SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 24, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Andrias, Moskowitz, Freedman, JJ.

5053 Third Lenox Terrace Associates, Index 570287/08
Petitioner-Respondent,

-against-

Cynthia Edwards, et al.,
Respondents-Appellants,

Eugene Smith, et al.,
Respondents.

_____

Cynthia Edwards, appellant pro se.

Rappaport Hertz Cherson & Rosenthal, P.C., Forest Hills (David I. Paul of counsel), for respondent.

_____

Order of the Appellate Term of the Supreme Court, First Department, entered March 27, 2009, which reversed a judgment of Civil Court, New York County (Rubin A. Martino, J.), entered on or about May 2, 2006, after a nonjury trial, dismissing petitioner landlord's summary holdover petition, granted the petition, and awarded petitioner a final judgment of possession, unanimously affirmed, without costs.

Respondent Linda Edwards is claiming succession rights to the rent-stabilized tenancy of her sister, respondent Cynthia Edwards. The record demonstrates that Cynthia, the tenant of record, initially entered into a two-year lease, beginning on November 15, 1995, with petitioner for the subject apartment. Cynthia remained the tenant of record by executing renewal leases every two years, with the last renewal being for the period beginning November 30, 2003 and ending November 30, 2005.

In August 2005, petitioner commenced the instant summary holdover proceeding for possession of the rent-stabilized apartment on the ground of non-primary residency, having discovered that Cynthia was not residing in the apartment as her primary residence, but that her sister Linda was residing there instead. Linda, who has admittedly been residing in the apartment since 1995, has the burden of proving that she resided with Cynthia, the tenant of record, in the apartment as her primary residence for a period of no less than two years prior to Cynthia permanently vacating the apartment (*see* Rent Stabilization Code [9 NYCRR] § 2523.5[b]; *68-74 Thompson Realty, LLC v McNally*, 71 AD3d 411 [2010]).

The trial evidence establishes, and it is not disputed, that Cynthia, the tenant of record, vacated the apartment in 1998 and

established a residence elsewhere. She, however, continued to execute renewal leases for the apartment extending through November 2005 and continued to pay the rent by money orders issued in her name during that time. Thus, although the apartment was no longer her primary residence after 1998, Cynthia, having continued to pay the rent and execute renewal leases extending through November 2005, cannot be found to have permanently vacated the apartment at any time prior to the expiration of the last lease renewal on November 30, 2005 (*see East 96th St. Co., LLC v Santos*, 13 Misc 3d 133[A], 2006 NY Slip Op 51980[U] [2006]). Accordingly, the relevant two-year period during which respondent Linda must show that she co-occupied the subject apartment with Cynthia is 2003 to 2005. Although Linda did submit sufficient documentary evidence to establish that she resided in the apartment during that period, there was no showing

that Cynthia lived in the premises at that time, since she admittedly had been residing elsewhere since 1998.

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

ENTERED: JANUARY 24, 2012

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, JJ.

3223 The People of the State of New York, Ind. 738/06
Respondent,

-against-

Timothy Washington,
Defendant-Appellant.

_____

Stephen Banks, The Legal Aid Society, New York (Adrienne Hale of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered October 17, 2007, as amended November 29, 2007, convicting defendant, after a jury trial, of two counts each of criminal possession of a weapon in the second and third degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 12½ years, unanimously affirmed.

On the original appeal (82 AD3d 570 [2011]), this Court rejected the suppression hearing court's rationale for denying suppression and remitted the matter to that court for determination of an alternative basis for upholding the search advanced by the People at the hearing but not reached by the court. Upon remittal, the hearing court again denied defendant's suppression motion, finding that the search of the car in which

defendant was a passenger was justified as a protective measure. We agree and now affirm.

Uniformed police officers observed a car carrying five passengers make an illegal turn, followed it and pulled it over. As they got out of their patrol car, the officers saw the three backseat passengers making "a lot" of "furtive" movements, including bending forward and then looking back at the officers. This conduct objectively appeared to be an effort to hide something from the police. The driver produced a registration, but was unable to produce a driver's license.

Furthermore, the occupants of the car were not fully complying with the officers' instructions. Although the officers told the men to stay in the car, a passenger began to get out, and the driver got out of the car and shouted that his license was in the trunk. In addition, the car's trunk had popped open, blocking the officer's view of the car's interior.

While one officer spoke to the driver by the trunk of the car, the other officer removed the passengers, including defendant, who had been sitting in the middle of the back seat. This officer leaned inside, pointed his flashlight into the car, and saw a revolver on the floor.

This evidence supports the hearing court's finding,

following our remittitur, that the officer made a lawful protective check for weapons. The totality of the information available to the police supported a reasonable conclusion that there was a weapon in the car that presented an actual and specific danger to their safety, and the limited intrusion into the back seat area, where the officers had seen furtive movements, was justified as a protective search for weapons (*see People v Mundo*, 99 NY2d 55, 57-59 [2002]; *People v Anderson*, 17 AD3d 166, 167-168 [2005]).

Turning to the other issues raised on the original appeal, we find no basis for reversal. The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was extensive evidence that defendant possessed two loaded handguns found in the car in which he had been riding. In addition to the automobile presumption (Penal Law § 265.15[4]) and defendant's proximity to the weapons, there was testimony that directly implicated defendant as the supplier of the weapons. The court's jury instructions appropriately conveyed the permissive nature of the automobile presumption, and that the burden of proof never shifts from the People.

We decline to invoke our interest of justice jurisdiction to dismiss the noninclusory concurrent counts (*see e.g. People v Martinez*, 8 AD3d 8 [2004], *lv denied* 3 NY3d 677 [2004]).

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

ENTERED: JANUARY 24, 2012

CLERK

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

6264-
6265 Ganpat Soodin, Index 111634/98
Plaintiff-Appellant-Respondent,

-against-

Gregory Fragakis, et al.,
Defendants-Respondents-Appellants.

_____

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

Domenick L. D'Angelica, New York, for respondents-appellants.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered August 24, 2010, which denied plaintiff's motion for partial summary judgment on the Labor Law §§ 240(1) and 241(6) causes of action, and granted defendants' motion for summary judgment to the extent it sought to dismiss those causes of action, unanimously reversed, on the law, without costs, to grant plaintiff's motion and to deny defendants' motion.

Plaintiff was entitled to partial summary judgment on his Section 240(1) and 241(6) claims. Plaintiff established that he was supplied with an old, weak, and shaky ladder that lacked rubber footings and was placed on a slippery polyurethane-coated floor, and that the ladder toppled over, causing him to fall. The commercial painting and plastering work in which plaintiff

was engaged when he fell is covered under Labor Law § 240(1) (*see Demaj v Pelham Realty, LLC*, 82 AD3d 531, 532 [2011]; *Gonzalez v 310 W. 38th, L.L.C.*, 14 AD3d 464 [2005]). The evidence that the ladder collapsed or malfunctioned for no apparent reason raises the presumption that the ladder "was not good enough to afford proper protection" under the statute (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]). It also establishes noncompliance with Industrial Code (12 NYCRR) §§ 23-1.21(b)(1), (3)(i)-(ii) and (iv), and (4)(ii).

Defendants failed to raise an issue of fact as to whether plaintiff was their special employee and therefore limited to workers' compensation benefits (*see* Workers' Compensation Law § 29[6]). Defendants contend that plaintiff was their special employee because they were the alter egos of nonparty Pine Management, plaintiff's general employer (*see e.g. Ramnarine v Memorial Ctr. for Cancer & Allied Diseases*, 281 AD2d 218 [2001). However, the record showed that Pine and defendant Delter Realty were separately incorporated and maintained separate records; there is no evidence that their finances were integrated, that they commingled assets, or that the principals failed to treat the entities as separate and distinct (*see Wernig v Parents & Bros. Two*, 195 AD2d 944 [1993] [closely associated corporations

which shared directors and officers were not alter-egos]). Indeed, Pine billed Delter for plaintiff's work. Moreover, plaintiff testified that he was never supervised by anyone from Delter, and was at all times supervised by someone from Pine.

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

6569 The People of the State of New York, Ind. 2455/03
Respondent,

-against-

Erick Villalona,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marc Adam Sherman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Harold Adler, J.), entered May 14, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

Regardless of whether defendant was eligible for resentencing, the record supports the court's alternative finding that substantial justice dictated denial of the application. That determination was a proper exercise of the court's discretion (*see People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]). Shortly after being released from prison on a homicide conviction, defendant possessed a significant quantity of drugs under circumstances indicating that he was involved in large-scale drug trafficking. These factors outweighed defendant's favorable record while incarcerated on the drug case

(*see e.g. People v Gumbs*, 66 AD3d 558 [2009], *lv dismissed* 14 NY3d 771 [2010]).

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6595 The People of the State of New York, Ind. 50/08
Respondent,

-against-

Robert McCoy,
Defendant-Appellant.

