SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 12, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8818 Victor Alonzo, Index 22592/05
Plaintiff-Appellant-Respondent, 86187/07

-against-

Safe Harbors of the Hudson Housing Development Fund Company, Inc., et al.,
Defendants-Respondents-Appellants.

[And a Third Party Action]

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Gorayeb & Associates, P.C., New York (Mark H. Edwards of counsel), for appellant-respondent.

Simmons Jannace LLP, Syosset (Michael D. Kern of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered July 8, 2011, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200, 240(1), and 241(6) claims, and denied plaintiff's cross motion for partial summary judgment on his §§ 240(1) and 241(6) claims, unanimously modified, on the law, to grant so much of

defendants' motion as sought dismissal of plaintiff's common-law negligence and Labor Law § 200 claims, to grant plaintiff's cross motion as against defendant Mountco and the owner of the property, and to remand for a determination as to who the owner of the property was for purposes of liability under §§ 240(1) and 241(6), and otherwise affirmed, without costs.

Plaintiff worked as a carpenter's assistant in connection with the conversion of a hotel into a residential apartment building. Defendant Mountco was the general contractor. The "General Conditions" of Mountco's contract with the owner provided that Mountco, as general contractor, "shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract," including "initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract." Further, Mountco's superintendent conceded that he had the authority to stop work if he observed any unsafe condition. Mountco's contract identified defendant Cornerstone as the "owner." However, the deed to the property identified defendant Safe Harbors as the owner.

The accident occurred on the third story of the building.

Plaintiff was walking towards a window through which insulation was being delivered, when he stepped on an eight-by-four-foot section of 3/4-inch-thick plywood, which unexpectedly "flipped up." The sheet of plywood had been covering an opening in the floor. Plaintiff fell through the hole, which to that point had been concealed, 10 or 12 feet to the story below.

Mountco's superintendent testified that on the morning of the accident, he had walked through the area where plaintiff later fell, and had observed the sheet of plywood covering the hole. According to the superintendent, the hole had been made to facilitate the passage of debris and materials from one floor to another. However, he stated that when he saw it that morning, the plywood was nailed down and had the word "Hole" written on it in orange spray paint. He further testified that he had been "advised" that plaintiff himself had removed the protective plywood from the opening before his fall.

Plaintiff asserted claims against all of the defendants for common-law negligence and for violations of Labor Law §§ 200, 240(1) and 241(6). Plaintiff filed a note of issue on October 19, 2010. By notice dated November 24, 2010, defendants moved for summary judgment dismissing the complaint in its entirety. They argued that they could not be held liable under Labor Law §

200, or under a theory of common-law negligence, because they did not direct, control, or supervise the work that plaintiff was doing at the time of his accident, and did not have notice of the dangerous condition. Defendants further argued that plaintiff had not pointed to any regulatory violations sufficient to support a cause of action under § 241(6). As for the Labor Law § 240(1) claim, defendants contended that plaintiff's fall through an opening in a level floor was not an elevation related accident. They further contended that plaintiff himself removed the plywood covering the opening, rendering him the sole proximate cause of his accident. Finally, defendant Safe Harbors asserted that it was not an owner, contractor, or owner's agent, and so could not be held liable under § 240(1).

By notice dated February 5, 2011, plaintiff opposed defendants' motion and cross-moved for summary judgment on the issue of defendants' liability under Labor Law §§ 240(1) and 241(6). In opposition to defendants' motion, plaintiff argued that issues of fact existed as to whether Mountco exercised supervisory control over his work and had notice of the dangerous condition that caused his accident, warranting denial of summary judgment on his negligence and Labor Law § 200 claims. Plaintiff asserted that Mountco's contractual authority to oversee safety

gave it the requisite degree of supervision necessary for imposing liability on it. In support of summary judgment on his § 240(1) claim, plaintiff asserted that the "uncompleted" and "temporary" nature of the area of the floor through which he fell rendered it the functional equivalent of a scaffold, and that the unprotected opening constituted a violation of the statute. Plaintiff further contended there was no view of the evidence that would support a finding that he caused his own accident by removing the protective plywood.

Plaintiff claimed that defendants had violated several provisions of rule 23 of the Industrial Code (12 NYCRR), including requirements that "hazardous openings" "shall be guarded by a substantial cover fastened in place, or by a safety railing" (12 NYCRR 23-1.7[b][1][i]) or by a railing with a swinging gate (*id.* [b][1][ii]). Plaintiff argued that these violations warranted partial summary judgment in his favor on his claim under Labor Law § 241(6).

In reply, defendants asserted that plaintiff's cross motion for summary judgment should be denied because it was made after the motion court's deadline for dispositive motions.[1]

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[1] It is unclear how many days after the note of issue was filed dispositive motions were due. Plaintiff, however, does not

Supreme Court denied defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment. The court held that issues of fact existed as to whether defendants exercised control over the work site and had actual or constructive notice of the dangerous condition that caused plaintiff's injuries, so that Labor Law § 200 liability could not be decided as a matter of law. As to plaintiff's claim under Labor Law § 240(1), the court held that issues of fact existed as to whether the floor opening was properly secured and whether defendants were on notice of the hazard and had time to take, or did take, any preventive measures. As to plaintiff's claim under Labor Law § 241(6), the court found that the Industrial Code sections relied upon were applicable, but that issues of fact as to how the accident happened precluded a finding that the provisions were violated as a matter of law. The court also held that evidence existed to suggest that both Cornerstone and Safe Harbors were "owners" of the building, but that there was insufficient proof to determine the issue as a matter of law.

Initially, we find that plaintiff's cross motion for summary

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dispute that his cross motion was filed beyond the ordered date.

judgment was timely.

> "A cross motion for summary judgment made after the expiration of the [deadline for making dispositive motions] may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion" (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006]).

Here, defendants timely moved for summary judgment dismissing, among other claims, plaintiff's claims under §§ 240(1) and 241(6). Supreme Court therefore properly considered plaintiff's mirror-image cross motion for partial summary judgment on his claims under those sections.

Where, as here, a construction accident arises out of the means and methods of the work, as opposed to a dangerous condition on the site, liability under Labor Law § 200 or for common law negligence may be imposed where the defendant "exercised control or supervision over the work and had actual or constructive notice of the purportedly unsafe condition" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]). However, the mere fact that a general contractor "had overall responsibility for the safety of the work done by the subcontractors" is insufficient to demonstrate that it had the

requisite degree of control and that it actually exercised that control (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006], *affd* 7 NY3d 805 [2006]). Here, plaintiff testified that he worked under the direction of his own employer's foreman, was not supervised by anyone else, and did not know who owned the building. While Mountco may have been responsible for ensuring that work was proceeding according to schedule, and its superintendent regularly inspected the work site for that purpose and had the authority to stop any work he observed to be unsafe, that general level of supervision is not enough to warrant holding it liable for plaintiff's injuries (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007]). Since no evidence in this record establishes that either Cornerstone or Safe Harbors had any supervisory role in the construction at issue, they too are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against them.

Plaintiff's Labor Law § 240(1) claim does not depend on a finding that defendants were in control of the work site. All that plaintiff was required to establish was that defendants breached their non-delegable duty to furnish or erect, or cause to be furnished or erected, safety devices in a manner that gave

him proper protection from gravity-related risks (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]). Here, the gravity-related risk was a sizable hole in the floor that had been made specifically to aid in the construction project. We have repeatedly held that § 240(1) is violated when workers fall through unprotected floor openings (*see e.g. Burke v Hilton Resorts Corp.*, 85 AD3d 419 [1st Dept 2011]; *Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472 [1st Dept 2008]; *O'Connor v Lincoln Metrocenter Partners*, 266 AD2d 60 [1st Dept 1999]; *Carpio v Tishman Constr. Corp. of N.Y.*, 240 AD2d 234 [1st Dept 1997]). Plaintiff established a prima facie violation of the statute by showing that the plywood cover on the hole was an inadequate safety device because it was not secured at the time of the accident.

Defendants failed to create an issue of fact as to the adequacy of the unsecured plywood cover. The Mountco supervisor's testimony that the cover was fastened by nails a short while before the accident is irrelevant, because liability under § 240(1) is not dependent on a finding that the owner or general contractor had notice of the violation (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Further, they failed to create an issue of fact as to whether plaintiff was the sole proximate

cause of the accident. The only evidence presented to support this theory was the Mountco supervisor's hearsay testimony that a worker whom he did not identify "advised" him of this fact. In the absence of any additional, non-hearsay evidence on this point, plaintiff is entitled to judgment as a matter of law (*see Briggs v 2244 Morris L.P.*, 30 AD3d 216 [1st Dept 2006]). However, it is impossible on this record to determine who the owner of the property was for liability purposes. Accordingly, which of the "owners" plaintiff is entitled to judgment against is subject to further proceedings below.

