 [1992] [rejecting defendant's reply containing a medical affidavit designed to cure the conclusory affidavit submitted with its initial motion]). In any event, plaintiff's in-house counsel received a copy of defendants' attorney's February 16, 2010 letter to the court, which referenced the first sanctions order, enumerated deficiencies in plaintiff's discovery responses, mentioned extensions to the note of issue deadline, and requested permission to file a second motion to dismiss. Given these circumstances, Supreme Court correctly found that plaintiff's in-house counsel was on notice of the situation and should have monitored it more closely, rendering plaintiff chargeable with the conduct of its attorney (*see Santiago v Santana*, 54 AD3d 929, 930 [2008] ["Even if the plaintiff's former attorney was responsible for both the lengthy delay in proceeding with trial and the plaintiff's failure to appear on the last three scheduled

trial dates, where there is a pattern of default and neglect, the negligence of the attorney is properly imputed to the client"]).

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

ENTERED: DECEMBER 8, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

5639-
5640-
5641

Bernardo Lopez,
Plaintiff-Respondent,

-against-

New York Life Insurance Company, et al.,
Defendants-Respondents-Appellants.

- - - - -

New York Life Insurance Company,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Jones Lang LaSalle Americas, Inc.,
Third-Party Defendant-Appellant-Respondent.

Index 105737/07
590643/08

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Hoey, King & Epstein, New York (Andrew Sfouggatakis of counsel), for New York Life Insurance Company, respondent-appellant.

Cerussi & Spring, White Plains (Kevin P. Westerman of counsel), for Collins Building Services, Inc., respondent-appellant.

Mcgaw, Alventusa & Zajac, Jericho (Ross Masler of counsel), for appellant-respondent.

Faber & Troy, Woodbury (Salvatore V. Agosta of counsel), for respondent.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered June 25, 2010, which, in this personal injury action arising from a slip and fall on a puddle of water in a building owned by defendant/third-party plaintiff New York Life Insurance Company (NYL) and managed by third-party defendant Jones Lang LaSalle Americas, Inc. (JLL), to the extent appealed from as limited by the briefs, denied NYL's motion for summary judgment

dismissing the complaint and all cross claims against it and for summary judgment on its claims for contractual and common-law indemnification against JLL and the maintenance contractor defendant Collins Building Services, Inc., denied Collins's motion for summary judgment dismissing the complaint and all cross claims against it, and denied JLL's motion for summary judgment dismissing the third-party complaint and for summary judgment on its counterclaim for contractual indemnification against NYL, affirmed, without costs.

Plaintiff allegedly slipped in a large puddle of water that appeared to be flowing out from under a locked men's room door in a building owned by NYL, managed by JLL, and for which Collins provided janatorial services. The evidence submitted by NYL, Collins and JLL was insufficient to establish as a matter of law that they did not have constructive notice of the hazard. In particular, they failed to provide evidence regarding the inspection procedures followed on the date of the accident or the duration and source of the hazard (*see Castillo v New York City Tr. Auth.*, 69 AD3d 487 [2010]; *Roy v City of New York*, 65 AD3d 1030, 1031 [2009]).

Nor do the submissions of maintenance contractor Collins entitle it to summary judgment dismissing the claim against it on the ground that it owed no duty to plaintiff. A contractor may

assume a duty of care toward third parties "where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm'" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002], quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]). In this case, the hazard could have been created, for instance, through a failure to correct a drip into a stoppered sink or a failure to notice and report a leak. On a summary judgment motion, the burden is on the movant to demonstrate in the first instance entitlement to judgment as a matter of law (*see Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). Under circumstances such as these, where plaintiff is unable to elaborate on how Collins "launched a force or instrument of harm" because *defendants* failed to explain how this undisputed hazardous condition occurred, the burden of the moving defendant cannot be satisfied by relying solely on the limited duty owed by a contractor, or by the assertion that its employees were not present in the building at the time of the accident. Collins' submissions were insufficient to make a showing that it did not launch any force or instrument of harm, and its failure to do so precludes the dismissal of the claim against it on this motion.

NYL's claims for common-law and contractual indemnification against JLL and Collins cannot be resolved summarily until a

determination is made as to their negligence, if any (*see e.g. Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 338 [2004]; *Gomez v National Ctr. for Disability Servs.*, 306 AD2d 103 [2003]). Similarly, JLL's indemnification claims against NYL cannot be resolved at this juncture.

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

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

DEGRASSE, J. (dissenting in part)

I respectfully dissent because I believe summary judgment should have been granted to the extent of dismissing (1) all of plaintiff's claims against defendant Collins Building Services, Inc. and (2) the claims for contribution asserted against Collins by defendant/third-party plaintiff New York Life Insurance Company, and third-party defendant Jones Lang LaSalle Americas, Inc. (JLL).

Plaintiff was injured when he slipped in a pool of water on the floor of New York Life's office building. Collins provided cleaning services in the building pursuant to a written agreement with New York Life. Standing alone, a contractual obligation will not suffice as a basis for tort liability to persons who are not parties to the contract (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). The *Espinal* Court, however, articulated three exceptions to the rule:

> "[A] party who enters into a contract to render services may be said to have assumed a duty of care - and thus be potentially liable in tort - to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 140 [internal quotation marks and citations omitted]).

Because plaintiff's pleadings did not allege the existence of any of the *Espinal* exceptions, Collins demonstrated its prima facie entitlement to judgment as a matter of law by coming forward with proof that plaintiff was not a party to its contract (*cf. Rubistello v Bartolini Landscaping*, __ AD3d __, __, 2011 NY Slip Op 06483, *2 [2d Dept 2011]; *see also Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2010]). In opposing Collins's motion, plaintiff made no showing that there was a triable issue of fact as to whether any of the *Espinal* exceptions applied. Instead, plaintiff makes the conclusory argument that "[Collins] created the subject condition through its negligent inspection, maintenance or repair in the fulfillment of its contractual duties." The argument is insufficient because it does not address the *Espinal* exceptions. Collins is, therefore, entitled to judgment dismissing plaintiff's causes of action against it.

The majority posits that Collins has not met its burden because "plaintiff is unable to elaborate on how Collins 'launched a force or instrument of harm' because *defendants* failed to explain how this undisputed hazardous condition occurred . . ." I disagree with the majority's reasoning because, as set forth above, Collins has made a prima facie showing of entitlement to summary judgment. Moreover, it is not Collins' burden to demonstrate how the underlying flood occurred.

It also follows that New York Life and JLL are not entitled to contribution from Collins. Contribution is available only where the party seeking contribution and the party from whom contribution is sought are liable for the same injury (*see* CPLR 1401; *Oursler v Brennan,* 67 AD3d 36, 45 [2009], *lv granted* 68 AD3d 1824 [2009], *appeal withdrawn* 15 NY3d 848 [2010]).

However, I agree with the majority's conclusion that issues of fact preclude the granting of summary judgment on the claims for contractual and common-law indemnification.

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

ENTERED: DECEMBER 8, 2011

CLERK

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5894 Ignacio Pintor, Index 101365/09
Plaintiff-Respondent,

-against-

122 Water Realty, LLC, et al.,
Defendants-Appellants.

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Conway, Farrell, Curtin & Kelly P.C., New York (Jonathan T. Uejio of counsel), for appellants.

The Mandel Law Firm, New York (Donald T. Ridley of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 30, 2011, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

In this premises liability action, the events leading to plaintiff Ignacio Pintor's injury are largely undisputed. On November 11, 2008, Pintor, a real estate agent, traveled to an apartment building located at 122 Water Street in New York City to show an apartment to a prospective tenant. After the client called to say he would be late for his appointment, Pintor decided to use the spare time to take photographs of vacant apartments in the building to show other clients.

Pintor entered the bedroom in a vacant apartment on the

fourth floor, and stood about one foot away from a window with his back turned to it. As he took a photograph, he heard a cracking sound and turned to see part or all of the upper portion of the window falling toward his face. As Pintor raised his arm to protect himself, the glass shattered against his hand and badly cut it.

In July 2009, Pintor commenced this action sounding in negligence against the building owner, 122 Water Realty, and its managing agent, IMK Management. After discovery, defendants moved for summary judgment on the ground that they neither created the defective condition in the apartment window nor had any notice of it. In support of their motion, defendants submitted the affidavit of the president of IMK Management, who averred that, pursuant to the company's policy, he had inspected the fourth-floor apartment after the previous tenants vacated it on August 31, 2008, and had not observed any defects in any of its windows. The president also stated that he had not been notified of any problem with the apartment windows before the accident, and that neither he nor any other IMK Management employee had ever repaired the windows.

Defendants also submitted the affidavit of a managing partner of the nonparty realty company that employed plaintiff. The partner stated that, from the time the fourth-floor apartment

became vacant at the end of August 2008 through the date of plaintiff's accident in mid-November, at least five of the company's realtors had showed the apartment to clients, and at least 15 prospective tenants per week had looked at it. Moreover, the partner stated, he had never noticed any defect in any of the apartment's windows, and had never received any complaints about the condition of the apartment.

In its March 2011 order denying summary judgment to defendants, the motion court found that the record presented an issue of fact whether defendants had notice of the window's defective condition. The court observed that defendants' affiants merely stated that they had inspected the apartment some time after the prior tenants had left, but did not specify exactly when and failed to furnish "supporting documentary proof" such as records of the inspections or a statement that no records exist.

The owner of a premises may be held liable for an accident caused by a dangerous condition on the property if the plaintiff can demonstrate that the owner created the condition or had actual or constructive notice of it (*see Hauptner v Laurel Dev., LLC*, 65 AD3d 900, 902 [2009]). An owner can be deemed to have constructive notice of a dangerous condition if it is visible and apparent, and if the condition existed for enough time before the

accident to permit the owner's employees to discover and remedy the problem (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

There is no evidence that defendants created the defect in the window or that they had actual notice of the defect. Moreover, and contrary to the motion court's conclusion, the affidavits that defendants submitted made a prima facie showing that they lacked constructive notice. The president of IMK Management averred that he inspected the window and did not see any defect; this observation constitutes evidence that, even if the defect existed when the president observed the window, it was not visible and apparent. The president's affidavit, based on his personal knowledge, is sufficient to establish entitlement to summary judgment on the issue of notice.