_____

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

Robert McCoy, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Micki A. Scherer, J. at dismissal motion; Edward J. McLaughlin, J. at jury trial and sentencing), rendered November 5, 2008, convicting defendant of attempted assault in the first degree (two counts), burglary in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a persistent felony offender, to an aggregate term of 16 years to life, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment, made on the ground that the prosecutor's questioning of defendant before the grand jury was allegedly improper. The cross-examination at issue was generally appropriate and

responsive to defendant's testimony (*see People v Karp*, 76 NY2d 1006, 1008 [1990], *revg on dissenting op of Sullivan, J.*, 158 AD2d 378, 385-390 [1990]). In any event, any defects fell far short of impairing the integrity of the proceeding and creating a risk of prejudice (*see People v Huston*, 88 NY2d 400, 410 [1996]; *People v Darby*, 75 NY2d 449, 455 [1990]).

Defendant did not preserve his claim that the People improperly re-presented the attempted assault charges to a second grand jury without court authorization (*see People v Julius*, 300 AD2d 167, 168 [2002], *lv denied* 99 NY2d 655 [2003]). We have considered and rejected defendant's arguments for exempting his claim from the requirement of preservation, including his claim that an unauthorized re-presentation is a mode-of-proceedings error. This type of error is not jurisdictional (*People v Batista*, 299 AD2d 270 [2002], *lv denied* 99 NY2d 626 [2003]), and defects in grand jury procedure generally require preservation (*see People v Brown*, 81 NY2d 798 [1993]). We see no reason to create an exception here, and we decline to review this unpreserved claim in the interest of justice. In any event, although the People should have obtained the court's permission to resubmit the charges (*see People v Credle*, 17 NY3d 556 [2011]), the reasons for the withdrawal were "legitimate . . .

and the underlying circumstances did not provide a clear indication that the first grand jury's decisional authority was being subverted" (*id.* at 562 [citation omitted]).

Since defendant's request for a jury charge on the lesser included offense of attempted third-degree assault was made on a different ground from the ground he raises on appeal, he did not preserve his present claim (*see e.g. People v Liner*, 262 AD2d 250 [1999], *lv denied* 93 NY2d 1021 [1999]), and we decline to review it in the interest of justice. As an alternative holding, we find that there was no reasonable view of the evidence that defendant attempted to commit a third-degree assault but not a first-degree assault.

The court properly exercised its discretion in adjudicating defendant a persistent felony offender. The persistent felony offender statute (Penal Law § 70.10) is constitutional (*People v*

Quinones, 12 NY3d 116 [2009]).

We have considered and rejected defendant's pro se claims.

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6596 In re Williamsburg Independent People, Inc., etc., Petitioner-Appellant, -against- Robert B. Tierney, etc., Respondent-Respondent. Index 104249/09

Camhi & Min, LLC, New York (Richard Min of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Edward F.X. Hart of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered October 14, 2010, which granted respondent's cross motion to dismiss the petition seeking a writ of mandamus to compel respondent to present to the New York City Landmarks Preservation Commission petitioner's request to landmark the entire site known as the Domino Sugar Refinery, unanimously affirmed, without costs.

The court properly dismissed the petition seeking to compel respondent to present petitioner's Request For Evaluation (RFE), since "there is no statutory requirement that [respondent] adhere to a particular procedure in determining whether to consider a property for designation" (*Matter of Citizens Emergency Comm. to*

Preserve Preserv. v Tierney, 70 AD3d 576, 577 [2010], *lv denied* 15 NY3d 710 [2010]). Accordingly, the decision as to whether an RFE should be calendered is a discretionary action and thus mandamus to compel is not an available remedy. Moreover, contrary to petitioner's contention, the Landmarks Preservation Commission is not obligated under 63 RCNY 1-02 to hold a public hearing before declining to calendar a request for the property's designation as a landmark (*see Matter of Landmark West! v Burden*, 15 AD3d 308, 309 [2005], *lv denied* 5 NY3d 713 [2005]).

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6597 In re Evan Matthew A.,

A Dependent Child Under
18 Years of Age, etc.,

– – – – –

Jocelyn Yvette A.,
Respondent-Appellant,

New Alternatives for Children,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Law Offices of James M. Ambramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

_____

Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about September 28, 2010, which denied respondent mother's motion to vacate an order, same court and Justice, entered on or about August 18, 2009, which upon her default in appearing at the fact-finding and dispositional hearings, found that she had neglected the subject child, terminated her parental rights and committed the custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

To vacate a Family Court's order issued on default, upon

failure to appear at either a fact-finding or dispositional hearing, the movant must establish both a reasonable excuse for the default and a meritorious defense to the allegations asserted (*see* CPLR 5015 [a][1]; *Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428 [2010], *lv dismissed* 15 NY3d 766 [2010]). Respondent's purported excuse of illness was properly rejected since she failed to provide any documentation to substantiate her claim, and did not explain why she was unable to contact either the court or her attorney regarding her inability to attend the hearings of which she had notice (*see Matter of Gloria Marie S.*, 55 AD3d 320 [2008], *lv dismissed* 11 NY3d 909 [2009]).

Moreover, respondent did not provide a meritorious defense to the charges of permanent neglect. She proffered only a general claim to have been engaged in her service plan and failed to provide any details or documentation (*see Matter of Christopher James A. (Anne Elizabeth Pierre L.)*, __ AD3d __, 2011 NY Slip Op 09015 [2011]). It is undisputed that during the applicable time period, respondent never completed any aspects of her service plan. In addition, respondent never challenged the finding that she failed to consistently visit with the child,

which in and of itself, constituted permanent neglect (*see Matter of Aisha C.*, 58 AD3d 471 [2009], *lv denied* 12 NY3d 706 [2009]).

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6598 Casa Redimix Concrete Corp., Index 13891/01
Plaintiff-Appellant,

-against-

Westway Industries Inc.,
Defendant,

Hunts Point Cooperative Market, Inc.,
Defendant-Respondent.

_____

Peckar & Abramson, P.C., New York (Alan Winkler of counsel), for appellant.

Greenberg Traurig, LLP, New York (James W. Perkins of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucy Billings, J.), entered June 22, 2010, which granted defendant Hunts Point Cooperative Market, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff seeks payment from defendant Hunts Point for concrete it supplied to Hunts Point's construction site pursuant to an agreement with defendant Westway Industries Inc., the contractor for the excavation and foundation work. Plaintiff contends that its claim is encompassed in a related reformation action brought by Hunts Point against the surety that issued

payment and performance bonds and in the settlement of that action.

We find that paragraphs in the complaint in the reformation action may be read as seeking damages based upon amounts owed to subcontractors and suppliers such as plaintiff. While it is true that paragraph 47 of the complaint alleges that "Westway's failure to perform its contracts and to pay its subcontractors ... and suppliers has caused *delays in construction*" (emphasis added), paragraphs 27, 35, 45, and 57 specifically refer to the monetary demands of subcontractors and suppliers, without connecting those demands to Hunts Point's asserted delay damages. Similarly, the *ad damnum* clause seeks declaratory relief and damages relating to the payment bonds, inter alia, and not merely to the performance bond. As plaintiff aptly observes, while the performance bond might address delay damages of the kind asserted by Hunts Point, it is the payment bonds that address the demands of unpaid subcontractors and suppliers (*see National Wall Sys. v Bay View Towers Apts.*, 64 AD2d 417, 424 [1978]).

Nor does the agreement unequivocally indicate that plaintiff's claims are not encompassed in the reformation action settlement. One of the "Whereas" clauses refers to both the performance bond "and a labor and material payment bond."

Although elsewhere the settlement agreement provides that the surety "shall resolve the claims made against the Bonds by Westway's subcontractors and suppliers" named in a separate interpleader action, the fact that plaintiff was not named in that action, when viewed in the light most favorable to it (the non-movant), suggests that plaintiff's claims are addressed in the reformation action settlement. Indeed, the very mention of the claims of subcontractors and suppliers in the settlement agreement militates against Hunts Point's position that it brought the reformation action only to address its own damages. Moreover, the deposition testimony and affidavits submitted by plaintiff suggest that subcontractors and suppliers, including plaintiff, were told by Hunts Point that their demands for payment would be resolved in the reformation action.

In addition, plaintiff presented documentary evidence that its specific claim was presented to the surety by Hunts Point in the reformation action. It may be, as Hunts Point's general manager claimed, that this documentation was "merely a tabulation by Hunts Point, as project owner, of the various claims by Westway subs and suppliers that had been made or payments that were outstanding at the time." However, in light of inferences drawn in plaintiff's favor, this fact suggests that plaintiff's

claim was at issue in the reformation action. The motion court improperly refused to consider this evidence, since nothing in the record establishes that it is inadmissible under CPLR 4547.

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6601 In re Thomas Maroti, Index 109862/10
Petitioner-Appellant,

-against-

Martha K. Hirst, etc., et al.,
Respondents-Respondents.

_____

Callahan & Fusco, LLC, New York (Scott A. Korenbaum of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered November 9, 2010, which denied the petition seeking to annul the determination by respondent Department of Citywide Administrative Services of the City of New York denying petitioner's application for a master rigger's license, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination to deny petitioner's application for a master rigger's license had a rational basis. The record demonstrates that petitioner failed to present evidence that he gained the requisite qualifying experience under the direct and continuing supervision of a master rigger duly licensed in the City of New York for five of the seven years prior to the filing

of the application (*see Matter of Auringer v Department of Citywide Admin. Servs. of City of N.Y.*, 28 AD3d 381 [2006]; Administrative Code of City of NY § 28-404.1; § 28-404.3.1).