Like his Labor Law § 240(1) claim, plaintiff's Labor Law § 241(6) claim is not dependent on the degree of control over his work that defendants exercised (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]). Rather, it is dependent on the application of a specific Industrial Code provision and a finding that the violation of the provision was a result of negligence (*id.* at 349-350). The Code provisions on which plaintiff relies (12 NYCRR 23-1.7[b][1][i], [ii]; 23-3.3[j][2][i]), are sufficiently specific. Section 23-1.7(b)(1)(i), which requires that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing," was violated, because the hole into which

plaintiff fell was dangerous and unguarded. Since the opening was being actively used in connection with the construction, § 23-1.7[b][1][ii] was violated, because that section requires "a barrier or safety railing . . . [to] guard [the] opening." Defendants contend that both of these sections are inapplicable because the hole was less than 15 feet deep. However, plaintiff does not rely on § 23-1.7(b)(1)(iii)(a), which contains the 15-foot minimum depth requirement. Nor could he, because that section only applies where a worker was "required to work close to the edge of [the] opening" (*id.*).

Plaintiff established that defendants violated Industrial Code § 23-3.3[j][2][i]), which provides that "[e]very opening used for the removal of debris or materials . . . shall be provided with an enclosure." The Mountco superintendent stated at his deposition that the hole into which plaintiff fell was used for that exact purpose. We disagree with defendants' theory that a construction project must be at the actual demolition phase in order for this section to apply.

Finally, because the removal of the covering, which created a significant falling hazard, was unquestionably negligent, and there is no evidence of plaintiff's complicity in the removal,

§ 241(6) was violated as a matter of law (*see Rizzuto*, 91 NY2d at 349-350). Again, because we cannot determine on this record which entity or entities bear responsibility as "owner," further proceedings are necessary to develop the record on that issue.

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

ENTERED: MARCH 12, 2013

CLERK

Friedman, J.P., Acosta, Renwick, Richter, Abdus-Salaam, JJ.

8159 Richard Miller, Index 603020/08
Plaintiff-Appellant,

-against-

New York University, et al.,
Defendants-Respondents.

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Kraus & Zuchlewski LLP, New York (Robert D. Kraus of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Ricki E. Roer of counsel), for respondents.

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Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered February 22, 2012, upon a jury verdict, dismissing the complaint as against defendants New York University and New York University Hospitals Center, unanimously affirmed, with costs.

The court correctly denied plaintiff's motion for a directed verdict. There was extensive testimony that plaintiff's reassignment from chief financial officer (CFO) to vice president of medical center finance (VP) resulted in expanded responsibilities. The testimony showed that as CFO he had financial oversight of the New York University (NYU) Hospitals Center and as VP he had financial oversight of the newly integrated NYU Medical Center, which included the NYU School of

Medicine as well as the Hospitals Center, and that the operating budget for the Medical Center was twice as large as that of the Hospitals Center alone. Thus, a rational jury could have found that plaintiff was not terminated from his CFO position within the meaning of the parties' May 1, 2006 retention agreement.

Contrary to plaintiff's contention, the pretrial order denying his motion for summary judgment is no longer reviewable by this Court because we previously reviewed that order upon defendants' interlocutory appeal from the portion thereof denying their cross motion for summary judgment (*see* 85 AD3d 670 [2011]; CPLR 5501[a][1]). Although plaintiff did not take an appeal from the pretrial order insofar as it aggrieved him, the question of his entitlement to summary judgment was before us upon defendants' appeal from the same order by virtue of our power to search the record in reviewing the denial of defendants' cross motion for that relief (*see* CPLR 3212[b]). If we had jurisdiction to review the denial of plaintiff's pretrial summary judgment motion, we would affirm it for substantially the same reasons we affirm the denial of his motion for a directed verdict. Contrary to plaintiff's further contention, our decision on the previous appeal did not determine that the evidence established as a matter of law that he had been

terminated within the meaning of the retention agreement, only that a jury could rationally find that such a termination had occurred.

The court properly submitted the case to the jury by way of an interrogatory asking whether plaintiff's "reassignment . . . constitute[d] a demotion in his rank and responsibilities such that it was a termination from his current position as set forth in [the retention agreement]" (*see* PJI 4:21; *Rudman v Cowles Communications*, 30 NY2d 1, 10 [1972]). We reject plaintiff's argument that asking whether the reassignment constituted a "demotion" altered the terms of the retention agreement.

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

ENTERED: MARCH 12, 2013

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8556 Glendora Young, et al., Index 304153/08
Plaintiffs-Respondents,

-against-

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

New York City Transit Authority,
Defendant.

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Shapiro, Beilly & Aronowitz, LLP, New York (Roy J. Karlin of counsel), for appellants.

Silverstein & Stern, New York (James M. Lane of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered May 19, 2011, which granted plaintiffs' motion for spoliation sanctions, to the extent of deeming that defendants The City of New York, New York City Department of Transportation, Cemusa NY, LLC and Shelter Express Corp. had prior notice of the subject condition, unanimously modified, on the facts, to grant plaintiffs' motion to the extent of striking defendants' answer unless, within 30 days after service of a copy of this order with notice of entry, defendants pay plaintiffs' attorney $5,000, and otherwise denied, without costs.

Plaintiffs seek damages for injuries allegedly sustained on

March 2, 2007, when plaintiff Glendora Young slipped and fell on a glass panel that was lying on the ground of a bus shelter on the Grand Concourse in the Bronx. Cemusa NY, LLC (Cemusa) had been retained by the City of New York and the New York City Department of Transportation (DOT) to maintain and supply street furniture throughout the city, including bus shelters. Cemusa, in turn, subcontracted with Shelter Express Corp. to inspect, maintain and clean the bus shelters twice a week, on nonconsecutive days, including removing broken glass within 24 hours of notice of the problem.

Among other discovery requests, plaintiffs sought the maintenance records for the bus shelter as well as any documentation indicating that there had been a decision to replace the panel involved in plaintiff's accident. Defendants produced maintenance reports and certain other documents pertaining to the bus shelter covering more than a year.

Based on the documentary evidence produced, defendants contend the bus shelter was intact and in good condition when inspected and cleaned on Thursday, March 1, 2007 by Shelter Express, but by 8:25 a.m. the next morning, Friday March 2, one of the glass panels had been removed and was on the ground next to the shelter. Given the deposition testimony of Cemusa's

director of operations, Carmine Adisano, that the glass panels were removed only when vandalized or when heavily scratched with acid graffiti, defendants claim that the removal was an act of vandalism which was only discovered in the normal course of business on Tuesday, March 6, when, as the documents show, a Shelter Express employee discovered it in the course of one its twice weekly inspections and cleaning. Plaintiffs contend that there must have existed an email, invoice and/or DOT directive reflecting the date of the decision to replace the glass panel.

On the motion, defendants submitted the affidavits of Adisano and Akash Chabra, defendant Shelter Express's general manager, each averring that a search for the records had been conducted and that no such documentation had been found. The motion court concluded that Adisano's previous deposition testimony that "the shelters were to be inspected twice per week and any repair issues would have been documented" leads inexorably to "the conclusion that records were either negligently or intentionally disposed of." However, the defendants did in fact produce the records of the twice weekly inspections both before and after plaintiff's accident, which showed no damage the day before the plaintiff's accident, and confirmed that a panel was missing from the bus shelter as of a

few days after the accident. Thus, the record does not support the conclusion reached by the motion court that there must have existed other documents spoliated by the defendants.

Our review of the record does reveal, however, that defendants were inexcusably slow to produce documents over a period of three years in response to several court orders, requiring plaintiffs to twice move for sanctions. We also note that the affidavits of Adisano and Chabra establishing that there were no further documents to be disclosed were not proffered until the instant motion was made. In monitoring discovery, any sanction levied by a court must be proportionate to the conduct at issue (*see Martinez v Goldrose Mgt., Inc.*, 49 AD3d 466 [1st Dept 2008]); here, we conclude that a monetary sanction in the amount of $5,000 is sufficient (*see Figdor v City of New York*, 33 AD3d 560 [1st Dept 2006]).

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

ENTERED: MARCH 12, 2013

CLERK

Tom, J.P., Moskowitz, Richter, Clark, JJ.

9291 James Cannon, Index 107033/05
Plaintiff-Appellant,

-against-

New York City Police Department, et al.,
Defendants-Respondents.

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Ballon Stoll Bader & Nadler, P.C., New York (Rudy A. Dermesropian of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for respondents.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered November 22, 2011, which, inter alia, granted defendants' cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied, without prejudice to renewal after discovery.