The affidavit of the managing partner of the realty company further demonstrates the lack of constructive notice. The managing partner stated that the apartment was frequently visited by realtors and their clients between the time that the previous tenants moved out and Pintor was injured, and that the affiant never received any complaints about conditions in the apartment. This evidence indicates that the defect in the window did not exist long enough for defendants to detect it.

Finally, plaintiff also raises the doctrine of res ipsa

loquitur as an alternate basis for finding defendants liable. However, that doctrine is inapplicable under the circumstances of this case. An injured plaintiff seeking to apply res ipsa loquitur must establish, among other things, that the accident was caused by an instrumentality within the defendant's exclusive control (*see Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987]). Since the defect in the window could have been caused by any of the realtors, prospective tenants, and other people who entered the apartment while it was vacant, defendants lacked exclusive control.

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

ENTERED: DECEMBER 8, 2011

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

6028 Olga Nazario, Index 302887/09
Plaintiff-Respondent, 42060/09

-against

The New York City Housing Authority,
Defendant-Appellant.

[And a Third Party Action]

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Stanley Green, J.), entered on or about March 7, 2011,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated November 15, 2011,

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

ENTERED: DECEMBER 8, 2011

CLERK

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6240 Peter Aaron, et al., Index 103685/10
Plaintiffs-Respondents,

-against-

Fish-Bones Towing, Inc., et al.,
Defendants,

The Doe Fund, Inc.,
Defendant-Appellant.

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Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellant.

Kramer & Dunleavy, L.L.P., New York (Lenore Kramer of counsel), for respondents.

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Order, Supreme Court, New York County (George J. Silver, J.), entered January 20, 2011, which granted plaintiffs' motion for summary judgment on the issue of liability as against all defendants, unanimously affirmed, without costs.

Summary judgment was not premature, where plaintiff Peter Aaron was allegedly injured when, as he was locking his bicycle to a signpost on a sidewalk, he was run over by an unoccupied moving van, owned by defendant The Doe Fund, Inc., that broke free from a tow truck owned by defendant Fish-Bones Towing and operated by defendant Gonzalez. Doe Fund's claimed need for discovery as to the injured plaintiff's alleged negligence is unsupported by facts suggesting that relevant evidence might be

revealed; thus, it is "insufficient to forestall summary judgment" (*2386 Creston Ave. Realty, LLC v M-P-M Mgt. Corp.*, 58 AD3d 158, 162 [2008], *lv denied* 11 NY3d 716 [2009]). Indeed, Doe Fund has not shown how a reasonable jury could find that plaintiff's injuries are a reasonably foreseeable consequence of locking up a bicycle to a signpost on a sidewalk (*cf. Tannous v MTA Bus Co.*, 83 AD3d 584 [2011]; *White v Diaz*, 49 AD3d 134, 139-140 [2008]).

As was made clear by the court's non-appealed, simultaneously issued order that granted Doe Fund's motion for summary judgment on its cross claim against its co-defendants for common-law indemnification, Doe Fund's liability for plaintiff's injuries was purely vicarious under Vehicle and Traffic Law § 388(1) (*see generally Them-Tuck Chung v Pinto*, 26 AD3d 428, 429 [2006]). Accordingly, the court correctly granted plaintiffs' motion as against Doe Fund.

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

ENTERED: DECEMBER 8, 2011

CLERK

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6241-
6242

In re Anastacia L., and Others,

Children Under the Age
of Eighteen Years, etc.,

Vito L.,
Respondent-Appellant,

Jennifer R.
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for Administration for Children's Services, respondent.

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

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Orders of fact-finding, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about April 16, 2010 and June 21, 2010, which determined that appellant Vito L. had neglected Anastacia L., Andrew L., Brandon L., Kyle M. and Douglas D., and that he had derivatively neglected Daphne L., unanimously affirmed, without costs. Appeal from order of disposition, same court and Justice, entered on or about June 21, 2010, unanimously dismissed, without costs, as moot.

The findings of neglect, including the finding of derivative

neglect, are supported by a preponderance of the evidence. Appellant, a level-three sex offender who committed past sex offenses against children, exposed the subject children to imminent danger of impairment by failing to complete sex offender treatment, despite the fact that such treatment was recommended in connection with a prior neglect proceeding, and by seeing the children without supervision (*see Matter of Christopher C.*, 73 AD3d 1349 [2010]; *Matter of Ahmad H.*, 46 AD3d 1357 [2007], *lv denied* 12 NY3d 715 [2009]; *compare Matter of Afton C. [James C.]*, 17 NY3d 1 [2011]).

The appeal from the order of disposition was rendered moot by the subsequent entry of orders discharging Douglas from care, granting custody of Kyle to a relative, and authorizing a final discharge of Brandon, Andrew, Anastacia, and Daphne to respondent Jennifer R. (*see Matter of Erica D. [Maria D.]*, 77 AD3d 505 [2010]).

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

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

ENTERED: DECEMBER 8, 2011

CLERK

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

6243 Francisco Mendoza, Index 1449/07
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

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Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for appellant.

Fotopoulos, Rosenblatt & Green, New York (Dimitrios C. Fotopoulos of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered October 19, 2010, which, insofar as appealed from as limited by the briefs, denied so much of defendant's motion for summary judgment as sought dismissal of the causes of action for false arrest, false imprisonment and malicious prosecution, unanimously reversed, on the law, without costs, and the complaint dismissed in its entirety. The Clerk is directed to enter judgment accordingly.

No triable issue of fact exists as to whether the detention, arrest, or prosecution was supported by probable cause, given that the police found plaintiff in a state of undress on premises identified in a valid search warrant as a drug distribution

point, and a controlled substance was recovered from those premises (*see Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]; *People v Mayo*, 59 AD3d 250, 254-255, *affd* 13 NY3d 767 [2009]).

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

ENTERED: DECEMBER 8, 2011

CLERK

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6244 Anna Ortiz, Index 14485/07
Plaintiff-Respondent,

-against-

Rose Nederlander Associates, Inc., et al.,
Defendants-Appellants.

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Nicoletti Gonson Spinner & Owen LLP, New York (Pauline E. Glaser of counsel), for appellants.

Gottlieb, Siegel & Schwartz, LLP, Bronx (Stuart D. Schwartz of counsel for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr. J.), entered on or about March 7, 2011, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court properly denied defendants' motion in this action where plaintiff alleges that she was injured when, while in the course of her employment cleaning defendants' theater, she slipped and fell down an interior staircase. Defendants failed to demonstrate that plaintiff was their special employee and thus, barred from maintaining this personal injury action under the Workers' Compensation Law.

The record shows that plaintiff was compensated by nonparty

Nederlander Producing Company of America (NPCA), which was also her supervisor's employer. Although identifying the entity which controlled the work of plaintiff's supervisor is highly probative of who controlled the injured plaintiff's work (*see Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 552 [2008]), the record does not support defendants' assertion that they controlled the work of plaintiff's supervisor. Moreover, the fact that defendants and NPCA appear to be affiliated, does not establish, as a matter of law, that they were "alter egos or joint venturers for the purpose of barring plaintiff's claims under the Workers' Compensation Law" (*Hughes v Solovieff Realty Co.*, 19 AD3d 142, 143 [2005]).

Defendants' argument that NPCA was merely a "common paymaster" is not dispositive of the special employer issue. The record shows that NPCA did more than just issue payroll checks. It is undisputed that it also entered into an employment contract with plaintiff's supervisor. The record does indicate that defendant, Rose Nederlander Associates, Inc., paid NPCA funds to cover payroll. However, there is no evidence that defendant J. Ned, Inc. directly contributed to such funding, and even with respect to Rose Nederlander Associates, Inc., there is no evidence that there was a written contract between it and NPCA mandating such payments.

Furthermore, even if one defendant funded NPCA's payroll, such fact is just a single factor militating in favor of a special employment relationship. Standing alone, and without, inter alia, the additional showing that, defendants directed and controlled plaintiff's duties, or the existence of a contract by which defendants directly undertook duties in relation to plaintiff, the funding-source element is not dispositive (*compare Evans v Citicorp,* 276 AD2d 370 [2000]).

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

ENTERED: DECEMBER 8, 2011

CLERK

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6247 The People of the State of New York, Respondent, Ind. 1954/07

-against-

Radcliffe McNab, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Megan R. Roberts of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert Neary, J.), rendered March 11, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentencing him to concurrent terms of two years, unanimously affirmed.

Although defendant requested disclosure of an undercover officer's name, he did not sufficiently alert the court to his claim that permitting the undercover officer to testify under his shield number violated his right of confrontation, and the court did not "expressly decide[ ]" the issue "in response to a protest by a party" (CPL 470.05[2]; *see People v Colon*, 46 AD3d 260, 263 [2007]). Accordingly, defendant did not preserve his Confrontation Clause claim, and we decline to review it in the

interest of justice.

As an alternative holding, we find no Confrontation Clause violation (*see United States v Rangel*, 534 F2d 147, 148 [9th Cir 1976], *cert denied* 429 US 854 [1976]; *see also Pennsylvania v Ritchie*, 480 US 39, 51-54 [1987]). At the *Hinton* hearing, the People established a need for anonymity (*see People v Waver,* 3 NY3d 748 [2004]; *People v Smith*, 33 AD3d 462 [2006], *lv denied* 8 NY3d 849 [2007]), and defendant failed to establish that only knowing the officer's shield number caused him any prejudice (*see People v Washington*, 40 AD3d 228 [2007], *lv denied* 9 NY3d 927 [2007]).

We also reject defendant's claim that use of the officer's shield number instead of a name conveyed to the jury that defendant was dangerous. The court's curative instruction was sufficient to minimize any prejudice.

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters outside the record concerning counsel's strategy and preparation (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance

under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Even assuming that, during defendant's testimony, counsel mishandled an inquiry about defendant's prior record, we find no reasonable probability that the error affected the outcome or deprived defendant of a fair trial. The evidence of guilt, which included the recovery of prerecorded buy money, was overwhelming.

Since defendant did not request any remedy, he did not preserve his claims regarding juror note-taking, and we decline to review them in the interest of justice. As an alternative holding, we find no indication that defendant was prejudiced in any way (*see People v Valienne*, 309 AD2d 562 [2003], *lv denied* 1 NY3d 602 [2004]).