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

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6602 In re Al-Amin Johnson, Ind. 107990/10
Petitioner-Appellant,

-against-

The Motor Vehicle Accident
Indemnification Corporation,
Respondent-Respondent.

_____

Edelman, Krasin & Jaye, PLLC, Carle Place (Jarad Lewis Siegel of counsel), for appellant.

Connors & Connors, P.C., Staten Island (Robert J. Pfuhler of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered November 23, 2010, which, in an action for personal injuries sustained by petitioner in a hit-and-run accident, denied his petition, brought pursuant to Insurance Law § 5218, to commence an action against the Motor Vehicle Accident Indemnification Corporation (MVAIC), unanimously affirmed, without costs.

The court properly denied the petition as time-barred. A petition for leave to sue MVAIC "is timely if made within the applicable statute of limitations" (*Steele v Motor Veh. Acc. Indem. Corp.*, 39 AD3d 78, 81 [2007], *appeal dismissed* 9 NY3d 989 [2007]). Here, petitioner's accident occurred on January 20,

2003, when he was 14 years old. The applicable three-year statute of limitations for a personal injury action (CPLR 214[5]) was tolled until petitioner turned 18, and expired on April 27, 2009, when he turned 21 (*see* CPLR 105[j]; 208). Petitioner brought the petition for leave to sue on June 14, 2010, rendering it untimely (*cf. Steele*, 39 AD3d at 82).

The court properly rejected petitioner's argument that he was not a "qualified person" under article 52 of the Insurance Law (*see* §§ 5202[b], 5218), and thus did not have standing to bring the petition, until after November 10, 2009, when an arbitration regarding whether he was insured under his stepfather's policy was resolved. As the court stated, petitioner could have filed his petition before the resolution of the arbitration and determination as to whether he was a "qualified person" (*see e.g. Cardona v Martinez*, 61 AD3d 462 [2009]).

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

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6603 Ethan Rand, Index 101796/06
Plaintiff-Appellant,

-against-

Cornell University,
Defendant-Respondent.

_____

Joseph Deliso & Associates, Brooklyn (Joseph A. Deliso of counsel), for appellant.

Cornell University, Office of the University Counsel, Ithaca (Wendy E. Tarlow of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered November 22, 2010, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law, in this action for personal injuries allegedly sustained when plaintiff slipped and fell on a sheet of ice on the sidewalk outside defendant's building. At the time of the fall, it was "cold with very light flurries," and plaintiff alleges that the sheet of ice "was under the flurried snow." Defendant submitted, inter alia, the affidavit of a climatologist and weather data from the day of the accident showing that a storm was in progress at the time of the accident (*see Pipero v*

New York City Tr. Auth., 69 AD3d 493 [2010]; *Powell v MLG Hillside Assoc.*, 290 AD2d 345 [2002]).

In opposition, plaintiff submitted an affidavit of a meteorologist who concluded that the hazardous icy condition preexisted the storm and was created by the melting and refreezing of snow that had accumulated from snowfalls that occurred several days before the accident date. However, nothing in the record supports the expert's claim that snow had accumulated on "exposed, undisturbed (i.e., not shoveled, plowed, walked upon, etc.) and untreated (i.e., not salted) ground" outside the building where plaintiff fell. Indeed, the lead custodian of the building stated that the entrance area where plaintiff fell was salted and shoveled at least twice per weekday; that the area had been cleared of snow for an event held at the building a week before the accident; and that his staff would never let snow accumulate so close to the building's heavily traveled entrance area. Accordingly, the conclusion of plaintiff's expert that the melting and refreezing of accumulated snow caused plaintiff's fall is speculative and fails to raise an issue of fact as to whether plaintiff slipped on "old ice" (*see Bernstein v City of New York*, 69 NY2d 1020, 1022 [1987]; *Hamill v City of New York*, 52 NY2d 1045 [1981], *affg* 78 AD2d 792 [1980];

compare Tubens v New York City Hous. Auth., 248 AD2d 291 [1998]).

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

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6604 The People of the State of New York, Ind. 5686/07
Respondent,

-against-

Brandon Stoudymire,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered May 5, 2009, convicting defendant, upon his plea of guilty, of robbery in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly exercised its discretion in denying defendant youthful offender treatment (*see People v Drayton*, 39

NY2d 580 [1976]), particularly in view of defendant's failure to comply with the conditions of his guilty plea.

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6606 In re Jazmine Weisman, et al., Index 402362/10
Petitioners-Appellants,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Jazmine Weisman, appellant pro se.

Jose De La Cruz, appellant pro se.

Sonya M. Kaloyanides, New York (Melissa Renwick of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered March 16, 2011, which denied the petition seeking to annul respondent's determination denying petitioners succession rights, as remaining family members, to the subject apartment, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

There exists no basis to disturb the determination that petitioners did not sustain their burden of establishing entitlement to succession rights to the apartment held by petitioner Weisman's mother; petitioner De La Cruz was the tenant's common-law husband. The evidence demonstrates that

petitioners' occupancy was not pursuant to respondent's written permission, and was not reflected in the affidavit of income submitted by Weisman's mother in the year before she died (*see Matter of Abreu v New York City Hous. Auth. E. Riv. Houses*, 52 AD3d 432 [2008]). Weisman has not established that respondent, by its conduct, consented to her tenancy and, even if she had, respondent's alleged approval of the tenancy occurred less than one-year before the death of Weisman's mother (*see e.g. Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 329-330 [2007]). Moreover, the payment of rent did not confer legitimacy on petitioners' occupation of the apartment (*see Barnhill v New York City Hous. Auth.*, 280 AD2d 339 [2001]).

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6607 Jose L.,
Petitioner-Respondent,

-against-

Yamely H.,
Respondent-Appellant.

_____

Yisroel Schulman, New York Legal Assistant Group, New York (Christina Brandt-Young of counsel), for appellant.

_____

Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about October 7, 2010, which denied respondent's motion to vacate an order of custody entered on default, unanimously reversed, on the facts, without costs, the motion granted, the custody order vacated, and the matter remanded for a custody hearing before a different Family Court judge.

In support of her motion to vacate her default on petitioner's application for custody of the parties' son, respondent offered the excuse that she was not served with the custody petition – she stated that she was working on the morning that it purportedly was served – and that petitioner had misrepresented to her that she need not appear on her family offense petition against him because they would resolve it out of

court, when unbeknownst to her that petition was returnable on the same day as the custody petition. Contrary to Family Court, we find this a reasonable excuse for the default (CPLR 5015[a][1]; *see Royall v Royall*, 105 AD2d 632 [1984]). We note that petitioner did not file for custody until the day after he was served with respondent's family offense petition, the one he told her they would resolve out of court. He then advised the court, when respondent did not appear, that he did not know where she was.

Respondent also demonstrated a meritorious defense to the custody petition. The custody order states that petitioner "report[ed]" that respondent had taken their son out of the country without his permission. However, respondent submitted evidence that petitioner had given his consent in writing, and

without imposing a time limit. Under the circumstances, the issue of custody should be determined on the merits (*see Matter of Precyse T.*, 13 AD3d 1113, 1113-1114 [2004]).

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6608 The People of the State of New York, Ind. 54060C/08
Respondent,

-against-

Awilda Toro,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (John P. Collins, J.), rendered on or about October 19, 2009, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6609- Evelyn Konrad, Index 102110/10
6610- Plaintiff-Appellant,
6611-
6612 -against-

William Brown,
Defendant-Respondent.

_____

Evelyn Konrad, appellant pro se.

Scarola Malone & Zubatov LLP, New York (Daniel C. Malone of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered September 30, 2010, dismissing the amended complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered September 14, 2010, which granted defendant's motion for summary judgment pursuant to CPLR 3211(c), unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court and Justice, entered on or about February 18, 2011, which granted plaintiff's motion to renew and adhered to the prior determination, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about April 25, 2011, which denied plaintiff's motion for leave to amend the amended complaint, unanimously dismissed, without costs, as abandoned.

The motion court correctly found that defendant's allegedly defamatory statements in his letter to the editor were either not susceptible to a defamatory meaning, true or substantially true or pure opinion. The assertion that plaintiff had made a false statement before an administrative tribunal was substantially true, as shown by the video and transcript of the hearing; this was a complete defense (*see Panghat v New York Downtown Hosp.*, 85 AD3d 473 [2011]. Considered as a whole, in context and based on its tone and apparent purpose (*see Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 42 [2011]) as well as the lack of any implication that it was based on undisclosed facts in light of defendant's reference to the videotape and transcript (*see Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]; *Guerrero v Carva*, 10 AD3d 105, 112 [2004]), it was also pure opinion. Defendant's assertion that plaintiff had made a false statement in an article 78 proceeding was both substantially true and his opinion of the news article reporting such conduct. The assertion that plaintiff, an attorney, had been discharged by a client, was true, as supported by the transcript of plaintiff's quantum meruit fee request wherein she stated that she had been discharged, and, in any event, was not susceptible of a defamatory meaning because defendant did not mention any reason

for the discharge.