It was premature to consider defendants' cross motion for summary judgment before plaintiff deposed First Deputy

Commissioner Raphael Pineiro and the NYPD representative. Those examinations might have led to additional information and discovery, none of which plaintiff had been able to obtain or compel prior to the court's decision on the cross motion.

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

ENTERED: MARCH 12, 2013

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particulars, and granted defendant's motion to quash plaintiff's trial subpoenas served on nonparties, unanimously modified, on the law, to reinstate the claims for personal injury, and otherwise affirmed, without costs.

Plaintiff submitted both testimonial and documentary evidence supporting her claim that there was a bedbug infestation in the apartment and that she sustained bedbug bites. The absence of any medical treatment for the bites, while significant to the value of the damages sought, does not mandate dismissing the claim for personal injury damages as a matter of law (*cf. Grogan v Gamber Corp.*, 19 Misc 3d 798 [Sup Ct, NY County 2008]).

Plaintiff, however, failed to show that defendant's failure to maintain the property in a reasonably safe condition unreasonably endangered her physical safety or caused her to fear for her safety so as to sustain the claim for negligent infliction of emotional distress (*see Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004]). Further, defendant's leasing of the apartment to plaintiff while aware of a bedbug history does not rise to the level of outrageous conduct required to sustain a claim for infliction of emotional distress, especially since at the time this case was filed there was no legal obligation for landlords to give a prospective tenant notice of bedbug

CORRECTED ORDER - MAY 3, 2013

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9349-
9350 Index 101313/09

Elizabeth Bour,
Plaintiff-Appellant,

-against-

259 Bleecker LLC,
Defendant-Respondent.

David Katz & Associates, LLP, New York (Salvatore J. Sciangula of counsel), for appellant.

Weiner, Millo, Morgan & Bonanno LLC, New York (Richard A. Walker of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered May 9, 2011, which granted defendant's motion to quash plaintiff's subpoenas duces tecum served on nonparties, and denied plaintiff's motion to strike defendant's answer for willful failure to produce discovery and to deem the subpoenas enforceable, unanimously affirmed, without costs. Order, same court and Justice, entered October 4, 2011, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the claims for personal injury and punitive damages, denied plaintiff's cross motion for summary judgment, to compel discovery or alternatively to strike defendant's answer, and for leave to amend her bill of particulars, and granted defendant's motion to quash plaintiff's trial subpoenas served on nonparties, unanimously modified, on

the law, to reinstate the claims for personal injury, and otherwise affirmed, without costs.

Plaintiff submitted both testimonial and documentary evidence supporting her claim that there was a bedbug infestation in the apartment and that she sustained bedbug bites. The absence of any medical treatment for the bites, while significant to the value of the damages sought, does not mandate dismissing the claim for personal injury damages as a matter of law (*cf. Grogan v Gamber Corp.*, 19 Misc 3d 798 [Sup Ct, NY County 2008]).

Plaintiff, however, failed to show that defendant's failure to maintain the property in a reasonably safe condition unreasonably endangered her physical safety or caused her to fear for her safety so as to sustain the claim for negligent infliction of emotional distress (*see Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004]). Further, defendant's leasing of the apartment to plaintiff while aware of a bedbug history does not rise to the level of outrageous conduct required to sustain a claim for infliction of emotional distress, especially since at the time this case was filed there was no legal obligation for landlords to give a prospective tenant notice of bedbug infestation history (Administrative Code of City of NY § 27-2018.1) and defendant had been treating the condition before plaintiff moved in. For the same reason, we find that in renting the apartment defendant was not "morally culpable, or . . .

actuated by evil and reprehensible motives" so as to warrant punitive damages (*see Munoz v Puretz*, 301 AD2d 382, 384 [1st Dept 2003] [internal quotation marks omitted]). Nor did defendant engage in pervasive or grave misconduct of a quasi-criminal nature affecting the public in general (*see Fabiano v Philip Morris Inc.*, 54 AD3d 146, 150 [1st Dept 2008]).

The post-note of issue subpoenas that plaintiff served on nonparties were overbroad (*see Rodriguez v Crescent Contr. Corp.*, 305 AD2d 215 [1st Dept 2003]), and plaintiff was improperly using them to secure discovery that she failed to obtain in pretrial disclosure (*see Mestel & Co. v Smythe Masterson & Judd*, 215 AD2d 329, 329-330 [1st Dept 1995]). To the extent plaintiff had demanded the production of the materials before filing the note of issue, it does not avail her, since she never requested an extension of time to file the note of issue, and she opposed defendant's motion to vacate the note of issue at one point without raising the discovery issue.

Plaintiff failed to submit her proposed amended bill of particulars with her motion. Further, the proposed amendments are based on her speculation as to what the subpoenaed materials would disclose.

Plaintiff failed to set forth any "'unusual or unanticipated

circumstances'" to justify vacating the note of issue (*see Price v Bloomingdale's*, 166 AD2d 151, 152 [1st Dept 1990], quoting 22 NYCRR 202.21[d]).

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

ENTERED: MARCH 12, 2013

CLERK

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ENTERED: MARCH 12, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9465 The People of the State of New York, Ind. 6219/07
Respondent,

-against-

Gabriel Cordero,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

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Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; Bonnie G. Wittner, J. at plea and sentencing), rendered May 13, 2008, convicting defendant of criminal possession of a controlled substance in the second degree, and sentencing him to a term of six years, unanimously affirmed.

Regardless of whether defendant made a valid waiver of his right to appeal, we find that the record supports the hearing court's denial of defendant's suppression motion.

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

ENTERED: MARCH 12, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9466 Aurora Gomez, Index 107983/10
Plaintiff-Respondent,

-against-

Congregation K'Hal Adath Jeshurun, Inc., etc.,
Defendant-Appellant.

Meiselman, Denlea, Packman, Carton & Eberz P.C., White Plains (Peter N. Freiberg of counsel), for appellant.

Silbowitz, Garafola, Silbowitz, Schatz & Frederick, LLP, New York (Mitchell Silbowitz of counsel), for respondent.

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 1, 2012, which, in this personal injury action arising from a trip and fall on a sidewalk abutting defendant landowner's property, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant made a prima facie showing of its entitlement to judgment as a matter of law by submitting its administrative manager's testimony that defendant lacked notice of any hazardous condition on the property, that the alleged sidewalk defect appeared to be "trivial," and that there had been no prior complaints or violations involving the alleged defective sidewalk

(*see Schwartz v Bleu Evolution Bar & Rest. Corp.*, 90 AD3d 488 [1st Dept 2011]).

Plaintiff's papers in opposition, however, raised triable issues of fact as to whether the one-half-inch differential between two sidewalk flags was a "substantial defect" under 34 RCNY 2-09(f)(5)(iv) and Administrative Code of the City of New York § 19-152(a)(4) and (a-1)(5), and whether the alleged defect had existed for a sufficient length of time to put defendant on notice of the condition (*see D'Amico v Archdiocese of N.Y.*, 95 AD3d 601 [1st Dept 2012]; *Naraez v 2914 Third Ave. Bronx, LLC*, 88 AD3d 500, 501 [1st Dept 2011]).

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ENTERED: MARCH 12, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9467-
9467A-
9467B In re Natasha Denise B.,
etc., and Others,

Children Under Eighteen
Years of Age, etc.,

Montricia Denise C., etc.,
Respondent-Appellant,

Leake & Watts Services, Inc.,
Petitioner-Respondent.

_____

Julian A. Hertz, Larchmont, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Andrew H. Rossmer, Bronx, attorney for the children.

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Orders, Family Court, Bronx County (Monica Drinane, J.), entered on or about April 12, 2012, which, to the extent appealed from as limited by the briefs, following a fact-finding hearing, determined that respondent-appellant mother had permanently neglected the subject children, unanimously affirmed, without costs.

The findings of permanent neglect were supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]). The record shows that petitioner agency exercised diligent

efforts to encourage and strengthen the parental relationship by, among other things, assisting respondent in filling out applications for housing, reminding her of the importance of submitting the additional documents required to complete the applications, referring her for mental health services, scheduling visitation, and planning for a trial discharge of the children to her care. Despite these efforts, respondent failed to plan for the children's future during the relevant time period (*id.*). Indeed, the record shows that respondent failed to obtain suitable housing or complete a mental health examination, even though she had been advised that her compliance with these services was required before the children could be returned to her care (*see Matter of Ernie Luis T. [Enid F.]*, 100 AD3d 475, 475 [1st Dept 2012]). In addition, although respondent completed parenting courses, on several occasions during the relevant time period she failed to call the agency or take the children to the hospital after they were injured, even though the agency told her to do so because of a potentially fatal medical condition of one

of the children (*see Matter of Atreyu Rashawn G.*, 254 AD2d 215, 216 [1st Dept 1998]).