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

ENTERED: DECEMBER 8, 2011

CLERK

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6248 The People of the State of New York, Respondent, Ind. 5494N/04 6241/09

-against-

Erin Anderson, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Eduardo Padro, J. at plea; Michael Sonberg, J. at sentencing), rendered on or about January 19, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: DECEMBER 8, 2011

CLERK

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

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6250 Atlantic Line Construction, LLC, 602173/09
Plaintiff,

-against-

Marstan Development Corp., et al.,
Defendants-Appellants,

AB Design Build Corp., et al.,
Defendants,

Argyle Development LLC,
Defendant-Respondent.

_____

Jeremy Rosenberg, New York, for appellants.

Mattar, D'Agostino & Gottlieb, LLP, Buffalo (Jonathan Schapp of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered August 6, 2010, which granted defendant Argyle Development LLC's motion for summary judgment on its cross claim against defendant Marstan Development Corp., unanimously affirmed, with costs.

Marstan's allegation that the "Affidavit and Waiver of Lien" was fraudulently procured by an unfulfilled promise on Argyle's part to pay the last of three invoices in full, as opposed to partial payment and a draw-down on previously advanced funds, is unsupported in the record (*see Grullon v City of New York*, 297 AD2d 261, 263 [2002]). Contrary to Marstan's contention that

previous invoices were paid in full by check, the documentary evidence demonstrates that each of Marstan's two previous invoices was paid by a combination of direct payment – either by check or wire transfer – and a reduction in the "float balance" – a sum advanced by Argyle to Marstan early in the construction project, from which Marstan was permitted to draw down amounts authorized by Argyle.

On June 9, 2009, Argyle informed Marstan by e-mail that it would pay the third invoice, for $55,170, by a wire transfer of $20,170 – a transfer that Argyle undisputedly made – and a $35,000 reduction in the float balance. Marstan alleges that, before sending the e-mail, a representative of Argyle promised that Argyle would send the full $55,170 by wire later in the day and requested that Marstan execute and forward the affidavit and waiver in the interim. Marstan claims that this promise induced it to execute the affidavit and waiver. However, upon receiving the wire transfer and the e-mail instructing it to deduct the remaining $35,000 from the float balance, Marstan made no objection. Nor has it controverted the assertion that the float balance existed, or that more than sufficient funds remained in it to draw down the $35,000. Moreover, Marstan submitted no evidence that payment by this method was somehow insufficient, so

as to raise the inference that it relied (a fraud claim requisite) on the alleged representation that Argyle would wire the full $55,170 (*see Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]).

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

ENTERED: DECEMBER 8, 2011

CLERK

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6254 The People of the State of New York, Ind. 5753/08
Respondent,

-against-

Troy Hill,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald Zweibel, J.), rendered on or about December 8, 2009,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: DECEMBER 8, 2011

CLERK

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

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

6255 Maria Padilla, Index 18627/06
Plaintiff-Appellant,

-against-

The Department of Education of
the City of New York, et al.,
Defendants-Respondents.

_____

The Berkman Law Office, LLC, Brooklyn (Robert J. Tolchin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 18, 2010, which granted defendants' motion to dismiss the complaint for failure to comply with General Municipal Law §§ 50-e and 50-i, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff, a teacher at defendant M.S. 201 Star Academy, seeks damages for injuries she allegedly suffered as a result of an assault by a student at the Academy in January 2006. Her initial notice of claim named only the City of New York as a defendant; her amended notice of claim adding the Department of Education as a defendant was untimely served (*see* General Municipal Law § 50-e[1][a]). In their answer to the complaint, defendants denied the allegations of proper service of a notice

of claim "except that a notice of claim was presented [and] that more than thirty days have elapsed without adjustment thereof." For the following reasons, defendants are equitably estopped to argue that plaintiff's initial notice of claim is defective (*see Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662 [1976]).

In November 2002, after the Education Law had been amended to increase mayoral control over education and decrease the Board of Education's power, the Office of the Corporation Counsel posted a notice in the New York Law Journal indicating that it was the "sole representative for the New York City Department or Board of Education" for service of notices of claim and process (*see Nacipucha v City of New York*, 18 Misc 3d 846, 851 [Sup Ct, Bronx County 2008]). There followed a "period of particular confusion" about notice of claim procedure (*see Matter of Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY2d 88, 94 n 1 [1981] [referring to confusion "incident to the transfer of operational control of municipal hospitals from the city to the Health and Hospitals Corporation"]). Understandably, a number of trial courts held that tort claims against the newly reorganized Board of Education and the newly designated Department of Education of the City of New York should be brought against the City (*see Nacipucha*, 18 Misc 3d at 852 [collecting cases]). The situation

was clarified in 2007, when this Court held that the City was not a proper party to actions arising out of torts allegedly committed by the Board and its employees (*see Perez v City of New York*, 41 AD3d 378 (2007), *lv denied* 10 NY3d 708 [2008]).

In 2006, it was reasonable for plaintiff to name the City as the only defendant in her initial notice of claim timely filed with Corporation Counsel. It was also reasonable for her to rely on defendants' answer to the complaint for the belief that she had served the proper party. While their conduct may not have risen to the level of fraud, defendants "comport[ed] [themselves] wrongfully or negligently, inducing reliance by [plaintiff]" and discouraging her from serving a timely amended notice of claim; they are therefore estopped from challenging her initial notice of claim (*see Bender*, 38 NY2d at 668).

By the time *Perez* was decided, it was too late for plaintiff to move for leave to serve a late notice of claim under General Municipal Law § 50-e(5). The most important factor that a court must consider in deciding such a motion is whether corporation counsel, which has as the "attorney" for both the City and

defendants, "acquired actual knowledge of the essential facts constituting the claim within the time specified" (General Municipal Law § 50-e[5]; *Matter of Allende v City of New York*, 69 AD3d 931, 932 [2010]).

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

ENTERED: DECEMBER 8, 2011

CLERK

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6259N Princes Point, LLC, etc., Index 601849/08
Plaintiff-Appellant,

-against-

AKRF Engineering, P.C., et al.,
Defendants-Respondents.

_____

Blank Rome LLP, New York (John J. Pribish of counsel), for appellant.

Seyfarth Shaw LLP, New York (Donald R. Dunn, Jr. of counsel), for AKRF Engineering, P.C., respondent.

Herrick, Feinstein LLP, New York (Scott E. Mollen of counsel), for Muss Development L.L.C., Allied Princes Bay Co., Allied Princes Bay Co. #2, L.P. and Joshua L. Muss, respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about March 24, 2011, which denied plaintiff's motion for leave to amend its complaint to add causes of action for fraud, promissory estoppel and prima facie tort, unanimously affirmed, without costs.

In this action arising from a real estate contract pursuant to which plaintiff agreed to purchase from defendants Allied Princes Bay Co. and Allied Princes Bay Co. #2, L.P. (Allied) a 23-acre parcel of waterfront property that had previously been listed by the Department of Environmental Conservation as a hazardous waste site, a disagreement occurred over the propriety of the shoreline revetment seawall, an issue which delayed

obtaining various development approvals and forestalled the contract's closing. Plaintiff commenced the instant action asserting causes of action for fraud in the inducement against Allied, fraud against defendant AKRF Engineering, P.C., the company that constructed the revetment, negligent misrepresentation against all defendants, and specific performance of the contract as well as rescission of an amendment to the contract against Allied.

Plaintiff's motion to amend the complaint to add additional causes of action was properly denied. The proposed fraud claim is duplicative of the previously pled rescission claims (*see Pollak v Moore*, 85 AD3d 578, 579 [2011]), and the new damages sought, consequential and punitive, are unavailable to plaintiff on the claims asserted. Damages for fraud are to compensate plaintiffs for what they lost, "'not to compensate them for what they might have gained'" (*Starr Found. v American Intl. Group, Inc.*, 76 AD3d 25, 27 [2010], quoting *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]), and punitive damages are not warranted since plaintiff has not alleged wrongdoing evincing a high degree of moral turpitude that demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478 [2007]).

Plaintiff's claim for promissory estoppel fails since,

pursuant to the contract, the property was being purchased "as is," plaintiff accepted all defects in the premises and was not relying on any assurances made by defendants as to the condition of the property. In addition, the contract included a clause stating that it represented the entire understanding between the parties (*Fariello v Checkmate Holdings, LLC*, 82 AD3d 437, 438 [2001]).

Plaintiff failed to plead facts that are sufficient to support a cause of action for prima facie tort because the allegations do not establish that defendants' purportedly tortious conduct was motivated by an otherwise lawful act performed with the intent to injure or with a "disinterested malevolence" (*see Curiano v Suozzi*, 63 NY2d 113, 117 [1984]; *Kleinerman v 245 E. 87 Tenants Corp.*, 74 AD3d 448 [2010]). Plaintiff's allegation of malevolence is contrary to its

allegation concerning defendants' alleged profit motives (*see Meridian Capital Partners, Inc. v Fifth Ave. 58/59 Acquisition Co. L.P.*, 60 AD3d 434 [2009]).

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: DECEMBER 8, 2011

CLERK

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6260N In re The Travelers Indemnity Index 260398/10
6260NA Company, etc.,
Petitioner-Respondent,

Katrina Armstead, et al.,
Respondents,

State Farm Mutual Automobile Insurance Company,
Additional Respondent-Appellant,

Farouk Omar,
Additional-Respondent.

_____

Martin , Fallon & Mullé, Huntington (Richard C. Mullé of counsel), for appellant.

_____

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered September 15, 2010, which granted petitioner's motion for a permanent stay of uninsured motorist arbitration, unanimously reversed, on the law, without costs, the motion denied, petitioner directed to join State Farm as an additional respondent and serve it with a supplemental petition and notice of petition, and the matter remanded for a hearing on the issue of State Farm's cancellation of its policy, and stayed pending the hearing. Appeal from order, same court and Justice, entered January 18, 2011, which granted State Farm's motion to reargue and, upon reargument, adhered to the initial determination, unanimously dismissed, without costs, as academic.

Petitioner concedes that the court lacked jurisdiction over

State Farm (*see Matter of American Tr. Ins. Co. [Carillo]*, 307 AD2d 220 [2003]; *Matter of Allstate Ins. Co. v Perez*, 157 AD2d 521 [1990]). Accordingly, the court improperly considered the merits of the petition.