The court's alternative ground for dismissal, that plaintiff failed to show malice, was also appropriate, as plaintiff was a limited public figure (*see Huggins v Moore*, 94 NY2d 296, 301-302 [1999]) and defendant's statements were based on documents or articles he had read and thus were not made with knowledge of their falsity or reckless disregard of whether or not they were true (*see Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 353-354 [2009]). Nor did plaintiff show that defendant's statements were actuated by ill will (*see id.* at 354 fn 4), her conclusory assertions to that effect notwithstanding.

Although the court correctly determined that plaintiff failed to justify her failure to submit her purported new evidence in opposition to defendant's motion, and that such evidence would not have warranted a different outcome, the court granted renewal and adhered to its initial determination. Accordingly, we need not disturb that result.

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

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, JJ.

6613 JP Morgan Chase Bank National Association,
Plaintiff-Respondent,

-against-

Hela Miodownik,
Defendant-Appellant,

Washington Mutual Bank, etc., et al.,
Defendants.

Index 118210/09

_____

Adam R. Allan, New York, for appellant.

Parker Ibrahim & Berg LLC, New York (Scott W. Parker of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 12, 2010, which denied defendant Miodowmik's motion to dismiss the complaint as against her, unanimously affirmed, without costs.

In this action to foreclose a consolidated mortgage, defendant argues that plaintiff JP Morgan Chase Bank, N.A. (JPMC) does not own the note it is attempting to foreclose. On September 25, 2008, the Office of Thrift Supervision closed Washington Mutual Bank (WAMU) and appointed the FDIC as Receiver (*see Dipaola v JPMorgan Chase Bank*, 2011 WL 3501756, *3, 2011 US Dist LEXIS 88753, *7 [ND Cal 2011]). On that same date, the bulk

of WAMU's assets were transferred to JPMC pursuant to a Purchase and Assumption Agreement (the P & A Agreement) entered into between FDIC as Receiver, the FDIC in its corporate capacity, and JPMC (*see id.*). Courts have found that the P & A Agreement evinced that JPMC purchased all of WAMU's loans and loan commitments, and therefore had the right to foreclose on a defaulting borrower (*see e.g. Haynes v JPMorgan Chase Bank, N.A.*, 2011 WL 2581956, 2011 US Dist LEXIS 69703 [MD Ga 2011]).

Defendant's contention that pursuant to sections 2.5 and 3.5 of the P & A Agreement, a borrower's loan is exempt from the P & A Agreement if the borrower is pressing a counterclaim against WAMU, is unavailing. Consistent with section 2.1 of the P & A Agreement, JPMC, as the assuming bank, agreed to continue to service all loans, and agreed to assume the liabilities associated with its ongoing servicing obligations (*see Allen v United Fin. Mtge. Corp.*, 2010 WL 1135787, *3-4, 2010 US Dist LEXIS 26503, *9-10 [ND Cal 2010]). However, section 2.5 of the P & A Agreement expressly provides that JPMC did not assume the potential liabilities of WAMU associated with claims of defaulting borrowers such as defendant, where the claims directly relate to WAMU's lending practices (*see e.g. Yeomalakis v Federal Deposit Ins. Co.*, 562 F3d 56, 60 [1st Cir 2009]; *Hanaway v*

JPMorgan Chase Bank, 2011 WL 672559, *2, 2011 US Dist LEXIS 21374, *8 [CD Cal 2011]; *Cassese v Washington Mut., Inc.*, 2008 WL 7022845, *3, 2008 US Dist LEXIS 111709, *7 [ED NY 2008]).

Moreover, defendant's reliance on section 3.5 of the P & A Agreement, is misplaced since this provision deals with "assets" of WAMU, and makes clear that the FDIC, as Receiver, was retaining any interest, right, action, claim, or judgment that WAMU had for itself so that the FDIC as Receiver would retain the benefit of those recoveries, rather than JPMC. Section 3.5 expressly excludes loss relating to defaulted loans, such as here, which would obviously be for the benefit of JPMC, since it acquired all of WAMU's loans and loan commitments.

In light of the foregoing, we need not address defendant's individual defenses, which result from WAMU's conduct at loan origination (*see Federici v Monroy*, 2010 WL 1345276, *3, 2010 US Dist LEXIS 37736, *10-11 [ND Cal 2010]). Were we to consider these claims, we would find them unavailing.

Defendant's attempt to thwart JPMC's request for attorney's fees is undermined by paragraph 14 of the Consolidation, Extension and Modification Agreement executed by defendant, which consolidated her first and second mortgages, and specifically provided that the lender could charge defendant for fees for

services performed in connection with default, including attorneys' fees. Contrary to defendant's argument, she should not be awarded attorney's fees on the basis that JPMC failed to attach a copy of the mortgage to its foreclosure papers that were signed by defendant.

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6614-
6615 The People of the State of New York, Respondent,

Ind. 1214/03

-against-

Jose Vaello,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Mary Jo L. Blanchard of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered January 28, 2009, convicting defendant, after a jury trial of rape in the first degree, sodomy in the first degree (two counts) and sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 50 years, unanimously affirmed.

The court properly exercised its discretion in permitting the People's expert, a licensed nurse practitioner certified as a sexual assault nurse examiner, to testify about the relationship between the victim's genital injury and forcible sexual intercourse. Given the witness's broad experience and training, she was qualified to testify about the physiological processes of a woman's body during sexual activity, and, concomitantly, about

how the victim's injury might have occurred in light of those physiological processes (*see People v Welch*, 71 AD3d 1329, 1331 [2010], *lv denied* 15 NY3d 811 [2010]). The witness did not express a direct opinion on the ultimate issue of whether the sexual conduct was forcible or consensual.

The court properly denied, without granting a hearing, defendants' CPL 330.30(2) motion to set aside the verdict on the ground of improper conduct by or relating to a juror. Through his counsel, defendant asserted that a juror's husband made a postverdict remark to defendant that suggested the possibility of such improper conduct. However, on its face, the purported remark made no reference to defendant's case and the inferences defendant's seeks to draw are highly speculative. Therefore, even if defendant's allegations are viewed most favorably to defendant, they did not contain "sworn allegations... of all facts essential to support the motion" (CPL 330.40[2][a]). Moreover, the People submitted an affidavit from the juror's husband denying having made the alleged remark, as well as documentary evidence tending to show that the purported conversation between defendant and the juror's husband could not have taken place. Under these circumstances, a hearing would have served no useful purpose. Defendant is "not entitled to a

hearing based on expressions of hope that a hearing might reveal the essential facts" (*People v Johnson*, 54 AD3d 636, 636 [2008], *lv denied* 11 NY3d 898 [2008]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6616 Indalecio Maldonado Torres, Index 111545/07
Plaintiff-Appellant,

-against-

Our Townhouse, LLC, et al.,
Defendants-Respondents.

_____

Shapiro Law Offices, PLLC, Bronx (Jason S. Shapiro of counsel), for appellant.

Gallo Vitucci & Klar, LLP, New York (Chad E. Sjdquist of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 29, 2011, which denied plaintiff's motion for partial summary judgment on his Labor Law § 240(1) cause of action, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff was injured when he fell to the ground while descending from a 12-foot-high sidewalk bridge without the use of a ladder or scaffold or any other safety device. Defendants contend that he was provided with a ladder and that his own decision to climb down a nearby tree instead of using the ladder was the sole proximate cause of his injuries. However, the record fails to support this contention. Even if defendants' evidence suggested that there might have been a ladder in the

chassis under the truck at the work site, no evidence was presented that plaintiff knew where the ladder was or that he knew he was expected to use it and for no good reason chose not to do so (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 11 [2011]).

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6617 Christian Urbano, Index 107829/09
Plaintiff-Appellant,

-against-

Rockefeller Center North, Inc., etc., et al.,
Defendants-Respondents,

Hachette Book Group USA, Inc., et al.,
Defendants.

– – – – –

[And a Third Party Action].

_____

Rheingold, Valet, Rheingold & McCartney, LLP, New York (Thomas P. Giuffra of counsel), for appellant.

Law Offices of Charles J. Siegel, New York (Peter E. Vairo of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered November 30, 2010, which, inter alia, granted the motions of defendants Americon Construction Inc. (Americon) and Rockefeller Center North, Inc. (Rockefeller Center) for summary judgment dismissing plaintiff's claims pursuant to Labor Law § 200 and § 241(6), unanimously affirmed, without costs.

Plaintiff, an employee of third-party defendant Rite-Way Internal Removal, Inc., a subcontractor hired by defendant Americon, the general contractor, to perform work at a building owned by defendant Rockefeller Center, was struck in the shoulder

by a piece of masonry that broke apart while he was placing it in a disposal container. Plaintiff's claim pursuant to Labor Law § 241(6) was properly dismissed. The Industrial Code provisions cited by plaintiff in support of this cause of action are inapplicable to the alleged facts (*see Romeo v Property Owner (USA) LLC*, 61 AD3d 491 [2009]). Industrial Code (12 NYCRR) § 23-1.7(d) and (e) concern hazzards which could cause workers to fall by slipping or tripping, or which could cut them. Although plaintiff testified that there was debris in the area where he was working, he did not slip or trip on this debris, nor did it cut him (*see id.; McParland v Travelers Ins. Co.*, 302 AD2d 328 [2003]).

12 NYCRR 23-3.3 is also inapplicable. The pieces of masonry laying on the floor were not "loosened material" within the meaning of that section. Nor did plaintiff's accident result from the collapse of deteriorated walls or floors.