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

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

ENTERED: MARCH 12, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9468 Seymon Gutarts, et al., Index 651765/11
Plaintiffs,

-against-

Jay Fox, etc., et al.,
Defendants-Respondents,

LT Service Corp.,
Defendant-Appellant.

_____

Ganfer & Shore, LLP, New York (Mark A. Berman of counsel), for appellant.

O'Donnell & Fox, P.C., New York (William G. O'Donnell, Jr. of counsel), for respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered September 27, 2012, which, to the extent appealed from as limited by the briefs, denied defendant L.T. Service Corp.'s cross motion for summary judgment dismissing the cross claims as premature, unanimously reversed, on the law, without costs, the cross motion granted, and the cross claims dismissed. The Clerk is directed to enter judgment accordingly.

Defendant L.T. Service Corporation (LT) was engaged by defendant Fox and his firm, O'Donnell & Fox (the Fox defendants) to file the necessary UCC statements to establish a lien in plaintiffs' favor on the cooperative apartment owned by nonparty

Irina Chatkhan to secure a loan by plaintiffs to her. The Fox defendants had been retained as counsel by plaintiffs to file the necessary documents. As a result of erroneous information provided by the Fox defendants and a misapprehension on the part of LT as to how to correct the mistake, the lien was not perfected for nearly 18 months after it was first filed. In the interim, Ms. Chatkhan filed for bankruptcy, leading other creditors to challenge plaintiff's security interest.

Plaintiffs then commenced this action, alleging legal malpractice and negligence against all the defendants. The legal malpractice and negligence claims against LT did not survive a motion to dismiss. LT is not a law firm and had no duty to plaintiffs; it had been hired by the Fox firm as an independent contractor for the ministerial act of filing the necessary documents with the City Register's Office.

After plaintiffs' claims against LT were dismissed, the Fox defendants sought leave to amend their answer to include cross claims against LT for breach of contract, breach of warranty, and indemnification. LT opposed the amendment of the answer, and, in the event that leave was granted, sought summary judgment dismissing the cross claims. The motion court granted leave to amend the answer to contain all the alleged cross claims and

denied LT's cross motion.

The court erred in denying the cross motion. The Fox defendants' alleged need for unspecified additional discovery was an insufficient basis to deny summary judgment. Plaintiffs' malpractice claim, far from being unspecified, alleges the Fox defendants' failure to file the UCC financing statement, as they had been retained to do. The record is clear that mistakes were made by both the Fox defendants and LT in completing the filing. The Fox defendants may not pass any liability they may have for this malpractice onto their independent contractor (*Kleeman v Rheingold*, 81 NY2d 270, 275 [1993]).

The record shows that LT had established its entitlement to judgment as a matter of law and the Fox defendants failed to raise any triable issue of fact. With regard to the breach of contract claim, the contract, as reflected by the invoices, was for LT to file a UCC Correction Statement and the Termination Statement on the Fox defendants' behalf. There is no question that, despite some difficulties, the documents were filed. That LT may have been negligent in its performance of the contract is of no moment; the contract as bargained for was performed. Indeed, even if LT was negligent, it would not be liable, as the Fox defendants have not alleged that any legal duty independent

of the contract has been violated (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]).

A breach of warranty claim does not lie against LT, as there is no cause of action for breach of warranty where the defendant has only provided a service (*Aegis Prods. v Arriflex Corp. of Am.*, 25 AD2d 639, 639 [1st Dept 1966]).

Finally, there is no proper claim for indemnification against LT. The invoice agreement contains a liquidated damages provision, limiting LT's liability to the cost of the service provided, here, $160. Provisions such as these are routinely enforced (*see Mom's Bagels of N.Y. v Sig Greenebaum Inc.*, 164 AD2d 820 [1st Dept 1990], *appeal dismissed* 77 NY2d 902 [1991]), and there is no evidence in the record that would permit the Fox defendants to escape this contractual language limiting liability.

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

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

ENTERED: MARCH 12, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9469 Robert Lee Brown, Index 307988/09
Plaintiff-Respondent,

-against-

Evans G. Smalls, et al.,
Defendants,

Djiba Doumbouya,
Defendant-Appellant.

_____

The Law Offices of Michael A. Barnett, Garden City (Jay M. Weinstein of counsel), for appellant.

Bernstone & Grieco, LLP, New York (Matthew A. Schroeder of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 18, 2012, which denied the motion of defendant Djiba Doumbouya for summary judgment dismissing the complaint as against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

"[A] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate nonnegligent explanation for the accident" (*Cabrera v Rodriguez*,

72 AD3d 553, 553 [1st Dept 2010]). Here, Doumbouya established his entitlement to judgment as a matter of law. Doumbouya testified that prior to being struck from behind by the car in which plaintiff was a rear-seat passenger, he was traveling in the same lane as plaintiff's car, just ahead of it, and had just begun to move forward after stopping at a red light, which had turned green.

Plaintiff failed to rebut Doumbouya's showing with a nonnegligent explanation for the rear-end collision from the driver of the car in which plaintiff was traveling. Indeed, the driver's sworn statement that Doumbouya was ahead of him at all times and was stopped at the moment of impact was consistent with Doumbouya's testimony. Plaintiff's attempt to provide a nonnegligent explanation for the rear impact, which contradicts the sworn statement of his driver, was insufficient. To the extent plaintiff relies upon his driver's statement, as recounted in a police accident report, that Doumbouya's car stopped suddenly, the unsworn report is inadmissable hearsay (*see*

Stankowski v Kim, 286 AD2d 282, 283 [1st Dept 2001], *appeal dismissed* 97 NY2d 677 [2001]), and, in any event, is not sufficient to defeat the motion (*see Francisco v Schoepfer*, 30 AD3d 275, 276 [1st Dept 2006]).

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

ENTERED: MARCH 12, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9470-
9470A Index 113279/07

Rock J. Walker,
Plaintiff-Appellant,

-against-

Scott Foreman, etc.,
Defendant-Respondent.

_____

Matthew A. Kaufman, New York, for appellant.

Kaufman & Serota, Rockville Centre (Lila N. Serota of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered May 6, 2011, which granted defendant's motion to strike plaintiff's pleadings, unanimously affirmed, without costs. Judgment, same court and Justice, entered July 14, 2011, awarding defendant damages in the amount of $116,530, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded for a new inquest on damages.

The court providently exercised its discretion in striking plaintiff's pleadings, given plaintiff's intentional and unexcused failure to comply with more than three orders, some of them stipulated to by plaintiff, to produce documents relevant to the case (CPLR 3126; *Oasis Sportswear, Inc. v Rego*, 95 AD3d 592 [1st Dept 2012]). However, as an appearing party whose pleadings

were stricken, plaintiff was entitled to five days notice of the inquest (CPLR 3215[g]; *Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]). The failure to give such notice requires a new inquest, on proper notice.

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

ENTERED: MARCH 12, 2013

CLERK

Sweeny J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9472 In re Omari W.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Lisa H. Blitman, New York, for appellant.

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

_____

Appeal from order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about October 29, 2010, which adjudicated appellant a juvenile delinquent upon his admission that he had committed an act that, if committed by an adult, would constitute the crime of possession of an imitation firearm, and placed him in the custody of the Office of Children and Family Services for a period of 12 months in a limited secure facility, unanimously dismissed, without costs, as moot.

Appellant challenges the dispositional order, asserting that the court should have granted his request for a third adjournment of the dispositional hearing. Since appellant has completed his placement, and since he does not challenge the juvenile delinquency adjudication, this appeal is moot (*see e.g. Matter of*

Rene A., 34 AD3d 223 [2006]). In any event, the denial of the adjournment was a proper exercise of discretion under the circumstances presented, and the placement was the least restrictive dispositional alternative.

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

ENTERED: MARCH 12, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9473 In re Anthony Rispoli, Index 109589/11
Petitioner-Appellant,

-against-

The Waterfront Commission
of New York Harbor,
Respondent-Respondent.

_____

Robert Koppelman, New York, for appellant.

Phoebe S. Sorial, New York, for respondent.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 12, 2012, denying the petition to annul the determination of respondent Waterfront Commission of New York, which revoked petitioner's registration as a special craft longshoreman, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The admission of hearsay statements at the administrative hearing did not violate petitioner's due process rights to a fair hearing or cross-examination. It is well established that "[h]earsay evidence can be the basis of an administrative determination" (*Matter of Gray v Adduci*, 73 NY2d 741, 742 [1988]). In addition to presenting the hearsay testimony, respondent presented the testimony of co-conspirator Cangelosi,

which corroborated the hearsay testimony, and provided significant detail about petitioner's involvement in the marijuana grow operation. Petitioner was able to cross-examine Cangelosi, as well as Agent DiPasquale, who was called to introduce the hearsay statements made by others which implicated petitioner.