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

ENTERED: DECEMBER 8, 2011

CLERK

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

6261 The People of the State of New York, Respondent, Ind. 961/08

-against-

Kent Davis, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Kevin A. Meehan of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered September 8, 2009, convicting defendant, after a jury trial, of assault in the first degree and endangering the welfare of a child, and sentencing him to an aggregate term of 11 years, unanimously affirmed.

The court properly precluded defendant's psychiatric expert witness from expressing an opinion on defendant's intent. The expert's proposed testimony had no genuine bearing on whether defendant acted intentionally within the meaning of Penal Law § 15.05(1), and it would not have helped to clarify an issue calling for professional or technical knowledge beyond the knowledge of the jurors (*see People v Cronin*, 60 NY2d 430, 433 [1983]; *People v Kincey*, 168 AD2d 231, 232 [1990], *lv denied* 78 NY2d 955 [1991]). At most, the proposed testimony tended to

establish the undisputed fact that the crime was not premeditated. Defendant's constitutional claim regarding this issue is without merit (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

The court properly declined to charge second-degree assault as a lesser included offense. There was no reasonable view of the evidence, viewed in a light most favorable to defendant, that he only caused physical injury (*see People v Richardson*, 57 AD3d 410 [2008], *lv denied* 12 NY3d 787 [2009]). Defendant stabbed his wife many times with a large knife, causing life-threatening injuries. The victim was hospitalized for 10 days after sustaining, among other things, a puncture wound just below her left clavicle and a partial lung collapse, which required that a tube be inserted into her chest. Defendant also caused serious physical injury by causing permanent and disfiguring scars (*see People v McKinnon*, 15 NY3d 311, 315 [2010]). Furthermore, given the violence of the attack, there is no reasonable view of the evidence under which defendant intended to cause physical injury as opposed to serious physical injury.

The court properly exercised its discretion in admitting certain evidence that defendant challenges as hearsay. In any event, to the extent the court made any errors in this regard, we find them to be harmless.

By failing to object, by making only generalized objections, and by failing to request further relief after objections were sustained, defendant failed to preserve his present challenges to the People's cross-examination and summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). The court's curative actions were sufficient to prevent any prejudice.

We find the sentence not to be excessive.

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

ENTERED: DECEMBER 8, 2011

CLERK

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

6262 Andrew Beck, III, Index 108995/09
Plaintiff, 590182/10

-against-

Studio Kenji, Ltd., et al.,
Defendants.

- - - - -

Ellen Honigstock,
Third-Party Plaintiff-Respondent,

-against-

Joseph Vance, AIA, et al.,
Third-Party Defendants-Appellants,

Josef Prini, AIA, et al.,
Third-Party Defendants.

_____

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Douglas R. Halstrom of counsel), for appellants.

Krieg Associates, P.C., Dix Hills (Marc S. Krieg of counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered July 29, 2010, which denied the motion of third-party defendants Joseph Vance, AIA and Joseph Vance Architects (collectively Vance) to dismiss the third-party complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The motion court erred in concluding that questions of fact

existed regarding whether Vance and third-party plaintiff Honigstock were in "the functional equivalent of privity." For a plaintiff to state a cause of action for negligent misrepresentation based on the existence of the functional equivalent of privity, three conditions must be satisfied: the defendant must have been aware that its representations were to be used for a particular purpose or purposes; the defendant must have intended that the other party rely on the representations for such purpose or purposes; and there must have been some conduct on the part of the defendant linking it to the other party which evinces the defendant's understanding of that party's reliance (*see Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 [1985]; *see also Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417 [1989]).

Here, while the third-party complaint contained sufficient allegations that Vance, the architect for the condominium building, reviewed and approved plans submitted by Honigstock, the architect of record for the design and construction of plaintiff Beck's apartment, the third-party complaint failed to adequately allege either that Vance intended Honigstock to rely on Vance in determining whether the plans complied with building codes and other regulations, or that Vance engaged in conduct evincing such an understanding. Accordingly, Honigstock failed

to state a claim based on the functional equivalent of privity.

The common-law indemnification claim fails, as Honigstock does not allege mere vicarious liability (*see Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.*, 59 AD3d 311, 312 [2009]). Nor is there a viable claim for contribution, since Honigstock seeks only economic losses (*see Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323 [2009]; CPLR 1401).

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

ENTERED: DECEMBER 8, 2011

CLERK

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

6263 In re Tonya B.,
Petitioner-Respondent,

-against-

Matthew B.,
Respondent-Appellant.

_____

Elisa Barnes, New York, for appellant.

Dora M. Lassinger, East Rockaway, for respondent.

_____

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about December 17, 2009, which, upon a finding that respondent Matthew B. committed the family offense of attempted assault, granted the petition for an order of protection against respondent for two years subject to court-ordered visitation with the parties' child, unanimously affirmed, without costs.

There exists no basis to disturb the court's determination that petitioner credibly testified that respondent attempted to assault her (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [2009]). Her testimony and the photographs of the bruises on her arm support the finding of attempted assault by a fair preponderance of the evidence (Family Court Act § 812; § 832).

Respondent waived his right to a dispositional hearing, as he did not demand, or object to the court's failure to hold, such

a hearing (*see Matter of Hazel P.R. v Paul J.P.*, 34 AD3d 307 [2006]). Rather, respondent proceeded to settle his visitation petition immediately after the court granted the stay away order and, over petitioner's objection, was granted the requested visitation rights. No apparent purpose would be achieved in convening a disposition hearing, given that respondent was granted liberal visitation rights, and the order of protection requires that he stay away only from petitioner, and not his child (*see id.*).

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

ENTERED: DECEMBER 8, 2011

CLERK

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

6266- Ocelot Capital Management, LLC, Index 603092/09
6267- Plaintiff-Respondent, 602838/09
6268- 651101/10
6269

-against-

Isaac Hershkovitz,
Defendant.

- - - - -

Eldan-Tech, Ltd., et al.,
Plaintiffs-Appellants,

-against-

Isaac Hershkovitz, et al.,
Defendants.

- - - - -

Eldan-Tech, Inc., etc.,
Plaintiff-Appellant,

-against-

Ocelot Capital Management, LLC,
Defendant-Respondent,

Ocelot Portfolio Holdings, LLC,
Defendant.

_____

Krol & O'Connor, New York (Igor Krol of counsel), for appellants.

Schlam Stone & Dolan LLP, New York (David J. Katz of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered July 15, 2010, in favor of Action 1 plaintiff Ocelot Capital Management, LLC (OCM) as against defendant Hershkovitz, in the aggregate amount of $378,837.50, pursuant to an order, same court and Justice, entered July 13, 2010, which, inter alia,

denied the motion of Action 2 plaintiffs and proposed intervenors Eldan-Tech, Ltd (ETL) and Eldan-Tech, Inc. (ETI) to intervene, and imposed costs upon said movants, and granted OCM's motion for summary judgment on its cause of action seeking payment from Hershkovitz on a $350,000 promissory note that Hershkovitz executed, unanimously affirmed, with costs. Order, same court and Justice, entered on or about July 30, 2010, which denied ETL/ETI's motion for a preliminary injunction to enjoin OCM from dissipating any monies recovered pursuant to the July 15, 2010 judgment, unanimously affirmed, with costs. Order, same court and Justice, entered November 4, 2010, which, in Action 3, granted OCM's motion to dismiss the complaint based on ETI's lack of standing to bring a derivative claim on behalf of Action 3 defendant Ocelot Portfolio Holdings, LLC (OPH), unanimously affirmed, with costs.

These actions involve a dispute between inter-related corporate entities regarding whether certain assets of one corporate entity, OPH, sold to Action 1 and Action 2 defendant Hershkovitz, produced more than one promissory note from Hershkovitz for $350,000. OCM and ETL each allege they possess an original promissory note from Hershkovitz, made out in the amount of $350,000. Hershkovitz averred that he made out only one note for $350,000, and he did not challenge the validity of

the notes allegedly possessed by either OCM or ETL. ETL's subsidiary, ETI, held an 80% equity stake in OPH.

The motion by ETL/ETI to intervene in Action 1 as of right (*see* CPLR 1012[a]), was properly denied since ETL/ETI did not show that they would be adversely affected by a judgment in favor of OCM. There was no evidence offered regarding Hershkovitz's liquidity, and ETL/ETI purportedly possessed their own note for $350,000, upon which they commenced a separate action (Action 2) that remains pending. ETL/ETI also offered no proof, apart from speculation, that the note and assignment in OCM's possession lacked authenticity and validity.

The court also properly denied ETL/ETI permission to intervene pursuant to CPLR 1013, since the legal issues and facts relevant to ETL/ETI's claims are not common with those asserted by OCM. In denying the motion to intervene, the motion court properly considered ETL/ETI's delay in moving to intervene, the complicating effect the ETL/ETI arguments would have on OCM's action, and the fact that ETL/ETI were prosecuting their claims on the note in their possession in another action (*see East Side Car Wash v K.R.K. Capitol*, 102 AD2d 157, 160 [1984], *appeal dismissed* 63 NY2d 770 [1984]).

The court properly granted OCM summary judgment on its cause of action seeking payment on the note in its possession. OCM

established prima facie entitlement to summary judgment based on submitted copies of the original note and a written assignment of the note from OPH to OCM, along with affidavits from individuals having personal knowledge regarding the creation and source of the aforementioned documents.

In opposition, Hershkovitz failed to raise a triable issue of fact. He provided a conclusory statement that he had executed only one $350,000 note, and that ETL/ETI had commenced a separate action against him based on the same note. Hershkovitz did not comply with rule 19-a of the Rules of the Commercial Division of Supreme Court (22 NYCRR 202.70[g]), inasmuch as he failed to submit a statement of material facts. The court noted that Hershkovitz had every opportunity to directly deny the validity of OCM's note, but failed to do so. Accordingly, OCM's statement of material facts, including that Hershkovitz was obligated to pay it $350,000, as per the terms of the original note, was appropriately deemed by the motion court to be admitted (*see Moonstone Judge, LLC v Shainwald*, 38 AD3d 215 [2007]; *see also Callisto Pharm., Inc. v Picker*, 74 AD3d 545 [2010]).