Plaintiff's Labor Law § 200 claim was also properly dismissed. The record contains no evidence that defendants exercised requisite supervisory control, or that there was a dangerous condition of which defendants were on notice *(see Bowman v Beach Concerts, Inc.*, 66 AD3d 880 [2009]; *Mitchell v New York Univ.*, 12 AD3d 200, 201 [2004]).

The affidavit of plaintiff's expert does not support plaintiff's theory since it is based on speculation rather than record facts (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6618N Crystal Donaldson, Index 260403/10
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

_____

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

Greenstein & Milbauer, LLP, New York (Michael A. Barnett of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered October 6, 2010, which, in an action for personal injuries, granted plaintiff's motion for leave to amend the notice of claim, unanimously reversed, on the law and the facts, without costs, and the motion denied.

Leave to amend the notice of claim pursuant to General Municipal Law § 50-e(6) was improperly granted since the statute only "authorizes the correction of good faith, nonprejudicial, technical defects or omissions, not substantive changes in the theory of liability" (*Scott v City of New York*, 40 AD3d 408, 410 [2007]). Plaintiff's proposed amendment impermissibly sought to change the theory of liability from a slip and fall on the sidewalk outside defendant's building due to an accumulation of

snow/ice, to a slip and fall due to a wet metal weather strip located on the threshold of the building's front door (*see Santana v New York City Tr. Auth.*, 88 AD3d 539 [2011]; *Torres v New York City Hous. Auth.*, 261 AD2d 273 [1999], *lv denied* 93 NY2d 816 [1999]). Moreover, the prejudice to defendant is apparent inasmuch as the original notice of claim was insufficient to allow defendant to conduct a meaningful investigation of plaintiff's amended claim (*see Santana* at 540).

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

ENTERED: JANUARY 24, 2012

CLERK

Tom, J.P., Saxe, Acosta, Freedman, Abdus-Salaam, JJ.

5205-
5205A

United States Fidelity & Guaranty Company et al.,
Plaintiffs-Respondents,

-against-

American Re-Insurance Company et al.,
Defendants-Appellants,

Excess and Treaty Management Corporation, et al.,
Defendants.

Index 604517/02

- - - - -

Reinsurance Association of America, Complex Insurance Claims Litigation Association and Chartis Inc.,
Amici Curiae.

Wachtell, Lipton, Rosen & Katz, New York (Herbert M. Wachtell of counsel), for American Re-Insurance Company, appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Kathleen M. Sullivan of counsel), for Excess Casualty Reinsurance Association and OneBeacon America Insurance Company, appellants.

Boies, Schiller & Flexner, LLP, Albany (George F. Carpinello of counsel), for ACE Property & Casualty Company and Century Indemnity Company, appellants.

Simpson Thacher & Bartlett LLP, New York (Mary Kay Vyskocil of counsel), for respondents.

Freeborn & Peters LLP, Chicago, Illinois (Kerry E. Slade of counsel), for Reinsurance Association of America, amicus curiae.

Chaffetz Lindsey LLP, New York (Peter R. Chaffetz of counsel), for Complex Insurance Claims Litigation and Chartis Inc., amici curiae.

Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered October 25, 2010, and bringing up for review an order, same court and Justice, entered August 20, 2010 and amended October 22, 2010, affirmed, without costs. Appeal from the aforesaid order dismissed, without costs, as subsumed in the appeal from the judgment.

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

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
Rolando T. Acosta
Helen E. Freedman
Sheila Abdus-Salaam, JJ.

5205-5205A
Index 604517/02

_____x
United States Fidelity
& Guaranty Company, et al.,
Plaintiffs-Respondents,

-against-

American Re-Insurance Company, et al.,
Defendants-Appellants,

Excess and Treaty Management
Corporation, et al.,
Defendants.

– – – – –

Reinsurance Association of America,
Complex Insurance Claims Litigation
Association and Chartis Inc., Amici Curiae.
_____x

Defendants American Re-Insurance Company, Excess Casualty Reinsurance Association, ACE Property & Casualty Company, Century Indemnity Company, and OneBeacon America Insurance Company appeal from a judgment of the Supreme Court, New York County (Richard B. Lowe III, J.), entered October 25, 2010, in favor of plaintiffs and bringing up for review an order, same court and Justice, entered August 20, 2010 and amended October 22, 2010, which granted plaintiffs' motion for summary judgment and denied defendants' motion for summary judgment.

Wachtell, Lipton, Rosen & Katz, New York (Herbert M. Wachtell and Ben M. Germana of counsel), for American Re-Insurance Company, appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Kathleen M. Sullivan, Michael B. Carlinsky, Jane M. Byrne and Sanford I. Weisburst of counsel), for Excess Casualty Reinsurance Association and OneBeacon America Insurance Company, appellants.

Boies, Schiller & Flexner, LLP, Albany (George F. Carpinello and Benjamin I. Battles of counsel), for ACE Property & Casualty Company and Century Indemnity Company, appellants.

Simpson Thacher & Bartlett LLP, New York (Mary Kay Vyskocil, Chet A. Kronenberg and Seth A. Ribner of counsel), for respondents.

Freeborn & Peters LLP, Chicago, Illinois (Kerry E. Slade, Joseph T. McCullogh IV, and Robin E. Dusek of counsel), for Reinsurance Association of America, amicus curiae.

Chaffetz Lindsey LLP, New York (Peter R. Chaffetz and Andreas A. Frischknecht of counsel), for Complex Insurance Claims Litigation Association and Chartis Inc., amici curiae.

ACOSTA, J.,

This case presents us with a reinsurance coverage dispute arising out of asbestos litigation which has spanned several decades and involved the state and federal courts of several jurisdictions.[1] For the sake of brevity, we presume familiarity with the case, and provide a general overview of the facts directly relevant to this appeal.

The underlying asbestos claims

In the 1950s and 1960s, Western Asbestos was a company that sold, distributed and installed asbestos-containing products. In 1967, Western Asbestos dissolved. Its business was taken over by Western MacArthur Company (MacArthur). Beginning in the 1970s, individuals with asbestos-related health injuries began suing MacArthur based on their exposure to Western-Asbestos related products. In 1993, MacArthur sued plaintiff herein, United States Fidelity & Guaranty Co. (USF&G), and another insurance company in California state court seeking coverage under policies allegedly issued to Western Asbestos. USF&G initially declined coverage. USF&G argued several defenses to the action, including

[1]*See e.g. General Acc. Ins. Co. v Superior Ct.*, 55 Cal App 4th 1444, 1445 (1997), *review denied* 1997 Cal LEXIS 6025 [1997]; *Kaminski v Western MacArthur Co.*, 175 Cal App 3d 445, 451 (1985); and this Court's prior decision in *American Re-Insurance Co. v United States Fid. & Guar.*, 40 AD3d 486 (2007).

that it had insured Western Asbestos, not MacArthur; that MacArthur was not a successor in interest to the policies; that it could not locate the policies; that even if it had the policies, the policies did not provide products liability coverage; and that even if the policies did provide liability coverage the claims would have exceeded the policies' aggregate limits. Significantly, in 1997, the California Court of Appeal held that MacArthur was not entitled to coverage under Western Asbestos's insurance policies (*General Acc. Ins. Co. v Superior Ct.*, 55 Cal App 4th at 1445, 1451 [In holding for the insurance companies, including USF&G, the Court commented, "It is one thing to deem the successor corporation liable for the predecessor's torts; it is quite another to deem the successor corporation a party to insurance contracts it never signed, and for which it never paid a premium, and to deem the insurer to be in a contractual relationship with a stranger"]).

MacArthur countered the California appellate decision by resurrecting the then-defunct Western Asbestos in 1997 for the purpose of assigning its insurance rights to MacArthur. MacArthur had a former Western Asbestos officer sign an assignment of insurance rights to MacArthur, and then successfully persuaded a California court to "revive" Western Asbestos to ratify the assignment. Western Asbestos intervened

in the MacArthur action as a co-plaintiff. The action proceeded to trial in 2002. USF&G argued that the assignment and ratification were unenforceable. The court rejected the claim.

USF&G ultimately settled the insurance coverage action with MacArthur in 2002. USF&G and the other insurers agreed to pay approximately $975 million in satisfaction of all asbestos injury-related claims. Pursuant to the settlement agreement, MacArthur was required to file for bankruptcy protection. As part of the bankruptcy proceeding, MacArthur was to seek, pursuant to 11 USC § 524(g), an injunction to supplement the injunctive effect of the bankruptcy discharge. Essentially, in exchange for the creation of a trust fund by USF&G and the other insurers, which was to receive the $975 million payment for the compensation of existing and future asbestos claimants, MacArthur was to seek an injunction that would bar future claims against the insurance companies. Prior to the issuance of the injunction, the bankruptcy court was required to find that Western MacArthur had contributed something of value to the trust (11 USC § 524[g][4][B][ii]).