Petitioner's inability to cross-examine his brother, one of the individuals who made the statements implicating petitioner, does not require a different result. The Administrative Law Judge issued a subpoena in accordance with respondent's rules to compel the brother's attendance in order to give petitioner the opportunity to cross-examine him. The fact that the subpoena may have been ignored was not the fault of respondent or the ALJ, and constitutes good cause for failing to produce petitioner's brother, who was incarcerated at the time.

Petitioner's reliance on *People ex rel. McGee v Walters* (62 NY2d 317 [1984]), is misplaced. In *McGee*, the administrative decision to revoke the petitioner's parole was based solely upon the parole officer's report, and the officer was not produced at the hearing because he was no longer employed by the Division of Parole. No reason was given for the failure to produce the parole officer that constituted good cause. Here, petitioner was

able to cross-examine the live witnesses, and good cause was established for the failure to produce his brother at the hearing.

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

ENTERED: MARCH 12, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, JJ.

9475 Gerald Lieblich, et al., Index 104523/11
Plaintiffs-Appellants,

-against-

Peter J. Pruzan, etc.,
Defendant-Respondent.

_____

Chapnick & Associates, P.C., Mineola (Robert A. Chapnick of counsel), for appellants.

Peter J. Pruzan, New York, respondent pro se.

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered May 1, 2012, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), and dismissed plaintiff Hasan Biberaj as a party to the action pursuant to CPLR 3211(a)(3), unanimously affirmed, with costs.

This is an action for, inter alia, legal malpractice arising from defendant attorney's representation of plaintiff Lieblich in a lawsuit filed against him as a majority shareholder in Lot 1555 Corp. and against the corporation by the minority shareholder (*see Nahzi v Lieblich*, 69 AD3d 427 [1st Dept 2010], *lv denied* 15 N.Y.3d 703 [2010]). Plaintiffs allege that defendant should have conducted discovery in the underlying litigation that would have revealed information discovered in subsequent related litigation

and should have used that information to oppose summary judgment in the underlying litigation. They further allege that had the information been submitted in opposition to the motion, it would have resulted in a judgment in their favor.

The motion court properly dismissed the legal malpractice claim as plaintiffs failed to "meet the 'case within a case' requirement, demonstrating that 'but for' the attorney's conduct the [plaintiff] client would have prevailed in the underlying matter or would not have sustained any ascertainable damages" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills*, Inc., 10 AD3d 267, 272 [1st Dept 2004]; *see also Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]). Plaintiffs submitted two affidavits that they allege should have been obtained and submitted in the earlier lawsuit. One of the affidavits is based entirely on hearsay and speculation (*see Harvey v Greenberg*, 82 AD3d 683 [1st Dept 2011]; *Babikian v Nikki Midtown, LLC*, 60 AD3d 470, 471 [1st Dept 2009]. The other, from the minority shareholder's accountant, is based purely on conclusory assertions and speculation that the minority shareholder would have revealed all of the details regarding the purchase of an apartment and his dealings with plaintiffs to the accountant. These documents in no way undermine the unambiguous

shareholder agreement clearly evincing the minority shareholder's interest in Lot 1555. The only remaining evidence that plaintiffs claim defendant failed to timely discover and submit in the underlying action was the minority shareholder's later deposition testimony that does not support the claim that he did not pay any consideration for his 25% interest in Lot 1555.

The court also properly rejected plaintiffs' argument that defendant negligently failed to seek an offset from the minority shareholder for his proportionate share of corporate expenses from the sale of corporate property, as the shareholder agreement did not require any shareholder contribution to corporate expenses (*see McRay v Citrin*, 270 AD2d 191 [1st Dept 2000]), and plaintiffs offered no contrary evidence.

The causes of action for breach of contract, breach of fiduciary duty, and mitigation of costs were also properly dismissed because they stem from the same factual allegations as the cause of action for legal malpractice and allege similar damages (*Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 416 [1st Dept 2011]).

Plaintiff Biberaj is not a proper party to this litigation because he was not a party to the underlying action, is not listed in the shareholder agreement, and does not allege any

misconduct of defendant other than the alleged negligent representation of Lieblich and Lot 1555 in the prior suit. As the motion court noted, the statements in Biberaj's and Lieblich's affidavits that Biberaj was a "beneficial shareholder" in the corporation are conclusory and insufficient to establish his legal capacity to sue in this action.

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

ENTERED: MARCH 12, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9476-
9477 The People of the State of New York,
Respondent,

-against-

Fernando Salas,
Defendant-Appellant.

Ind. 3565/08

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

Order, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), entered on or about May 5, 2011, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly raised defendant's "Use of Violence" score based on medical evidence and grand jury testimony establishing that the victim sustained the requisite physical injury. The evidence supports the inference that defendant caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]) to the victim by inflicting a complete tear to her hymen, along with bruises, soreness and red marks to her

arms, wrists and hands (*see People v Fisher*, 22 AD3d 358, 358 [1st Dept 2005]). Among other things, the victim reported significant pain when she was examined at the hospital, notwithstanding that her pain had lessened by the time she was discharged.

The court properly exercised its discretion in denying defendant's application for a downward departure (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied* 558 US __, 130 S Ct 552 [2009]; *People v Mingo*, 12 NY3d 563, 568 n 2 [2009]). The mitigating factors asserted by defendant were adequately taken into account by the risk assessment instrument, and were outweighed by the seriousness of the underlying sex crime (*see e.g. People v Melendez*, 83 AD3d 448 [1st Dept 2011]).

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

ENTERED: MARCH 12, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9479 Letitia Cadeau, etc., Index 307779/08
Plaintiff-Appellant,

Jayson Cadeau, etc.,
Plaintiff,

-against-

Lindsay Gregorio,
Defendant-Respondent,

Dennis Tyne,
Defendant-Appellant.

_____

Sackstein, Sackstein & Lee, LLP, Garden City (Leonard B. Chipkin of counsel), for Letitia Cadeau, appellant.

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for Dennis Tyne, appellant.

Martin, Fallon & Mullé, Huntington (Stephen P. Burke of counsel), for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered February 23, 2012, which, to the extent appealed from as limited by the briefs, granted defendant Gregorio's motion for summary judgment dismissing the complaint as against her, unanimously affirmed, without costs.

Defendant Gregorio made a prima facie showing that she was not negligent by submitting evidence that, within "[f]raction of seconds" of her seeing it in the left-turn lane on the opposite

side of the intersection, the vehicle operated by defendant Tyne made a left turn across the path of her oncoming vehicle and that she applied her brakes "[v]ery hard" but could not avoid the collision (*see* Vehicle & Traffic Law § 1141; *Moreback v Mesquita*, 17 AD3d 420 [2d Dept 2005]; *Welch v Norman*, 282 AD2d 448 [2d Dept 2001]; *Stiles v County of Dutchess*, 278 AD2d 304, 305 [2d Dept 2000]). Tyne and the injured plaintiff, who was traveling in Tyne's vehicle, failed to raise an issue of fact in opposition, since their contention that Gregorio was traveling at an excessive speed or otherwise failed to avoid the accident was unsupported by any evidence (*see Batista v Rivera*, 5 AD3d 308 [1st Dept 2004]; *Murchison v Incognoli*, 5 AD3d 271 [1st Dept 2004]).

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

ENTERED: MARCH 12, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9481 Donna Cyril, Index 302570/09
Plaintiff-Appellant,

-against-

Caroline Samsen Mueller, et al.,
Defendants-Respondents.

_____

Goldstein & Handwerker, LLP, New York (Steven Goldstein of counsel), for appellant.

Law Offices of James J. Toomey, New York (Evy Kazansky of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered January 11, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law in this action where plaintiff allegedly slipped and fell on an icy condition on defendants' property. Defendants' testimony that they had shoveled the snow and salted the area after a snowstorm, had salted the area the day before the accident, and left for work via that staircase the morning of the accident and did not see ice or snow, demonstrated that they did not have actual or constructive notice of the icy condition of the back stairs and landing. Moreover, plaintiff testified

that she did not see ice on the stairs or landing prior to the fall, although she had used that entrance earlier in the day (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

In opposition, plaintiff failed to raise a triable issue of fact. She presented no evidence that defendants created the condition, that it was readily apparent, or that it was present for a sufficiently long period of time so that defendants had an opportunity to remedy the alleged hazard (*see Deegan v 336 E. 50th St. Tenants Corp.*, 216 AD2d 59 [1st Dept 1995]). Nor did plaintiff submit evidence indicating that the condition on the landing was recurrent (*see Roman v Met-Paca II Assoc., L.P.*, 85 AD3d 509 [1st Dept 2011]).