The court properly dismissed ETI's derivative action on standing grounds. ETI did not allege that it made a prior demand of OPH to institute an action (*see* Business Corporation Law [BCL]

§ 626[c]), or that to make such a demand would be futile (*see Wandel v Eisenberg*, 60 AD3d 77 [2009]). ETI's argument that the demand requirement was inapplicable because it had a majority equity interest in OPH, as opposed to a minority interest, is unavailing. BCL 626(c) does not differentiate between minority and majority shareholders for demand purposes. Moreover, the enumerated exceptions to the demand requirement have not been shown to be applicable here (*see Wandel* at 80).

Furthermore, even assuming that ETI had demonstrated its standing to bring a derivative action, the application for preliminary injunctive relief enjoining OCM from dissipating any assets derived from the Action 1 judgment was properly denied. There was no showing of a clear right to equitable relief given the law and the undisputed facts presented (*see generally Peterson v Corbin*, 275 AD2d 35, 37 [2000], *lv dismissed* 95 NY2d 919 [2000]).

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

ENTERED: DECEMBER 8, 2011

CLERK

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

6271- 6271A — The People of the State of New York, Respondent, — Ind. 5476/08, 1628/09

-against-

Jose Rivera,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

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Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about January 4, 2010,

Said appeals having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgments so appealed from be and the same are hereby affirmed.

ENTERED: DECEMBER 8, 2011

CLERK

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

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

6273 Mayra Bonilla, et al., Index 305495/08
Plaintiffs-Respondents,

-against-

Mohammed Abdullah, et al.,
Defendants-Appellants.

_____

Marjorie E. Bornes, New York, for Mohammed Abdullah and Raymond Solomon, appellants.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for Errola Gooden, appellant.

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

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Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered October 25, 2010, which, to the extent appealed from as limited by the briefs, denied defendants' motions for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), granted plaintiffs' cross motion for summary judgment on the issue of liability, and denied defendant Gooden's cross motion for summary judgment dismissing the complaint based on the issue of liability, unanimously modified, on the law, to grant defendants' motions to the extent of dismissing plaintiffs' 90/180-day claim, and to deny plaintiffs' cross motion, and otherwise affirmed, without costs.

The record demonstrates that, as defendant Gooden was operating his SUV on Seventh Avenue South, a taxi owned by defendant Solomon and operated by defendant Abdullah cut in front of him from his left, turned right, and caused a collision between the two vehicles at the intersection of Seventh Avenue South and Charles Street. The taxi continued on toward Charles Street, where plaintiffs Mayra and Michael Bonilla were crossing. Michael "yanked" Mayra out of the way of the oncoming cab, which caused her to trip on the sidewalk.

Plaintiffs' cross motion should have been denied, since issues of fact exist as to proximate causation. Defendant Gooden, however, failed to make a prima facie showing of entitlement to judgment as a matter of law. Indeed, his deposition testimony that he saw the taxi five to six seconds before impact raises issues of fact as to whether he was confronted with an emergency and acted prudently under the circumstances (*see Dayong Liu v Peng Cheng*, 82 AD3d 405, 405-406 [2011]; *Trevino v Castro*, 256 AD2d 6 [1998]).

Defendants made a prima facie showing that the injured plaintiff did not sustain a serious injury as a result of the accident. Indeed, defendants submitted the affirmed reports of an orthopedist finding normal ranges of motion in plaintiff's knees and lumbar spine and concluding that any injuries had

resolved (*Dennis v New York City Tr. Auth.*, 84 AD3d 579 [2011]). Defendants also submitted the affirmed report of their radiologist who, upon reviewing plaintiff's MRI film, opined that there was preexisting degenerative disc disease in the lumber spine (*Colon v Bernabe*, 65 AD3d 969, 970 [2009]).

In opposition, plaintiffs raised triable issues of fact as to whether the injured plaintiff sustained a significant or permanent consequential limitation of use of her knees and lumbar spine (*see* Insurance Law § 5102[d]). The affidavit of plaintiff's treating orthopedist contains objective, quantitative evidence of range-of-motion deficits in the lumbar spine and knees based on testing performed both immediately and approximately two years after the accident. These range-of-motion findings conflict with those of defendants' experts, who found no restrictions in range of motion. Evidence of range-of-motion limitations, especially when coupled with positive MRI test results, are sufficient to defeat summary judgment (*see Colon*, 65 AD3d at 970). Additionally, plaintiff's expert adequately addressed defendants' claims of preexisting degenerative disease by attributing the cause of plaintiff's injuries to the accident and noting that she was asymptomatic before the accident (*see Byong Yol Yi v Canela*, 70 AD3d 584, 584-585 [2010]). Plaintiff adequately explained the gap in treatment

by asserting in her affidavit that she stopped receiving treatment for her injuries when her no-fault insurance benefits were cut off (*see Browne v Covington*, 82 AD3d 406, 407 [2011]).

Plaintiffs' 90/180-day claim, however, should have been dismissed. The injured plaintiff alleged in her bill of particulars that she was confined to bed and home for only a few weeks immediately following the accident. Although she alleged that she was confined to bed for two weeks and home for two months immediately following her surgery, she asserted in her affidavit that she was home for only two weeks after her surgery (*see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522, 523 [2010]).

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

ENTERED: DECEMBER 8, 2011

CLERK

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

6274 Phoenix Erectors, LLC, Index 100701/10
Plaintiff-Appellant,

-against-

Edward M. Fogarty, Jr., Esq., et al.,
Defendants-Respondents.

_____

Carroll, McNulty & Kull, LLC, New York (Robert Seigal of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Thomas W. Hyland of counsel), for Edward M. Fogarty, Jr., respondent.

Rivkin Radler LLP, Uniondale (Melissa M. Murphy of counsel), for Litchfield Cavo, LLP, respondent.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Jonathan Harwood of counsel), for White & McSpedon, P.C., respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered February 17, 2011, which, in this action for legal malpractice, granted defendants Litchfield Cavo, LLP's and Edward M. Fogarty, Jr.'s motions to dismiss the complaint as against them, and denied plaintiff's cross motion pursuant to CPLR 3211(c), unanimously modified, on the law, to deny Fogarty's motion, and otherwise affirmed, without costs.

Within a four-month period in early 2002, Hera Construction, Inc. (Hera), a general contractor, commenced a New York action against plaintiff, a subcontractor, for breach of a construction contract, and plaintiff commenced a New Jersey

action to recover payments under the construction contract from Hera and a surety from whom Hera had obtained a $1.6 million bond to cover the subcontractors' labor and material payments. Plaintiff retained Fogarty, originally as a partner of defendant law firm White & McSpedon and subsequently as a partner of defendant law firm Litchfield Cavo, LLP, to represent it in the New York action. However, in efforts to combine the two actions, Fogarty, inter alia, drafted a stipulation that discontinued the New Jersey action with prejudice, and allowed the surety company to appear in the New York action *only* as a third-party defendant. A jury trial resulted in a verdict in favor of plaintiff on its counterclaim against Hera; a judgment, including interest, was entered in the amount of $194,340.30. However, immediately following the jury verdict, the third party action was dismissed, since pursuant to CPLR 1007, suits against a third party can only be maintained for contribution or indemnification claims, neither of which could be properly asserted by plaintiff against the surety company. Subsequently, Hera proved to be judgment proof and plaintiff commenced this action.

The court erred in finding that plaintiff failed to state a cause of action for legal malpractice as against Fogarty. The complaint alleged that Fogarty was negligent in failing to protect and preserve plaintiff's claims against the surety

company and that "but for" Fogarty's negligence in drafting the New York and New Jersey stipulations, and his corresponding failure to protect plaintiff's claims against the surety company, plaintiff would have been able to collect on its damages award against Hera (*see Bishop v Maurer*, 33 AD3d 497, 498 [2006], *affd* 9 NY3d 910 [2007]). These allegations met the requirements of a legal malpractice claim inasmuch as they set forth "'the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages'" (*see O'Callaghan v Brunelle*, 84 AD3d 581, 582 [2011], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]).

The court properly granted defendant Litchfield Cavo's motion to dismiss, since there was no evidence that Cavo, as superseding counsel, either contributed to the loss or could have

done anything to correct the errors of predecessor counsel (*see Waggoner v Caruso*, 68 AD3d 1 [2009], *affd* 14 NY3d 874 [2010]; *Rivas v Raymond Schwartzberg & Assoc., PLLC*, 52 AD3d 401 [2008]).

We have considered plaintiff's remaining contention and find it without merit.

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

ENTERED: DECEMBER 8, 2011

CLERK

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

6275-6276 Smartix International Corporation, Plaintiff-Appellant-Respondent, Index 114575/08

-against-

MasterCard International LLC, et al., Defendants-Respondents-Appellants,

Eric Petrosinelli, et al., Defendants.

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The Law Offices of Neal Brickman, P.C., New York (Neal Brickman of counsel), for appellant-respondent.

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (Jeffrey T. Golenbock of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 3, 2010, which, insofar as appealed from, granted defendants MasterCard International LLC and MasterCard International, Inc.'s (MasterCard) motion to the extent that it sought summary judgment dismissing the amended complaint and denied that part of the motion which sought sanctions against plaintiff, unanimously affirmed, with costs.

This action for misappropriation of trade secrets and confidential information, fraud, conversion, breach of contract and breach of fiduciary duty arises from a contract between plaintiff and defendant MasterCard International, Inc. pursuant to which plaintiff agreed to develop and deliver "SmartFan," a

software program that allows season-ticket holders for sporting events to manage, trade, or re-sell unused tickets to subscribers who participate in a program implemented through a team-affiliated credit card, and license it for MasterCard's exclusive use. Plaintiff alleges that after the termination of the contract, MasterCard improperly used SmartFan's technology to create the Extra Points Affinity Cards (Extra Points) program, a rewards program conceived and developed by defendant MBNA America Bank, N.A., in order to promote NFL team branded payment cards.

MasterCard made a prima facie showing of entitlement to judgment as a matter of law by establishing that the Extra Points program was not based on SmartFan. Plaintiff's assertion that Extra Points is an improper continuation of SmartFan, based on speculation and hearsay, is insufficient to raise a triable issue of fact. Plaintiff's mere hope that discovery will uncover evidence needed to defeat summary judgment is insufficient to deny the motion (*Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 [2005]).