The bankruptcy petition was filed in and approved by the United States Bankruptcy Court for the Northern District of California. In its lengthy decision and order confirming the reorganization plan of MacArthur, including the settlement of the

asbestos-injury claims and the creation of the trust, the court found first that the value of MacArthur itself was insufficient to support creation of the trust. The bankruptcy court did find, though, that MacArthur was contributing value to the trust in the form of its business loss claims. These "business loss claims" included "potential bad faith claims" against USF&G for its longstanding refusal to either indemnify, defend, or settle or otherwise pay the asbestos-injury claims. The court noted that while the bad faith claims were of "sufficient value" to justify the issuance of the injunctions, it was not deciding the merits or the specific value of the bad faith claims despite what it termed the "substantial evidence" to support them. Rather, the bankruptcy court merely stated that "some portion" of the $2 billion being contributed to the trust must be attributed to those bad faith claims, and that the value of the bad faith claims was at least in excess of MacArthur's $17 million net liquidation value.

The Reinsurance Treaties

Beginning in 1945, USF&G entered into a series of reinsurance treaties with defendants American Re-Insurance (American Re) and the Excess Casualty Reinsurance Association (ECRA), each of which provided 50% of the coverage under the terms of the reinsurance treaties. ECRA was a pool of

reinsurers, each of which was responsible for a portion of ECRA's 50% of the treaty. The pool members were ACE Property and Casualty Company, Century Indemnity Company, OneBeacon America Insurance Company, and American Re.[2]

The treaty is an excess-of-loss contract, which requires the reinsurers to reimburse a portion of each covered loss over and above the amount of loss to be retained by USF&G (the retention). The first treaty, covering the period from 1945 to 1951, required USF&G to retain, for its own account, the first $50,000 arising from each covered loss. For the treaties running from 1951 to 1956 and 1956 to 1962, USF&G's retention increased to $100,000. For the treaties covering the years 1962 to 1975, USF&G's retention increased to $500,000, and for the treaties covering the years 1975 to 1980, USF&G's retention was $1,000,000. For the reinsurance treaty years 1957 to 1962, in dispute here, the maximum amount of loss payable by the reinsurers, after the $100,000 retention, was $4,900,000 for any one loss, subject to a limit of $3,000,000 for personal injury liability or property damage liability.

Following the settlement, in or about November 2002, USFG submitted its reinsurance billing under the treaties for the

[2]In addition to providing 50% of the reinsurance coverage, American Re was an 8% participant in the pool coverage.

reinsurer's share of the loss. In the settlement, the parties stipulated that USF&G issued thirteen comprehensive general liability policies to Western Asbestos, the first of which incepted in 1948 and the last of which incepted on July 1, 1959. Following the execution of the settlement agreement, USF&G, in consultation with MacArthur and claimant's counsel, determined to allocate the losses to the policy covering the period July 1, 1959 through July 1, 1960. The 1959 policy year was one of the policy years with the highest per person limits of $200,000, allowing a higher payout to injured claimants. In addition, USF&G determined that the 1959 policy was the only policy year that covered all potential claims for anyone exposed to asbestos during the settlement period. In accordance with its decision to allocate all the settlement claims to the 1959 insurance contract year, USF&G allocated all of its reinsurance claims to 1959 as well.

USF&G states that in preparing the reinsurance cession, it treated each injury as a separate accident, applying the $100,000 retention to each claimant's injury. For past claims, the judgment amount attributable to USF&G was capped at the $200,000 policy limit, and only the portion exceeding the retention was ceded to the reinsurers. For future claims, only two types of asbestos injuries were valued above the $100,000 retention: lung

cancer, valued at $200,000, and mesothelioma, valued at $500,000. USF&G's overall liability was calculated by multiplying the expected number of claimants in each category by $200,000. Half of that amount was then ceded to the reinsurers.

American Re and ECRA, however, refused to pay USF&G's reinsurance claim because, among other reasons, they believed that the retention under the 1956 to 1962 treaty had been increased from $100,000 to $3 million, and, that, notwithstanding the terms of the underlying settlement agreement as approved by the bankruptcy court, it was clear that USF&G was paying for Western's bad faith claims against it, which were not covered under the treaty. In or about December 2002, American commenced this lawsuit as a declaratory judgment action, but the parties were realigned to make USF&G the plaintiff. The parties subsequently submitted motions for summary judgment. The IAS court granted USF&G's motion, and denied the reinsurers'.

Defendants now appeal, arguing primarily that the "bad faith" of USF&G that they contend suffuses every layer of this action, from USF&G's initial denial of its duty to indemnify and defend MacArthur through its reinsurance presentation to the defendants, warrants summary judgment in their favor. Defendants believe that USF&G's bad faith has been so extensive that it has breached its duty of utmost good faith to them as the

reinsurers.[3]

These dramatic contentions, however, can be distilled into basic questions of law and fact that defendants believe the motion court erred in resolving. The question of fact, framed mainly by ECRA, concerns the increase of the retention in the 1956-1962 treaty to $3 million, an increase ECRA maintains was agreed upon by all parties. ECRA contends that even if the reinsureds did not agree to the increase in retention, sufficient conflicting evidence exists barring summary resolution of the issue. The issue of law, zealously pursued by both parties, concerns what they believe was the IAS court's erroneous application of the "follow the fortunes" doctrine, peculiar to reinsurance law. For the reasons set forth herein, we find defendants' arguments unavailing, and now affirm.

The Retention Amount

ECRA contends that in 1981, USF&G agreed to increase the retention amount on all of its reinsurance treaties from 1945 forward, to $3 million for claims reported on or after July 1, 1981. In support of this contention, ECRA asserts that its

[3]Despite these allegations of rampant bad faith, the record demonstrates that the reinsurers were kept duly advised of the course of the underlying litigation and settlement negotiations. The reinsurers manifestly had the right, under the treaty, to associate in the defense of the claim, but chose not to do so.

underwriter, Tom Renko, was concerned because claims from past years were "coming out of the woodwork," creating "rapidly ballooning exposures" that were hard to estimate. Renko, to address these concerns, contacted USF&G's broker and agent, James Steen of Guy Carpenter & Co, to negotiate the increase. ECRA points to numerous pieces of evidence in the record, including a memorandum of a conversation between Renko and Steen where the retention increase allegedly had been agreed to, a letter from Joseph K. Conwell, USF&G's Superintendent of Reinsurance, to Steen, acknowledging that the "old" Casualty first layer would increase to a $3,000,000 retention for new claims after July 1, 1981, and a letter from Guy Carpenter & Co. to USF&G in 1987 stating that "it is clear that the original intent of the agreement between the reinsurers and USF&G was to "clearly eliminate" any further losses to the "old First Excess of Loss reinsurance layer, irrespective of the effective date of such covers." ECRA also points to the course of conduct of the parties following the alleged 1981 retention increase, where it claims USF&G, in unrelated claims to the one herein, acknowledged that the retention was over $3 million for all claims, including ones that occurred before 1962.

Despite this evidence pointed to by ECRA, we find that the motion court correctly concluded that the retention increase to

$3 million was limited to those claims submitted under the 1962 to 1967 treaty and later treaty years. To be sure, USF&G points to other evidence claiming that it had only agreed to increase the retention to $3 million for claims post-1962, including that only the reinsurance treaties going back to 1962 were endorsed to reflect the change in retention and a 1992 letter from Guy Carpenter to Rentko stating that the agreement negotiated in 1981-1982 was that "all new claims against USF&G's 'old first layer' casualty cover (in force from 1/1/62 to 6/30/80) will be subject to a $3,000,000 retention."

However, the motion court found the affidavit submitted by the aforementioned Joseph Conwell of USF&G dispositive of this issue, and we agree. Conwell stated first that the "old First Excess" treaties mentioned in the correspondence cited by ECRA were for the treaty years starting in 1962, because 1962 was the first year in which USF&G's first and second layers of reinsurance were covered in separate treaties. Furthermore, Conwell states that when the retention for the 1962 policies was increased, the reinsurers were not suffering losses in the pre-1962 years, so no modification of those treaties was required. Finally, and most persuasively, the coverage limit for personal injuries under the 1957-1962 treaty was $3,000,000. Conwell stated that to increase the retention limit to $3,000,000 would

effectively wipe out USF&G's reinsurance, as it would be forced to retain the reinsurance limit of its personal liability coverage. ECRA, in all of its arguments on appeal, fails to squarely address this affidavit, or to demonstrate an issue of fact showing how or why USF&G was prepared to basically forfeit its reinsurance for the 1957-1962 treaty years.

The Follow the Fortunes doctrine

The reinsurance treaty here contains a follow the fortunes clause, which states:

"All claims in which this reinsurance is involved, when allowed by the Company (USF&G), shall be binding upon the Reinsurers, which shall be bound to pay or allow, as the case may be, their proportion of such loss. It is understood, however, that when so requested, the Company will afford the reinsurers an opportunity to be associated with the Company, at the expense of the Reinsurers, in the defense of any claim or suit or proceeding involving this reinsurance, and the Company and the Reinsurers shall cooperate in every respect in the defense or control of such claim or suit or proceeding, provided that the Company (USF&G) shall have the right to defend, settle, or compromise any such claim, suit or proceeding, and such action on the part of the Company shall be binding upon its reinsurers."