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

ENTERED: MARCH 12, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9482 Inez Simens, etc., et al., Index 105097/09
Plaintiffs-Respondents,

-against-

Charles Darwish, etc., et al.,
Defendants-Appellants.
- - - - -
Neal Fellenbaum,
Temporary Receiver-Respondent.

_____

Rosenfeld & Kaplan, LLP, New York (Steven M. Kaplan of counsel), for appellants.

Scott F. Guardino, PLLC, Albertson (Scott F. Guardino of counsel), for Inez Simens, respondents.

Zegen & Fellenbaum, New York (Neal Fellenbaum respondent pro se).

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 7, 2011, which, to the extent appealed from, granted the motions of plaintiffs and the temporary receiver to the extent of holding defendant Charles Darwish (defendant) in civil and criminal contempt, and ordering him to pay $541,607.43 in civil fines and $500 in criminal fines, unanimously modified, on the law, to vacate the finding of criminal contempt and the $500 fine, and otherwise affirmed, without costs.

The court did not give defendant sufficient notice that he

was in danger of being held in criminal contempt (*see Beninati v Beninati*, 181 AD2d 434, 434 [1st Dept 1992], *lv dismissed* 80 NY2d 924 [1992]). Indeed, the court stated at the beginning of the evidentiary hearing that the hearing was to involve civil contempt only. Accordingly, the finding of criminal contempt, and the corresponding fine, must be vacated.

The court, however, correctly held defendant in civil contempt, as there was clear and convincing evidence that defendant knowingly disobeyed clear and unequivocal orders of the court, causing prejudice to plaintiffs and the temporary receiver (*Matter of McCormick v Axelrod*, 59 NY2d 574, 582-583 [1983]). Defendant's argument that the court, in finding him in contempt, could not consider its own record, which included admissions by defendant that he did, in fact, commit various acts that were the subject of the contempt motions, is unavailing and

unsupported by any relevant or controlling legal authority.

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

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

ENTERED: MARCH 12, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9483 The People of the State of New York, Ind. 1760/10
Respondent,

-against-

Robin Ogando,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about November 15, 2010,

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

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

ENTERED: MARCH 12, 2013

CLERK

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

Sweeny, J.P., Abdus-Salaam, Román, Feinman, JJ.

9484 Sterling National Bank, as assignee of Astro Plastics, Plaintiff-Respondent, Index 302402/07

-against-

Polyseal Packaging Corp., etc., Defendant-Appellant,

Pace Polyethylene Mfg. Co., Inc., etc., Defendant.

_____

Osita Emmanuel Okocha, New York, for appellant.

Platzer, Swergold, Karlin, Levine, Goldberg & Jaslow, LLP, New York (Steven D. Karlin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Diane A. Lebedeff, J.), entered March 21, 2011, which denied defendant-appellant's motion to vacate a default judgment against it, unanimously affirmed, without costs.

Plaintiff — as the assignee of Astro Plastics, Inc. — has standing to sue defendant for receiving goods from Astro but failing to pay for them (*see M.S. Textiles v Rafaella Sportswear*, 293 AD2d 261, 262 [1st Dept 2002]). Defendant's contention that the October 3, 2006 assignment is invalid because it predates the January 26-June 29, 2007 invoices that Astro sent to defendant is unavailing. "An assignment may properly relate to a future . . .

right which is adequately identified" (*Leon v Martinez*, 84 NY2d 83, 88 n 1 [1994]). The October 3, 2006 Loan and Security Agreement between plaintiff and Astro gave plaintiff a security interest in, among other things, Astro's present and future accounts and accounts receivable.

Defendant's claim that the assignment is invalid because it is not notarized is without merit. Since an assignment need not be in writing (*see M.S. Textiles*, 293 AD2d at 262), it need not be notarized. CPLR 5019(c), on which defendant relies, is inapplicable. Plaintiff is not "[a] person other than the party recovering a judgment" (*id.*); it *is* the party recovering the judgment.

Since plaintiff properly served defendant by serving the Secretary of State (*see* CPLR 311[a][1]; Business Corporation Law § 306[b][1]), defendant was required to demonstrate a meritorious defense (*see Shaw v Shaw*, 97 AD2d 403, 404 [2d Dept 1983]). Defendant failed to demonstrate such a defense (*see Lopez v 592-600 Union Ave. Corp.*, 292 AD2d 262, 263 [1st Dept 2002]).

In light of the above determination, it is unnecessary to consider whether defendant demonstrated a reasonable excuse under CPLR 5015(a)(1). Were we to reach that issue, we would find that defendant's failure for 23 years to keep its address with the

Secretary of State updated "extinguishes any viable claim of 'reasonableness'" (*Lopez*, 292 AD2d at 263).

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

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

ENTERED: MARCH 12, 2013

CLERK

Sweeny, J.P., Moskowitz, Abdus-Salaam, Román, Feinman, JJ.

9485N In re National Union Fire Insurance Company of Pittsburgh, PA, etc., Petitioner-Respondent, Index 652351/12

-against-

Chukchansi Economic Development Authority, Respondent,

Cascade Entertainment Group, LLC, Respondent-Appellant.

_____

Miller & Wrubel, P.C., New York (Adam J. Safer of counsel), for appellant.

Barger & Wolen LLP, New York (Matthew C. Ferlazzo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 19, 2012, which, insofar as appealed from, granted the petition to compel respondent Cascade Entertainment Group, LLC to arbitrate, and denied Cascade's motion to permanently stay arbitration as against it, unanimously reversed, on the law, with costs, the petition denied, Cascade's motion granted, and the proceeding dismissed as against Cascade.

Cascade signed the "Payment Agreement for Insurance and Risk Management Services" between petitioner and respondent Chukchansi Economic Development Authority (CEDA) solely as the agent of

CEDA, a disclosed principal; it did not sign the agreement a second time on its own behalf. There being no other "clear and explicit" evidence that Cascade intended to be bound by the Payment Agreement, it is not bound by the arbitration provisions contained therein (*see Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1 [1964]; *Salzman Sign Co. v Beck*, 10 NY2d 63 [1961]; *Performance Comercial Importadora E Exportadora Ltda. v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673 [1st Dept 2010]).

Contrary to petitioner's argument, Cascade is not bound by the Payment Agreement based on the agreement's definition of "You," which includes "associated organizations that are included as Named Insureds." Cascade is not "associated" with CEDA, as petitioner contends, by virtue of their agency-principal relationship. Mere contractual agreements do not constitute associations or affiliations (*see e.g. Fairfield Dev., Inc. v J.D.I. Contr. & Supply, Inc.*, 703 F Supp 2d 1211, 1216 [D Colo 2010]; *Preston Trucking Co., Inc. v Carolina Cas. Ins. Co.*, 712 F Supp 1208, 1212 [WD Pa 1989]; *In re Marine Sulphur Transp. Corp.*, 312 F Supp 1081, 1103 [SD NY 1970], *affd in part, revd in part on other grounds* 460 F2d 89 [2d Cir 1972], *cert denied* 409 US 982 [1972]). Indeed, the definition of "You" does not embrace mere contractual agreements. The term "associated organizations" is

grouped with the terms "predecessor and successor organizations" and "subsidiary [or] affiliated . . . organizations," which describe formal corporate relationships, and, equally, must be understood to refer to a formal corporate relationship (*see e.g. National Football League v Vigilant Ins. Co.*, 36 AD3d 207, 213-214 [1st Dept 2006]).

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

ENTERED: MARCH 12, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9486 & M-802 The People of the State of New York, Respondent,

-against-

Elizabeth Cherry, Defendant-Appellant.

SCI 8663C/10

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered October 11, 2011, convicting defendant, after a nonjury trial, of criminal trespass in the second degree, criminal mischief in the fourth degree, and attempted assault in third degree, and sentencing her to a term of three years' probation, unanimously modified, on the law, to the extent of vacating the attempted assault conviction, dismissing that count, and remanding for resentencing on the remaining convictions, and otherwise affirmed.