Denial of sanctions was not improper since plaintiff's position was not so egregious as to constitute frivolous conduct

within the meaning of 22 NYCRR 130-1.1 (*Parametric Capital Mgt., LLC v Lacher*, 26 AD3d 175 [2006]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 8, 2011

CLERK

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

6277 Jennifer Cangro, Index 111339/09
Plaintiff-Appellant,

-against-

John Z. Marangos,
Defendant-Respondent.

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Jennifer Cangro, appellant pro se.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 13, 2010, which denied plaintiff's motion for summary judgment, and granted defendant's cross motion to dismiss the complaint, unanimously affirmed, without costs.

Apart from the fact that the complaint amounts to an impermissible collateral attack on plaintiff's divorce judgment, it fails to state a cause of action (*see* CPLR 3211[a][7]). The fraud allegations are insufficiently detailed (*see* CPLR 3016[b]),

and the remaining allegations consist of bare legal conclusions (*see Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233 [1994]).

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

ENTERED: DECEMBER 8, 2011

CLERK

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

6281 Lenox Hill Hospital, Index 601901/09
Plaintiff-Respondent,

-against-

305/72 Owners Corp.,
Defendant-Appellant.

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Kagan Lubic Lepper Lewis Gold & Colbert, LLP, New York (Jesse P. Schwartz of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for respondent.

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Order, Supreme Court, New York County (James A. Yates, J.), entered October 18, 2010, which, upon reargument, adhered to its prior order denying the motion to dismiss the second cause of action seeking declaratory relief, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

The proprietary lease at issue requires consent to sublet units and authorizes the imposition of conditions on the granting of such consent. Plaintiff-hospital, proprietary lessee in a building owned by defendant, is subject to the same subletting rules applicable to other shareholders (*see Spiegel v 1065 Park Ave. Corp.*, 305 AD2d 204, 205 [2003]). Thus, the part of the second cause of action that seeks a declaration that defendant does not have a right to require that plaintiff ask permission to

sublet or meet any specific requirements regarding subletting should have been dismissed.

Moreover, even assuming that plaintiff is entitled to a declaration that the arrangements under which its employees occupy the cooperative apartments at issue are not sublets, which declaration plaintiff also seeks in its second cause of action, the arrangement nevertheless violates the provision in the proprietary lease governing occupancy. Indeed, plaintiff's employees are not the proprietary lessees, and plaintiff cannot occupy the apartments within the meaning of the proprietary lease (*see Conversion Equities v Sherwood House Owners Corp.*, 151 AD2d 635, 637 [1989]). Contrary to the motion court's finding, the occupancy provision is consistent with Real Property Law § 235-f(2) (*see Barrett Japaning, Inc. v Bialobroda*, 68 AD3d 474, 475 [2009]). Accordingly, the second cause of action fails to state a claim, because the occupancy provision of the proprietary

lease "conclusively establishes a defense to the asserted claim[] as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

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

ENTERED: DECEMBER 8, 2011

CLERK

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

6282 The People of the State of New York, Ind. 3365/09
Respondent,

-against-

Jaime Martel,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Carruthers, J.), rendered on or about March 26, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: DECEMBER 8, 2011

CLERK

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

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

6286N Ana Link, LTD., Index 106147/07
Plaintiff-Respondent,

-against-

Mega U.S.A., Inc.,
Defendant-Appellant.

_____

Glenn Backer, New York, for appellant.

Salon Marrow Dyckman Newman & Broudy LLP, New York (William J. Cortellessa of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered July 15, 2010, awarding plaintiff damages in the principal sum of $40,637.05, unanimously dismissed, without costs, as taken from a nonappealable judgment.

A party cannot appeal from a judgment or order entered against it upon its default (CPLR 5511; *Salomon v Angsten*, 63 AD3d 564 [2009]; *Matter of Darryl P.*, 228 AD2d 176 [1996]). Since defendant failed to take a direct appeal from the order denying its motion to vacate the default, that order is not reviewable by this Court.

Were we able to reach the merits, we would affirm denial of the motion to vacate because no reasonable excuse was offered for defendant's failure to answer or its failure to obtain counsel within 30 days of the withdrawal of its former counsel (*see* CPLR

321; *Benson Park Assoc., LLC v Herman*, 73 AD3d 464, 465 [2010]. Moreover, defendant's alleged meritorious defenses are, at best, questionable.

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

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

ENTERED: DECEMBER 8, 2011

CLERK

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam JJ.

5448 EBC I, Inc., formerly known as eToys Inc., etc., Plaintiff-Appellant, Index 601805/02

-against-

Goldman Sachs & Co., Defendant-Respondent.

_____

Pomerantz Haudek Grossman & Gross LLP, New York (Stanley M. Grossman of counsel), for appellant.

Sullivan & Cromwell LLP, New York (Penny Shane of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 8, 2010, affirmed, with costs.

Opinion by DeGrasse, J. All concur except Abdus-Salaam, J. who dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
Diane T. Renwick
Leland G. DeGrasse
Sheila Abdus-Salaam, JJ.

5448
Index 601805/02

_____x

EBC I, Inc., formerly known as eToys Inc., etc.,
Plaintiff-Appellant,

-against-

Goldman Sachs & Co.,
Defendant-Respondent.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Eileen Bransten, J.), entered November 8, 2010, which, to the extent appealed from, granted defendant's motion for summary judgment dismissing the complaint.

Pomerantz Haudek Grossman & Gross LLP, New York (Stanley M. Grossman, H. Adam Prussin, Murielle J. Steven Walsh, Marie L. Oliver and Anthony F. Maul of counsel), and Wachtel & Masyr, LLP, New York (William B. Wachtel and John H. Reichman of counsel), for appellant.

Sullivan & Cromwell LLP, New York (Penny Shane of counsel), for respondent.

DEGRASSE, J.

Plaintiff is the Official Committee of Unsecured Creditors of eToys, Inc., a bankrupt internet start-up company that was incorporated in 1996. By order of the United States Bankruptcy Court for the District of Delaware (Walrath, J.), plaintiff was granted standing as a representative of eToys' bankruptcy estate and authorized to prosecute any litigation claim on behalf of eToys and the estate. Plaintiff's instant breach of fiduciary duty and fraud claims stem from the May 20, 1999 initial public offering (IPO) of more than 9 million shares of eToys' stock. Defendant, Goldman Sachs & Co., became the lead managing underwriter of the IPO pursuant to a May 19, 1999 underwriting agreement between itself and eToys. Plaintiff alleges in the amended complaint that Goldman Sachs also acted as eToys' fiduciary and, in that disputed capacity, misled the company into underpricing its IPO at $20 per share (discounted to Goldman Sachs at $18.65 per share). Plaintiff alleges in its second amended complaint that

> "[i]n sum Goldman [Sachs] served as eToys' fiduciary because eToys reposed great trust and confidence in Goldman [Sachs] in the pricing of the IPO and provided to this underwriter confidential information. Goldman [Sachs] exercised effective control over the pricing of the IPO. eToys placed utmost reliance on Goldman [Sachs] and accepted its recommended IPO price."

On the first day of trading, May 20, 1999, eToys' stock

traded at between $71 and $85 per share. Within three days, the trading price sank to $48.13 and fluctuated between $28 and $50 between June 11 and September 9, 1999. The stock's average trading price was $25.20 from December 20, 1999 to January 19, 2000 and $16.95 from January 20 to February 19, 2000. Thereafter the value of eToys' shares fell even further, never again to rise above the $20 offering price. With its stock trading near zero, in March 2001 eToys filed a voluntary petition for reorganization under chapter 11 of the United States Bankruptcy Code.

On a prior appeal, which was taken from an order determining a CPLR 3211(a)(7) motion, the Court of Appeals addressed the facial sufficiency of the breach of fiduciary duty cause of action as set forth in a prior complaint (*see* 5 NY3d 11, 19-22 [2005][*EBC I*]). As noted above, Goldman Sachs was engaged by eToys pursuant to a written agreement. Like the complaint then before the Court of Appeals, the instant complaint alleges "an advisory relationship that was independent of the underwriting agreement" (*id.* at 20). As the Court of Appeals held, "a cause of action for breach of fiduciary duty may survive, for pleading purposes, where the complaining party sets forth allegations that, apart from the terms of the contract, the underwriter and issuer created a relationship of higher trust than would arise from the underwriting agreement alone" (*id.*). "A fiduciary

relationship 'exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation'" (*id.* at 19, quoting *Restatement [Second] of Torts* § 874, Comment a). In making our required fact-specific inquiry, we first examine the scope of the underwriting agreement in order to determine whether eToys and Goldman Sachs had a principal-fiduciary relationship that transcended it. Indeed, "[c]ourts look to the parties' agreements to discover, not generate, the nexus of relationship and the particular contractual expression establishing the parties' interdependency" (*Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 160 [1993]).

As acknowledged in plaintiff's reply brief, the underwriting agreement was negotiated at arm's length between eToys, the issuer, and Goldman Sachs, the lead managing underwriter. The underwriters' discounted per share price of eToys' stock is an express term of the negotiated agreement. To be sure, eToys' prospectus, dated May 19, 1999, provides: "The initial public offering price for the common stock has been *negotiated* among eToys and the representatives of the underwriters" (emphasis added). Absent fraud, which will be addressed later, the undisputed arm's length negotiation of the offering price negates plaintiff's claim that it was the subject of advice given by

Goldman Sachs as a fiduciary. "A conventional business relationship between parties dealing at arm's length does not give rise to fiduciary duties . . . " (*Roni LLC v Arfa*, 74 AD3d 442, 444 [2010], *affd* 15 NY3d 826 [2010]).

Goldman Sachs had been represented in unrelated matters by eToys' securities counsel, Venture Law Group (VLG). In January 1999, when the IPO process began, VLG notified Goldman Sachs in writing of its role as eToys' securities counsel and that it would be "providing advice to eToys that is adverse to [Goldman Sachs]." Glen Van Ligten, a VLG attorney, testified that the relationship between eToys and Goldman Sachs was "adverse." Thus, the relationship between eToys and Goldman Sachs was acknowledged by eToys through its counsel to be adversarial from the outset. To be sure, Steven J. Schoch, eToys' chief financial officer (CFO), testified that "the equity capital markets folks have the investor base as their clients and they're responsible for bringing opportunities to them." Schoch also testified that he "would never leave [his] company's fate in the hands of an investment banker. They're not looking out for your interest."