The requirement that a reinsurer "follow the fortunes" of the reinsured is as old as the business of reinsurance itself. The doctrine is broad in its application, and is said to derive from the Latin phrase: *iste secundus assecurator tenetur ad solvendum omne totum quod primus assecurator solverit,"* which although "indeterminate and general in its expression" (*New York State Marine Ins. Co. v Protection Ins. Co.,* 18 F Cas 160, 161 (D

Mass 1841]) has been translated to mean that "the reinsurer is held in full to the result that the primary insurer (reinsured) obtained" (*North Riv. Ins. Co. v Cigna Rein. Co.*, 52 F 3d 1194, 1205, n 16 [3rd Cir 1995]). Put simply, the reinsurer agrees to follow the insurer's financial obligations (fortunes), wherever they lead either company.

In modern parlance, follow the fortunes "burdens the reinsurer with those risks which the direct insurer bears under the direct insurer's policy covering the original insured" (*Bellefonte Rein. Co. v Aetna Cas. & Sur. Co.*, 903 F2d 910, 912 [2d Cir 1990]), in effect protecting the "risk transfer mechanism by providing that covered losses pass uninterrupted along the risk transfer chain" (*North River Ins. Co.*, 52 F 3d at 1205). It "simply requires payment where the [insurer's] good faith payment is at least arguably within the scope of the insurance coverage that was reinsured" (*Mentor Ins. Co [UK] v Brannkasse*, 996 F2d 506, 517 [2d Cir 1993]), preventing the reinsurer from second guessing the good faith liability determinations made by its reinsured (*see e.g. Insurance Co. v Associated Manufacturers' Corp.*, 70 App Div 69 [1902], *affd* 174 NY 541 [1903]) as well as precluding "wasteful relitigation" by a reinsurer in cases where the insured has paid in good faith (*National Union Fire Ins. Co. of Pittsburgh, Pa. v American Re-Insurance Co.*, 441 F Supp 2d

646, 650 [SD NY 2006]).

We find that the motion Court correctly determined that the follow-the-fortunes doctrine required defendants to accept the reinsurance presentation made by USF&G herein. Accordingly, all of defendants' efforts to second guess USF&G's decisions concerning allocation of the loss, whether it be the alleged bad faith claims; the decision to allocate the losses to the 1959 USF&G/MacArthur policy year and corresponding failure to spread the losses over the 13 policy years; the valuation of the lung cancer and mesothelioma claims; the alleged alteration of the loss presentation from an accident to occurrence basis; and the failure of USF&G to otherwise spread the loss out over the life of the policies as purportedly required by California law, which governed the USF&G/MacArthur policies, are precluded from this court's review (*see e.g. id at* 650-651). However, even if we were to consider these arguments on the merits, we would disagree that they excused the reinsurers from their obligation to follow the fortunes of USF&G or created an issue of fact barring summary resolution.

As a basis for precluding summary judgment, the dissent points to MacArthur's claim in its coverage action that USF&G initially disclaimed coverage in bad faith, and discerns evidence in the record to support that claim. However, MacArthur's prior

bad faith claim has no bearing on the reinsurers' obligations because the settlement agreement that resolved the coverage action does not allocate any of the settlement funds to compensating MacArthur for USF&G's alleged bad faith. The parties that negotiated the settlement, including MacArthur and its affiliates, the asbestos plaintiffs, and USF&G, confirm that the settlement amount was solely allocated to establish and administer the trust fund to compensate asbestos claimants and reimburse MacArthur's litigation fees and costs.

Defendants nonetheless argue that, because of a statement by the bankruptcy court in its decision confirming MacArthur's reorganization plan, the doctrine of collateral estoppel requires us to find that some of the settlement amount is attributable to bad faith claims. We disagree. Preclusion only applies to an issue that was "actually litigated, squarely addressed and specifically decided" (*Ross v Medical Liab. Mut. Ins. Co.*, 75 NY2d 825, 826 [1990]). Here, the parties to the bankruptcy proceeding never litigated whether USF&G paid monies to MacArthur on account of bad faith. The issue only arose tangentially when the bankruptcy court addressed whether the reorganization plan was "proposed in good faith," as required pursuant to 11 USC § 1129(a)(3). Specifically, the court was considering the objection by some parties that the plan had not been proposed in

good faith because the amount that MacArthur was contributing to the trust to compensate existing asbestos claims was insufficient to entitle it to an injunction against future claims.

The bankruptcy court determined that the objectors had undervalued MacArthur's contribution because they had not included the value of its potential bad faith claims. The court found that, based on evidence presented at the confirmation hearing, MacArthur had "colorable claims for bad faith." Accordingly, the court stated, "some portion" of the $2 billion contribution to the trust was attributable to those bad faith claims, but it disavowed that it was "deciding here the merit or specific value of any bad faith claim that was or could have been raised in a state court insurance coverage action." Thus the purpose of the court's finding was to clarify that MacArthur was able to contribute (and indeed, was contributing) something of adequate value to the trust in exchange for its insulation from further lawsuits.

It also bears mentioning that, during MacArthur's coverage action, USF&G raised at least one legitimate defense that found favor with the courts and cannot be attributed to bad faith. USF&G argued that MacArthur lacked standing to sue under insurance policies that USF&G had issued to Western Asbestos. In 1997, the California Court of Appeal held that Western MacArthur

was neither the insured nor a proper beneficiary of the policy (*General Acc. Ins. Co. v Superior Ct.*, 55 Cal App 4th at 1454-1455). Although the issue was later resolved in MacArthur's favor when Western Asbestos was resurrected for the sole purpose of transferring the USF&G policies to MacArthur, USF&G cannot be faulted for litigating the issue (*see Bosetti v United States Life Ins. Co. in City of New York*, 175 Cal App 4th 1208, 1237 ["(a)n insurer denying or delaying the payment of policy benefits due to the existence of a *genuine dispute* with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract"] [internal quotation marks and citations omitted]).

Insofar as defendants contend that the motion court also erred in stating that the settlement agreement was structured so that all losses were deemed to have occurred in 1959, we find that while the settlement agreement did not provide that those losses would be specifically allocated to that year, it was not improper for USF&G to do so in consultation with MacArthur and claimant's counsel. First, we must note again that, as with the alleged increase of the retention limit to $3 million, to require USF&G to spread the payment associated with each individual asbestos claimant over multiple policy years, thereby applying

more than one reinsurance retention, would in all likelihood have left USF&G without reinsurance coverage. Next, USF&G has made it clear that 1959 was selected in order to provide a maximum benefit to the actual injured persons and because 1959 was the only policy year that covered every potential claimant. Neither do we find the law cited by defendants to warrant a different result. California's "all sums" rule militates against spreading the loss across several policies, as it specifically forbids the stacking of policy limits (*see e.g. California v Continental Ins. Co.*, 170 Cal App 4th 160, 178 [2009], *pet for review granted* 203 P3d 425 [Cal 2009] ["in California, when there is a continuous loss spanning multiple policy periods, any insurer that covered any policy period is liable for the entire loss, up to the limits of its policy"] [emphasis omitted]). In addition, under California law, "[o]ther insurance' clauses become relevant only where several insurers insure the same risk at the same level of coverage" (*Dart Indus., Inc. v Commercial Union Ins. Co.*, 28 Cal 4th 1059, 1078 n 6 [internal quotation marks, citation and emphasis omitted]), and "[e]quitable contribution applies *only* between insurers" (*Aerojet-Gen. Corp. v Transport Indem. Co.*, 17 Cal 4th 38, 72 [1997] [citations omitted]). Neither does New York law favor the multiplication of deductibles (*see In re Prudential Lines Inc.*, 158 F3d 65, 86 [2d Cir 1998]).

We note, in brief, that the defendants' repeated invocation of this Court's prior decision in *Allstate Ins. Co. v Am. Home Assurance Co.,* 43 AD3d 113 [2007], *lv denied* 10 NY3d 711 [2008]) is unavailing. The facts of that case are inapposite to the facts herein. In *Allstate,* the reinsured sought to maximize its recovery against the reinsurer by abandoning, in an environmental pollution clean up case, the one occurrence per polluted site allocation directed by a district court ruling and the multi-occurrence position taken by both sides in the underlying litigation and settlement negotiations. Here, by contrast, defendants have not demonstrated the existence of an issue of fact with evidence directly contradicting USF&G's evidence that in negotiating the settlement, the parties treated each asbestos injury as a separate accident.

The Judgment

Finally, we note that ECRA contends that it was error for the motion court to enter judgment against it, as it ceased being a functioning entity in 1982. However, a review of the judgment demonstrates that the judgment was entered against ECRA and its constituent companies, assigning each of the constituent companies a specific dollar amount based on its percentage participation in the pool.

Accordingly, the judgment of the Supreme Court, New York

County (Richard B. Lowe III, J.), entered October 25, 2010, in favor of plaintiffs in the amount of $420,425,536.15, and bringing up for review an order, same court and Justice, entered August 20, 2010 and amended October 22, 2010, which granted plaintiffs' motion for summary judgment and denied defendants-appellants' motions for summary judgment, unanimously affirmed, without costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

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

ABDUS-SALAAM, J. (dissenting)

I respectfully dissent. There is a genuine triable issue of fact as to whether a portion of the $987.3 million settlement that United States Fidelity & Guaranty Company (USF&G) reached with Western MacArthur was for bad faith claims, which are not covered by the reinsurance treaty issued by defendants. Accordingly, I would deny plaintiffs' motion for summary judgment and vacate the judgment.