The count of the information charging attempted assault in the third degree is jurisdictionally defective (*see generally People v Alejandro*, 70 NY2d 133 [1987]) because it fails to

contain allegations establishing or providing reasonable cause to believe that defendant intended to cause physical injury to the victim. At most, the factual allegations support an inference that defendant pushed her former boyfriend in an effort to enter his apartment, and then his living room; there was nothing to support an inference of intent to injure. In any event, the verdict convicting defendant under that count was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

We remand for plenary resentencing proceedings on the remaining convictions, both as a matter of discretion under CPL 470.30(3) and because resentencing is required as a matter of law. The sentencing court violated defendant's constitutional right to self-representation by summarily denying, without inquiry, defendant's request to represent herself at sentencing. Regardless of any ambiguity in defendant's written application, her subsequent application, conveyed through counsel at the sentencing proceeding, was clear and unequivocal (*see People v McIntyre*, 36 NY2d 10, 17 [1974]) *People v Arroyo*, 98 NY2d 101, 103-04 [2002]). Since the harm to defendant is denial of her right of self-representation (*see Faretta v California*, 422 US 806 [1975]), there is no need for her to make any further showing

of prejudice.

In view of this determination, it is unnecessary to consider defendant's remaining contentions.

M-802 - ***People v Elizabeth Cherry***

Motion to file pro se supplemental brief denied.

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

ENTERED: MARCH 12, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9491 The People of the State of New York, Dkt. 78777C/10
Respondent,

-against-

Mario Ruiz,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven Barrett, J.), rendered on or about May 10, 2011,

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

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

ENTERED: MARCH 12, 2013

CLERK

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

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9496 In re 100 Lafayette Street, Ltd., doing business as Santos Party House, Petitioner, Index 114546/11

-against-

New York State Liquor Authority, Respondent.

_____

Pesetsky and Bookman, New York (Randye F. Bernfeld of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Leslie B. Dubeck of counsel), for respondent.

_____

Determination of respondent New York State Liquor Authority, dated August 31, 2011, which, after a hearing, inter alia, sustained four charges that petitioner permitted its premises to become disorderly in violation of Alcoholic Beverage Control Law § 106, and failed to exercise adequate supervision over the premises in violation of Rule 54.2 of the Rules of the State Liquor Authority (9 NYCRR 48.2), and imposed a penalty of $10,000, unanimously modified, on the law, the determination vacated insofar as it sustained charges 2 and 4, the matter remanded to respondent for reassessment of the penalty, and the CPLR article 78 proceeding (transferred to this Court by order of the Supreme Court, New York County [Geoffrey D.S. Wright, J.],

entered April 6, 2011) granted, otherwise disposed of by confirming the remainder of the determination, without costs.

We find that respondent's conclusion that petitioner suffered or permitted the possession, use, or sale of drugs by nightclub patrons alleged in charges 2 and 4 was not supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). "[C]onduct is not 'suffered or permitted' unless 'the licensee or his manager knew or should have known' of the asserted disorderly condition on the premises and tolerated its existence" (*Matter of Playboy Club of N.Y. v State Liq. Auth. of State of N.Y.*, 23 NY2d 544, 550 [1969][citations omitted]).

However, we find that substantial evidence supported the other two sustained charges, which related to an assault on two club patrons by a security guard.

In light of the foregoing, we remand for the imposition of an appropriate penalty.

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

ENTERED: MARCH 12, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9497 In re Maureen H.,
Petitioner-Appellant,

-against-

Samuel G., Sr.,
Respondent-Respondent,

Administration for Children's Services,
Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Geoffrey P. Berman, Larchmont, for Samuel G., Sr., respondent.

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

_____

Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about April 27, 2012, which, after a hearing, denied appellant mother's petition to modify a prior order of custody, unanimously affirmed, without costs.

There exists no basis upon which to disturb Family Court's determination, reached after a full evidentiary hearing at which it had the opportunity to hear the testimony of the witnesses, including both parents, that it is in the subject children's best interest for them to remain in their father's custody (*see Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]; *Matter of Nelissa O. v Danny C.*, 70 AD3d 572, 572-573 [1st Dept 2010]). A sound

and substantial basis in the record supports this determination. The children are happy and well cared for by their father who has provided for their medical care and special needs (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [1st Dept 2006], *lv denied* 8 NY3d 806 [2007]; *and see, Stanat v Stanat*, 93 AD2d 114, 116 [1st Dept 1983], *lv denied* 59 NY2d 605 [1983]).

Appellant's contention of alleged judicial bias has not been preserved for appellate review, and we decline to review it in the interest of justice. As an alternative holding, we find that the record fails to support appellant's allegation of bias (*see Matter of Malinda V.*, 221 AD2d 549, 549-550 [2d Dept 1995], *lv denied* 87 NY2d 811 [1996]).

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

ENTERED: MARCH 12, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9499 Arthur at the Westchester, Inc., etc., et al., Plaintiffs-Appellants-Respondents, Index 600293/10

-against-

Westchester Mall, LLC, Defendant-Respondent-Appellant.

_____

Tenenbaum Berger & Shivers LLP, Brooklyn (David M. Berger of counsel), for appellants-respondents.

Braff, Harris & Sukoneck, New York (Massimo F. D'Angelo of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered February 21, 2012, which, insofar as appealed from, denied plaintiffs' motion to the extent that it sought to dismiss the counterclaims for rent against plaintiff guarantor and granted their motion to the extent that it sought summary judgment as to liability on their causes of action for wrongful eviction, unanimously affirmed, with costs.

The guaranty, which recited that it was made to induce execution of a lease, was supported by consideration notwithstanding that it was signed before the lease (*see Teitelbaum v Mordowitz*, 248 AD2d 161 [1st Dept 1998]; *Michelin Mgt. Co. v Mayaud*, 307 AD2d 280, 281 [2nd Dept 2003]).

Vacatur of the default judgment in the summary proceeding for improper service of process precludes any argument that the evictions were lawful (*see Maracina v Shirrmeister*, 105 AD2d 672, 673 [1st Dept 1984]). We note that the lease did not authorize the landlord's re-entry to the commercial premises without legal process (*see North Main St. Bagel Corp. v Duncan*, 6 AD3d 590, 591 [2nd Dept 2004]).

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

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

ENTERED: MARCH 12, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9500-
9501 Index 115773/08

Bruno Kearney Architects, LLP,
Plaintiff-Respondent,

-against-

Lisa Rose,
Defendant-Appellant.

_____

William R. Garbarino, Sayville (Donald R. Hamill of counsel), for appellant.

Gogick, Byrne & O'Neill, New York (Kriton A. Pantelidis of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered April 18, 2012, after a nonjury trial, in plaintiff's favor, unanimously reversed, on the law, with costs, the judgment vacated, and the matter remanded for a new trial. Appeal from order, same court and Justice, entered January 13, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Contrary to the trial court's determination, plaintiff failed to demonstrate that the parties intended to be bound by the terms of the written agreement without signing the agreement (*see Matter of Municipal Consultants & Publs. v Town of Ramapo*, 47 NY2d 144, 148-149 [1979]). Moreover, it is clear from the

agreement that plaintiff was required to provide a design for a house with an estimated cost of construction consistent with defendant's project budget. To construe the agreement as plaintiff urges would mean that the estimate, and therefore plaintiff's fee (15% of the estimate), would be untethered to any objective measure, thus rendering the agreement unenforceable (*see Metro-Goldwyn-Mayer v Scheider*, 40 NY2d 1069 [1976]).

Given the existence of an express agreement, plaintiff may not recover in quantum meruit (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Nor did plaintiff establish an account stated, since defendant never paid any invoice related to the new construction or the $1,000,000 estimate (*see Stephan B. Gleich & Assoc. v Gritsipis*, 87 AD3d 216, 223 [2d Dept 2011]).

Plaintiff's attorneys' fees were awarded not only pursuant to the unsigned agreement not adopted by the parties, but also

without an evidentiary basis, since no evidence was given, either at trial or an inquest, as to the proper amount of fees.

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

ENTERED: MARCH 12, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9502 Eric Lopez, Index 303271/09
Plaintiff-Respondent,

-against-

Abayev Transit Corp.,
Defendant-Appellant.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for appellant.

Kramer & Pollack, Mineola (Joshua D. Pollack of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered June 1, 2012, which denied defendant's motion for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion to the extent of finding that plaintiff's claimed left knee, back and neck injuries are not serious as a matter of law, and otherwise affirmed, without costs.

Defendant made a prima facie showing that plaintiff did not suffer a serious injury by submitting the affirmed report of its radiologist stating that there were no abnormalities in the MRI (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 351-352 [2002]).