The instant IPO was a firm commitment underwriting by which eToys, the issuer, sold an entire allotment of shares to Goldman Sachs's underwriting syndicate which, in turn, sold the shares to the public (*see* 5 NY3d at 16-17). In a firm commitment

underwriting, the underwriter bears the risk of loss on the unsold portion of the offering (*SEC v Coven*, 581 F2d 1020, 1022 n 2 [2d Cir 1978]). "Because of their firm commitment obligations, underwriters will generally be conservative in pricing an issue" (1 Thomas Lee Hazen, Securities Regulation § 3.2 [6th ed]). Regardless of plaintiff's claims in this action, Goldman Sachs had an inherent interest in limiting its exposure by negotiating for a low offering price. Therefore, Goldman Sachs's interests were indisputably adverse to eToys' due to the nature of the firm commitment underwriting.

Plaintiff's briefs do not address the motion court's treatment of the prospectus by which eToys acknowledged that it had negotiated the offering price for its common stock with the representatives of the underwriters. According to the prospectus, eToys and the underwriters determined the IPO price after considering prevailing market conditions as well as other factors that included

> "eToys' historical performance, estimates of eToys' business potential and earnings prospects, an assessment of eToys' management and the consideration of the above factors in relation to market valuation in related businesses."

Negotiation is a "consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter" (Black's Law Dictionary 1064-1065 [8th ed

2004]). The word implies an arm's length exchange. Under the Securities Act of 1933 (15 USC § 77a *et seq.*), eToys was required to issue a prospectus that accurately disclosed the material facts of the IPO, including the manner by which the offering price was determined (*cf. Acacia Natl. Life Ins. Co. v Kay Jewelers*, 203 AD2d 40, 44 [1994]). A material inaccuracy would have exposed eToys to liability under the statute.

It is well settled that a fiduciary relationship ceases once the parties thereto become adversaries (*see Eastbrook Caribe A.V.V. v Fresh Del Monte Produce, Inc.*, 11 AD3d 296, 297 [2004], *lv dismissed in part, lv denied in part* 4 NY3d 844 [2005]). A fortiori, a fiduciary relationship cannot have been created between parties who have been adversaries throughout their transaction.[1]

In discovery responses, plaintiff acknowledged that eToys did not separately compensate Goldman Sachs for any alleged advisory services. Plaintiff also conceded that it was unaware of any financial advisory letter between eToys and Goldman Sachs. The following deposition testimony by eToys' chief executive officer (CEO), Edward C. Lenk, summarizes all that plaintiff

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[1]Also, in applying *EBC I*, this Court reaffirmed the principle that the underwriter-issuer relationship is nonfiduciary (*see HF Mgt. Servs. LLC v Pistone*, 34 AD3d 82, 86 [2006]).

offered to support its assertion that a fiduciary relationship had been created:

> "Q. Did you believe on May 19, 1999, that Goldman Sachs was giving you advice with the interest of eToys foremost in their mind [*sic*]?
>
> "A. Yes . . .
>
> "Q. Well you relied on them on May 19th?
>
> "A. We relied on them and . . . why did we rely on them?
>
> "Q. Yeah.
>
> "A. Because they're Goldman Sachs, for crying out loud, and they make a market and they take companies public. They completely control the process. They know how to do it. They get it done. They raise the money for us. They are the experts. They do this every day. We do this once in a life."

This evidence amounts to a mere expression of confidence in Goldman Sachs's expertise, wholly insufficient to create a "relationship of higher trust than would arise from the underwriting agreement alone" (5 NY3d at 20). "[A] fiduciary duty cannot be imposed unilaterally" (*Marmelstein v Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 45 AD3d 33, 37 [2007] [internal quotation marks omitted], *affd* 11 NY3d 15 [2008]). As recognized by the *EBC I* Court, an advisory relationship independent of an underwriting agreement may give rise to a fiduciary duty (*see* 5 NY3d at 20). Advice alone,

however, is not enough to impose a fiduciary duty (*see Citibank, N.A. v Silverman*, 85 AD3d 463, 466 [2011]; *Flying J Fish Farm v Peoples Bank of Greensboro*, 12 So3d 1185, 1191 [Ala 2008]).

The *EBC I* Court found the complaint facially sufficient insofar as it alleged the parties "created their own relationship of higher trust beyond that which arises from the underwriting agreement alone, which required Goldman Sachs to deal honestly with eToys and disclose its conflict of interest — the alleged profit-sharing arrangement with prospective investors in the IPO" (5 NY 3d at 22).

According to the complaint, Goldman Sachs's undisclosed conflicts of interests stemmed from its practice of allocating IPO shares to large institutional customers and private wealth investors for the purpose of enhancing future trading business with them. We find no issue of fact as to whether Goldman Sachs had undisclosed conflicts of interest on the basis of the following evidence given by eToys' executives:

- Lenk's testimony that he knew that Goldman Sachs did business with many large institutions and wealthy customers that would receive IPO allocations;

- testimony by director Tony A. Hung that he knew Goldman Sachs had to have its investor clients' interests at heart and that it would give allocations to institutional and private wealth customers;

- testimony by Senior Vice President Stephen Paul that from his familiarity with the IPO process he "knew that underwriters allocate shares to institutions that generate significant commissions, and also to high-net-worth individuals affiliated with companies that may have been, or could become, investment banking clients and that this would happen with eToys' IPO"; and

- director Peter C.M. Hart's affidavit in which he states that based on his experience and observations over the course of his career in business and investments he was aware "that brokerage firms like Goldman Sachs allocate valuable resources to their most valued customers" and that a "'hot' IPO allocation was a potentially valuable and scarce resource that Goldman Sachs would distribute among its valued customers, taking into account those customers' overall levels of business or potential business with Goldman Sachs."

On the basis of the foregoing testimony and affidavit, we find that the fraud cause of action was properly dismissed to the extent that it is based on Goldman Sachs's alleged failure to disclose its compensation arrangements with its customers. Based on the same proof, considered in light of the prospectus and the underwriting agreement, we find no issue of fact as to whether Goldman Sachs assumed a fiduciary duty to advise eToys with respect to its IPO price. We therefore need not consider whether such a duty was breached. Were we to consider the issue, we would find that Goldman Sachs met its burden of establishing that there was no breach.

In January 2002, four months before plaintiff commenced this action, Lenk gave the following testimony before the Securities and Exchange Commission:

> "A. Let me give you some basic math here. At the $20 price, the company was valued at $2.4 billion. So Goldman did — from our perspective, Goldman did a great job. A lot of times historically, banks have been criticized for underpricing IPO's. You cannot criticize our underwriters for underpricing our IPO. They got us, you know, a $2.4 billion valuation. They did a great job in getting the price up and maximizing the proceeds of the company which we were grateful and happy for. Because they gave us the proceeds to try and grow and achieve our vision . . .
>
> "Q. And was there ever a discussion of bringing the price of the offering above $20?
>
> "A. I don't recall that. From a tactical perspective, what the banks would tell us was they liked to price IPO's between ten and twenty dollars a share. They don't like to be below ten. They don't like to be above twenty. And, ideally, they want to be in that — and I don't know — you, know I think it's sort of a practice in the marketplace. They like to have them priced between ten and twenty.
>
> You know, at ten to twelve, and moving up to eighteen and twenty and then twenty, we were raising double proceeds we initially thought. We were very happy strategically as a company to be able to have that extra cash. I don't recall us ever talking about going up to the higher price.
>
> "Q. Yeah . . .
>
> "A. As a CEO, I was scared to death of just living up to the $20 price. I was scared to death. We got [*sic*] to try to justify valuing the company.

> "There's only one thing worse than falling after the first day spike, it's falling below the IPO price. So how am I going to manage this company to be worth $2.4 billion, which was the $20 price.
>
> "If we had talked about going higher, I would have said, No — I would have opposed that because I was already scared as it was."[2]

Lenk's testimony refutes the pivotal allegation that eToys had been duped into underpricing its IPO shares. Similar statements regarding Goldman Sachs's performance were made in the affidavits of four of eToys' directors and the depositions of CFO Schoch and two other senior officers. The dissent mistakenly relies on Lenk's deposition testimony that eToys would have likely priced its IPO shares higher if it "had full information as to the demand, the book, the conditions, what was possible, that [its] stock was going up that much." This testimony is demonstrably immaterial because the amended complaint sets forth no allegation that Goldman Sachs misrepresented or concealed any of the factors

[2]Lenk's fear was well-founded. According to the prospectus, eToys suffered losses of $2.3 million and $28.6 million in fiscal years 1998 and 1999 respectively. It was also undisputed that eToys never made a profit, it always operated at a loss, and in May 1999 its operating losses were projected to be $79.4 million by 2000 and $98 million by 2001. In addition, Lenk's testimony constitutes an admission by plaintiff, eToys' successor in interest (*see* Prince, Richardson on Evidence § 8-201 [Farrell 11th ed]).

referenced by Lenk.[3] Where a claim is based upon misrepresentation, fraud or breach of trust, the circumstances constituting the wrong must be pleaded in detail (*see* CPLR 3016 [b]). Therefore, Lenk's deposition does not materially contradict his SEC testimony that he would have categorically opposed any increase in the offering price. Moreover, non-misleading omissions do not constitute fraud where there is no fiduciary relationship between the parties (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 46 AD3d 400, 402 [2007], *affd* 12 NY3d 553 [2009]).