As an initial matter, while plaintiffs argue here that the treaty covers extra-contractual liabilities such as bad faith liability, the plain language of the treaty indicates otherwise. The treaty provides reinsurance for "any loss in connection with each policy," with certain exceptions, such as burglary and theft, health insurance and worker's compensation. A "loss" arises out of an "accident," and an "accident" is defined as an accident or occurrence arising out of products personal injury liability and products property damage liability, personal injury liability (other than automobile and products) and property damage liability (other than automobile and products). Bad faith damages incurred as a result of the reinsured's refusal to provide coverage to its insured do not fall within the ambit of a loss arising out of an accident as defined in the treaty (*see Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208,

220 [2002] ["the requirement of a fortuitous loss is a necessary element of insurance policies based on either an 'accident' or 'occurrence'"].

The exceptions to coverage that are listed could all arguably be considered losses arising out of an accident, and they are specifically excluded. Because bad faith damages cannot reasonably be considered to be a loss arising out of an accident, the absence of their mention in the exclusions to the policy is not probative when determining the coverage provided.

Plaintiffs' citation to *Peerless Ins. v Inland Mut. Ins.* (251 F.2d 696, 704 [4th Cir 1958]) for the proposition that bad faith damages are a covered loss under the reinsurance treaty is unpersuasive. In *Peerless*, the court held that a reinsurer who acquiesced in the defense strategy not to settle a claim within the policy limits, and knew as much about the underlying case as the insurer, was bound to follow the liability of the insurer and was thus liable to the insurer for damages paid to settle a negligence action brought by the insured for failure to settle. There is no evidence here that defendants participated in the handling of MacArthur's claim against USF&G, or acquiesced in plaintiffs' strategy to deny that the underlying policies provided coverage to MacArthur. Even if defendants had participated, a "follow the fortunes" clause does not serve to

create coverage where there is none (*see Travelers Cas. & Sur. Co. v Certain Underwriters at Lloyd's of London*, 96 NY2d 583, 596 [2001] [a "follow the fortunes" clause "does not alter the terms or override the language of reinsurance policies"]; *see also North Riv. Ins. Co. v Cigna Reins. Co.*, 52 F 3d 1194, 1206 [1995] ["(w)here the reinsured's liability attaches from a settlement or binding judgment, the reinsurer is not accountable if the liability arises from uninsured activity"] [citation omitted]). Thus, the majority is incorrect when it concludes that all of defendants' efforts to second guess plaintiffs' decisions, *including the settlement of bad faith claims which are not covered*, are precluded by virtue of the "follow the fortunes" clause.

The motion court erred when it concluded that defendants had not presented evidence to raise a triable issue of fact as to whether a portion of the settlement was attributable to Western MacArthur's bad faith claim against USF&G. There is ample evidence, including the findings made by the Bankruptcy Court, and the record in the underlying coverage action brought by Western MacArthur against USF&G, to support defendants' position that part of the settlement represented bad faith damages.

I disagree with the majority's analysis that whether plaintiffs actually engaged in bad faith is of no moment "because

the parties present at the settlement negotiations agreed that the settlement amount included no payment for settlement of bad faith claims." In fact, it is evident from the Bankruptcy Court's decision that the Court would not have approved the bankruptcy plan if it believed that there had been no payment for bad faith claims. This matter was not merely addressed "tangentially" by the Bankruptcy Court, as found by the majority, but was an essential element of the court's approval.

In concluding that defendants had not raised any issue of fact, the motion court and the majority note that the Bankruptcy Court stated it was not determining the merit or potential value of any bad faith claim. However, the Bankruptcy Court made some determinations which clearly demonstrate the Court concluded that bad faith damages had been part of the settlement and that contribution by Western MacArthur of their bad faith claims to the Trust in order to pay asbestos claims against the debtors was integral to the Court's confirmation of the bankruptcy plan. Responding to the Objecting Insurers' assertion that the debtors had not contributed enough to the Trust, the Court stated:

> "This argument ignores the value of the Debtors' bad faith claims against Settling Insurers. . . [T]he evidence presented at the confirmation hearing convinced the Court that the Debtors had colorable claims for bad faith against each of these two insurers. While the Court cannot allocate to these bad faith claims a specific percentage of the settlement

> amounts, even if the bad faith claims represent only ten percent of the settlement amount, this gives them a value of approximately $200 million" (*In re Western Asbestos Company, et al.*, U.S. Bankruptcy Court, ND CA, Case No. 02-46284 T, at 24-25 [February 3, 2004, Tchaikovsky, J.]).

The Bankruptcy Court also determined that the debtors are contributing "business loss claims" to the Trust, which "include their potential bad faith claims against USF&G and Hartford as well as the remaining Objecting Insurers" (*id.* at 63).

> "As discussed in connection with the USF&G and Hartford Settlement Agreements, there was substantial evidence to support the Debtor's bad faith claims against USF&G and Hartford.[40] *Some portion of the over $2 billion being contributed to the Trust pursuant to the USF&G and Hartford Settlement Agreements must be attributed to those claims.* These claims belong to the Debtors, not to the asbestos claimants. While the Court is not able to ascribe a specific value to these claims, the Court is persuaded that their value is in excess of the value of the Debtors' net liquidation value: i.e., $17 million. The Court finds the contribution of the Debtors' bad faith claims sufficient to justify the issuance of an 11 U.S.C. §§ 524(g) injunction."
>
> [40]"As noted above, by finding that the Debtors' bad faith claims were of sufficient value to justify the issuance of the injunctions, the Court is not actually deciding the merits or specific value of the Debtors' potential bad faith claims against any insurer (emphasis supplied)"(*id.* at 64).

Contrary to the majority's position, these findings by the Bankruptcy Court are clearly more than just a recognition that evidence of bad faith allegations existed. While the majority acknowledges many of the Bankruptcy Court's findings, it reaches

the mystifying conclusion that there is no genuine issue as to whether the settlement included bad faith damages. The majority is apparently persuaded that because counsel involved in the settlement have stated that the settlement represented only compensatory damages, the Bankruptcy Court's determination that some portion of the settlement was for bad faith claims is irrelevant. Although I concur that defendants are mistaken when they urge that collateral estoppel prevents us from considering the issue of bad faith, I do not agree with the majority that there are no issues of fact.

Significantly, examination of the record in the underlying coverage litigation between Western MacArthur and USF&G buttresses the Bankruptcy Court's conclusion that there was substantial evidence to support the bad faith claims against USF&G, and that payment for these bad faith claims was a part of the settlement. The litigation in California state court between Western MacArthur and USF&G dragged on for nine years. While the majority emphasizes that plaintiffs had, for most of those years, a legitimate basis for declining coverage based on a defense that Western MacArthur was not its insured or a proper beneficiary of the policy, it is the other defenses, and the missing policies, that were the basis of the bad faith claims, as detailed below. USF&G took the position that its policies (which neither party

could locate) did not provide products liability coverage, and that even if there were such coverage, the policies would have contained aggregate limits on such coverage. USF&G, the insurance company that maintained it did not possess copies of its own policies, was nonetheless certain that the policies did not cover the claims brought by individuals with health-related injuries due to exposure to asbestos.

During the course of the coverage litigation, it was discovered that USF&G had "donated" documents establishing the existence of coverage to the Baltimore Museum of Industry. And at trial, Western MacArthur presented secondary evidence that USF&G's "lost" policies provided products coverage *without* the aggregate limits that USF&G had steadfastly insisted were in the policies. It was during this phase of the trial that the Western MacArthur action settled.

Additionally, a reading of the California trial court's rulings on a motion by USF&G for summary adjudication of Western MacArthur's bad faith claims and in limine motions is illuminating. The insurer's motion for summary judgment was denied, the court finding triable issues of fact as to whether USF&G acted in bad faith by alleged conduct including destruction of insurance policies, falsely stating that it had no documents in its possession, "donation" of key documents to a museum

without ever informing plaintiffs that it had done so, and interfering with a subpoena that Western MacArthur had obtained in order to review the documents that had been "donated" to the museum (*Western MacArthur v USF&G*, Superior Court, CA, Sept. 12, 2001, Kawaichi, J., Case No. 721595-7).

A motion *in limine* by USF&G "to exclude evidence that USF&G donated documents to the Baltimore Museum of Industry and motion to exclude evidence regarding USF&G's failure to produce documents from its "Claims Legal Collection"" was denied (*Western MacArthur v USF&G*, Superior Court, CA, March 22, 2002, Sabraw, J., Case No. 721595-7), as was another in limine motion by USF&G to exclude evidence or argument that USF&G had destroyed documents as part of a "1984 Document Destruction Program." The Court ruled:

> "Plaintiffs may present evidence of the 1984 document Destruction Program; i.e., evidence inferring that the destruction of documents was done willfully due to USF&G's concerns about a "litigation crisis" and asbestos liability under old policies and that USF&G's intent in destroying the documents was to make it more difficult for insureds to establish coverage and the terms and conditions of their policies"(*id.* at 4).

In sum, the record raises a genuine issue of fact as to whether the settlement of the underlying coverage action included

payment of bad faith damages. Thus, summary judgment in favor of plaintiffs was not warranted.

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

ENTERED: JANUARY 24, 2012

CLERK