The remainder of the fraud cause of action was also properly dismissed. According to the complaint, Goldman Sachs made "materially misleading" statements "that its pricing represented 'the fair value of the Company's Common Stock.'" Such statements would have constituted nonactionable opinion providing no basis for a fraud claim (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178-179 [2011]). Plaintiff also alleges that Goldman Sachs fraudulently represented that it would allocate the IPO shares to long-term institutional investors when it instead

[3]As the dissent notes, plaintiff's expert opined that issuers generally rely on lead managers for advice with regard to IPO share prices. This opinion is irrelevant in light of Lenk's foregoing testimony that he was dead set against increasing the offering price.

allocated the shares to known "flippers."[4] Goldman Sachs's statement of material facts, served pursuant to rule 19-a of the Rules of the Commercial Division of the Supreme Court (22 NYCRR) § 202.70(g), contained the statement that "[t]here was no promise made by Goldman Sachs regarding allocating only to investors who would be long-term holders." In support of the statement, Goldman Sachs cited Lenk's SEC testimony, his deposition and the depositions of CFO Schoch and director Hung, who was a member of eToys' Pricing Committee. Specifically, Lenk testified that eToys was generally aware that people would flip its stock for quick profits. Schoch testified that he did not remember any conversation in which it was said that "everybody that's in must stay in or they can't be in the I.P.O." Hung testified that he could recall no "'promise' that those who received eToys allocations would hold them, no matter what the price did." In its counterstatement, plaintiff disputed the conclusion that no promise was made but did not refer to any promise made by Goldman Sachs. Instead, plaintiff cited to Lenk's testimony that eToys had a "preference that [its] shares not be placed with flippers." Plaintiff also cited Hung's testimony and Goldman Sachs's Wells

[4]"Flippers" are those who quickly resell IPO shares in the aftermarket for large profits (*see*, *EBC I*, 5 NY3d at 25 n 3 [Read, J., dissenting in part]).

submission to the extent that they essentially stated that attracting long-term investors was a goal of the IPO.[5] We deem Goldman Sachs's statement to be admitted by plaintiff inasmuch as the counterstatement is bereft of citations supporting its assertion that Goldman Sachs made a promise regarding allocations to only long-term holders (*see Moonstone Judge, LLC v Shainwald*, 38 AD3d 215, 216 [2007]). Accordingly, there is no triable issue of fact as to whether Goldman Sachs fraudulently misrepresented that it intended to issue the IPO shares to only long-term investors (*see generally Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 406-407 [1958]).

We reject Goldman Sachs's alternative argument that the instant breach of fiduciary duty and fraud claims are preempted by federal securities laws. Goldman Sachs has made no showing of how plaintiff's claims would conflict with the SEC's regulatory scheme. We have considered the parties' remaining contentions and find them without merit.

Accordingly, the order of the Supreme Court, New York County (Eileen Bransten, J.), entered November 8, 2010, which, to the

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[5]A Wells submission is a written statement that may be submitted to the SEC by persons involved in SEC investigations who wish to set forth their interest and position with respect to the subject matter of the investigation (*see U.S. S.E.C. v Zahareas*, 374 F3d 624, 629 [8th Cir 2004]; 17 CFR 202.5[c]).

extent appealed from, granted the motion by defendant Goldman Sachs for summary judgment dismissing the complaint, should be affirmed, with costs.

All concur except Abdus-Salaam, J. who dissents in part in an Opinion:

ABDUS-SALAAM, J. (dissenting in part)

I would modify, on the law and the facts, to reinstate the causes of action for breach of fiduciary duty and fraud to the extent that they are based on defendant's failure to disclose its compensation arrangements with its customers.

Although the majority concludes that there can be no fiduciary relationship between parties dealing at arm's length, the Court of Appeals acknowledged in *EBC I, Inc. v Goldman, Sachs & Co.* (5 NY3d 11 [2005]) that even though an issuer and underwriter have an arm's length commercial relationship, there may also be an advisory relationship independent of the underwriting agreement that creates a fiduciary duty.

While the majority states that it has examined the scope of the underwriting agreement to determine whether the parties had a fiduciary relationship that transcended the agreement, the majority's analysis essentially hinges solely on the language of the agreement, which concededly does not set forth a fiduciary relationship. This analysis runs afoul of the Court of Appeals' recognition that an advisory relationship independent of the underwriting agreement would be demonstrated upon proof that "eToys was induced to and did repose confidence in Goldman Sachs' knowledge and expertise to advise it as to a fair IPO price and engage in honest dealings with eToys' best interest in mind"

(5 NY3d at 20). Because the record presents proof on this very subject, the majority improperly engages in issue determining rather than issue finding when it concludes as a matter of law that there was no fiduciary relationship (*see generally Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Martin v Citibank, N.A.*, 64 AD3d 477, 478 [2009]).

Defendant's witness Lawton Fitt, the eToys "deal captain," testified that she advised plaintiff about the pricing of the IPO. In particular, Fitt testified:

> "[F]rom an advisory standpoint, the role that I was in was as adjunct, if you will, to the investment banking role. I was one of the advisors to the company, and that is an unusual, unique position, if you think in terms of the equity function, where the equity function is largely dealing with the investor community, not so much the investment banking community or the corporate community."

This buttresses the testimony of plaintiff's Chairman and CEO, Edward Lenk, that Goldman Sachs gave eToys advice on the pricing of the IPO, upon which plaintiff relied. Thus, Lenk's testimony about his reliance on defendant's advice is not merely an expression of confidence in defendant's expertise, as found by the majority, but confirmation of Fitt's testimony that she was the expert on pricing and was the force behind the ultimate decision to price the shares at $20.

That plaintiff and defendant negotiated the price does not

negate plaintiff's proof that defendant was advising plaintiff and that plaintiff was relying on defendant's expertise in pricing. The majority's suggestion that plaintiff is seeking to unilaterally impose a fiduciary duty is belied by evidence in this record that defendant was acting as an advisor on the IPO share price, that defendant induced plaintiff to rely on this advice, and that plaintiff did so rely, thus creating a relationship of higher trust independent from the underwriting agreement (*see EBC I*, 5 NY3d at 20; *Pergament v Roach*, 41 AD3d 569, 571 [2007]; *Xpedior Creditor Trust v Credit Suisse First Boston (USA)*, 399 F Supp 2d 375, 385 [SD NY 2005]; *compare HF Mgt. Servs. LLC v Pistone*, 34 AD3d 82, 85 [2006] [no evidence that the underwriter acted as an "'expert advisor on market conditions'"]).[1]

The majority's conclusion that there can be no fiduciary

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[1]The motion court's observation that it was plaintiff's decision to rely on defendant's expertise rather than to utilize its own resources, misses the mark. The Court of Appeals recognized in *EBC I* that the underwriter's role as advisor creates and also limits the underwriter's fiduciary duty. That plaintiff could have also utilized other resources to help set the IPO price is not dispositive. As the motion court properly noted in another lawsuit, with application here, where "the parties are in a fiduciary relationship, whether [plaintiff] could reasonably rely on [defendant's] misrepresentations generally raises an issue of fact precluding summary disposition (*Aris Multi-Strategy Offshore Fund, Ltd. v Devaney*, 26 Misc 3d 1221 [A],*7, 2009 NY Slip Op 52738[U][2009, Bransten, J.]).

duty because the parties have adverse interests echoes the observations of the dissent in *EBC I* where Judge Read wrote:

> "How may a buyer ever owe a duty of the highest trust and confidence to a seller regarding a negotiated purchase price? The interests of a buyer and seller are inevitably not the same. Indeed, it is a longstanding principle of contract law that a buyer may make a binding contract to buy something that it knows its seller undervalues"(5 NY3d at 26).

However, Judge Read's concern about recognizing the viability of a fiduciary relationship was implicitly rejected by the majority when it held that there can be a limited fiduciary duty separate and apart from the underwriting agreement.

The majority's citation to *Eastbrook Caribe A.V.V. v Fresh Del Monte Produce, Inc.* (11 AD3d 296 [2004], *lv dismissed in part, lv denied in part* 4 NY3d 844 [2005]) is inapt, as it merely stands for the straightforward proposition that once parties become adversaries in litigation, any fiduciary relationship between them ceases. Nor does this Court's holding in *HF Mgt. Servs. LLC v Pistone* (34 AD3d 82 [2006]) support dismissal of the complaint here, as suggested by the majority. To the contrary, in *HF Mgt.*, we *contrasted* the situation in that case to that in *EBC I*, noting that there was "no indication or suggestion that . . . [the underwriter of the IPO] acted as an 'expert advisor on market conditions' [] in the same way that Goldman Sachs apparently advised eToys" (34 AD3d at 85).

The record evidence is also sufficient to raise a triable issue of fact as to whether the underwriter, by failing to disclose its alleged conflicts of interest with respect to the IPO pricing, breached any fiduciary duty. Again, the majority is improperly engaging in issue determining when it concludes that even assuming there was a fiduciary relationship, Goldman Sachs has established there was no breach. Lenk testified before the SEC in 2002, prior to commencement of this action, that he thought Goldman Sachs did a great job on the IPO and that he would have been opposed to any suggestion by defendant that the IPO be priced higher. Years later, however, based upon additional information that was not known to him at the time of his SEC testimony, he testified in this lawsuit as follows:

> "I believe that if we had full information as to the demand, the book, the conditions, what was possible, that we — our stock was going to go up that much, we would have very likely priced our IPO higher, and we would have had more proceeds, and it would have helped give us a stronger balance sheet, giving us a significant chance of surviving as a company."

The majority cites Lenk's testimony before the SEC and completely disregards his testimony in this action as immaterial.

The majority also improperly ignores and disregards, as irrelevant, pertinent testimony by plaintiff's expert, including

the following:

> "In addition to a contractual relationship concerning the underwriting (i.e. purchase) and re-sale of the issuer's (here eToys) stock, it is also a professional relationship between the issuer, as advisee and the lead-manager, as advisor.[1]
>
> "Issuers (like eToys) must necessarily rely on lead-managers (like Goldman) for advice all the way through the IPO process but *particularly*, and *most importantly*, with regard to the ultimate price per share of the IPO. Issuers simply do not have the requisite experience and expertise to make the pricing decision on their own. Recommending a specific offering price is the single most important aspect of a lead-manager's job."
>
> [1] "Of note, this relationship must co-exist [*sic*] with the ongoing relationships the lead-manager has with potential purchasers of the eToys IPO"(emphasis in original).

In sum, this record presents triable issues of fact as to whether there was a fiduciary relationship between the parties, and, if so, whether defendant breached that duty — issues that should be resolved by the trier of fact.

Finally, although plaintiff has not raised any issue of fact regarding its contention that defendant misrepresented that it intended to issue the IPO shares to only long-term investors, there is evidence that plaintiff relied on defendant's advice about the pricing of the IPO without defendant having disclosed its compensation arrangements with its customers — such as its alleged strategy to use the "trade up value" of underpriced IPOs to receive, as quid pro quos, increased brokerage commissions and

other business from recipients of IPO allocations. Accordingly, that portion of the fraud cause of action should be reinstated and resolved by the trier of fact.

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

ENTERED: DECEMBER 8, 2011

CLERK