In opposition, plaintiff raised a triable issue of fact

with respect to his right knee only. Plaintiff's treating orthopedic surgeon found tears of multiple ligaments in plaintiff's right knee on his review of the MRI films, and during the arthroscopic surgical procedure (*see Daniels v S.R.M. Mgt. Corp.*, 100 AD3d 440, 440 [1st Dept 2012]). Although plaintiff did not submit any objective evidence of limitations based on a recent examination of any of the subject body parts, defendant's medical expert reported significant limitations of range of motion in flexion of plaintiff's right knee, which was sufficient to raise a triable issue of fact (*see Torres v Knight*, 63 AD3d 450, 451 [1st Dept 2009]). Further, plaintiff's surgeon more than adequately addressed defendant's expert's conclusory opinion on causation by noting the absence of any pre-accident history of symptoms in the affected body parts (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 591 [1st Dept 2011]).

Although defendants met their initial burden as to plaintiff's 90/180-day claim, plaintiff raised a triable issue of fact. Specifically, plaintiff submitted his orthopedic surgeon's affirmed report stating that, during the relevant period, plaintiff's right knee required arthroscopic surgery and an immobilizer for "at least three, possibly four months" after the surgery. In addition, plaintiff submitted her testimony that she

wore a brace during that time (*see Martinez v Goldmag Hacking Corp.*, 95 AD3d 682, 683 [1st Dept 2012]).

We note that if a jury determines that plaintiff suffered any serious injury, it may award him damages for all his injuries proximately caused by the accident, even those that do not meet the serious injury threshold (*see id.*).

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

ENTERED: MARCH 12, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9503 The People of the State of New York, Ind. 6/11
Respondent,

-against-

Denzel Fleming,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about April 5, 2011, 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: MARCH 12, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9504 Jessica Dorfman, Index 600929/04
Plaintiff-Appellant,

-against-

American Student Assistance,
Defendant-Respondent,

Education Resources Institute, et al.,
Defendants.

_____

Jessica Dorfman, appellant pro se.

Pitaro & Pitaro, Flushing (Vincent D. Pitaro of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 7, 2011, which denied plaintiff's motion for summary judgment, granted defendants American Student Assistance's and Education Resource Institute's motions for summary judgment dismissing the complaint as against them, granted Education Resource Institute's motion for summary judgment on its counterclaim, and referred to a special referee the issues of the exact amount due on the counterclaim and the amount of attorneys' fees and costs to which defendants are entitled, unanimously affirmed, without costs.

Plaintiff failed to allege, let alone establish, her own performance under the contract, a necessary element of her breach

of contract claim (*see Chappo & Co., Inc. v Ion Geophysical Corp.*, 83 AD3d 499 [1st Dept 2011]).

Education Resource Institute's prima facie entitlement to sums owed on two "private" loans was established by plaintiff's execution of promissory notes, her disclosure of the first "private" loan in the application for the second one, and her correspondence directing that certain payments be allocated to the "private" loans. Plaintiff's conclusory allegation that the "private" loans were never funded and failed for lack of consideration fails to raise a triable issue of fact.

Plaintiff's objection to the motion court's separate recall and vacatur of a prior order referring the matter to a referee is improperly raised on this appeal.

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

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

ENTERED: MARCH 12, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9505 Horizons Investors Corp., Index 114600/09
Plaintiff-Respondent,

-against-

John Brecevich, etc., et al.,
Defendants-Appellants,

Warminster Investment Corp., et al.,
Defendants.

_____

Boris Kogan & Associates, New York (David Binson of counsel), for appellants.

Chris Mills, New York, for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered October 26, 2011, which, to the extent appealed from as limited by the briefs, in this mortgage foreclosure action, granted plaintiff's motion for summary judgment and denied the cross motion of defendants John Brecevich a/k/a Giovanni Brecevich and Rosemary Brecevich to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff demonstrated its prima facie entitlement to judgment as a matter of law by submitting proof of the mortgage and evidence of default, and defendants failed to come forward with evidence sufficient to raise an issue of fact as to an available defense (*see e.g. CitiFinancial Co. [DE] v McKinney*, 27

AD3d 224 [1st Dept 2006]). The motion court properly determined that the statutes governing pleading and notice requirements and mandating settlement conferences in foreclosure actions on certain home loans were inapplicable to the instant action (*see* RPAPL 1302, 1303, 1304 and 1320; CPLR 3408; *see also Pritchard v Curtis*, 101 AD3d 1502, 1504 n 1 [3d Dept 2012]). Nor did defendants raise an issue of fact that the subject loan was usurious or that plaintiff acted with unclean hands or in bad faith by recording the deed upon defendants' default.

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

ENTERED: MARCH 12, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9506 Jorge Clavijo, Index 103313/07
Plaintiff-Respondent, 590069/09

-against-

Atlas Terminals, LLC, et al.,
Defendants-Appellants,

Mol-Mon Realty Company, Inc.,
Defendant.

- - - - -

Atlas Terminals, LLC, et al.,
Third-Party Plaintiffs-
Appellants-Respondents,

-against-

Marlite Construction Corp., etc.,
Third-Party Defendant-
Respondent-Appellant.

_____

Rubin, Fiorella & Friedman LLP, New York (Leila Cardo of counsel), for appellants/appellants-respondents.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Howard J. Snyder of counsel), for respondent-appellant.

Gorayeb & Associates, P.C., New York (Mark H. Edwards of counsel), for respondent.

_____

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered February 14, 2012, which, to the extent appealed from as limited by the briefs, denied the motion by defendants/third-party plaintiffs (collectively, Atlas) for summary judgment on their claim for contractual indemnification

against third-party defendant (Marlite), and granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, unanimously modified, on the law, to grant Atlas's motion, and otherwise affirmed, without costs.

Plaintiff was injured in the course of building a mezzanine floor by nailing plywood to beaming when he stepped through a ceiling tile he believed to be plywood and fell to the concrete floor below. Plaintiff established his entitlement to summary judgment under Labor Law § 240(1) by showing that Atlas failed to provide any safety devices that would have prevented his fall *(see Bland v Manocherian*, 66 NY2d 452, 459 [1985]).

In opposition, Atlas failed to raise an issue of fact whether plaintiff was a recalcitrant worker or the sole proximate cause of his accident *(see Eustaquio v 860 Cortlandt Holdings, Inc.*, 95 AD3d 548 [1st Dept 2012]). The only evidence it submitted was the testimony of the owner of Marlite, plaintiff's employer, that safety harnesses were available at the site but that he did not know where they were kept or whether plaintiff knew of their existence.

Marlite's lease obligated it to indemnify Atlas for any losses resulting from its (Marlite's) breach of any covenant or condition of the lease or from any carelessness, negligence or

improper conduct on its part. This indemnification obligation is triggered by Marlite's sending plaintiff to work on a mezzanine under construction on which the floor beams were only partially covered, some with ceiling tiles, without safety equipment (*see Correa v 100 W. 32nd St. Realty Corp.*, 290 AD2d 306 [1st Dept 2002]).

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

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

ENTERED: MARCH 12, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9507 In re Claud Ponton, Index 401911/11
Petitioner,

-against-

John B. Rhea, etc., et al.,
Respondents.

_____

Y. Andre Vital, Long Island City, for petitioner.

Kelly D. MacNeal, New York (Marisa D. Shemi of counsel), for respondents.

_____

Determination of respondent, New York City Housing Authority (NYCHA), dated March 16, 2011, denying petitioner's grievance challenging the denial of his request for succession rights to his deceased wife's public housing unit as a purported remaining family member, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Donna M. Mills, J.], entered on or about October 12, 2011), dismissed, without costs.

The evidence at the hearing established by overwhelming evidence, largely undisputed, that petitioner left the household either in 1988 or 1992, and was removed from the lease. In February, 2009, he and his wife sought permission from respondent

to have petitioner rejoin the household. However, as of November, 2009, the time of his wife's death, that permission had not yet been granted, as petitioner had not yet signed the application and necessary documentation, which the agency had requested. Nor was petitioner's income reflected on any of the annual affidavits of income for the household, for nearly two decades. Under these circumstances, petitioner failed to sustain his burden of establishing that he was entitled to succession rights to the apartment held by his wife, as a remaining family member (*see Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694 [1st Dept 2012]; *Matter of Echeverria v New York City Hous. Auth.*, 85 AD3d 580 [1st Dept 2011]). Additionally, as the Hearing Officer found, even if the incomplete application to rejoin the household had been immediately granted in February, 2009, petitioner would still not have resided lawfully in the apartment for the requisite minimum of one year prior to his wife's death, to entitle him to remaining family member succession rights (*see Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [1st Dept 2007]).

Finally, the arguments raised by petitioner on appeal were not raised at the administrative level, and are not properly

before us (*see Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Quinones v New York City Hous. Auth.*, 99 AD3d 473 [1st Dept 2012]).

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

ENTERED: MARCH 12, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9508N Anastacio Martinez, Index 14959/07
Plaintiff-Respondent,

-against-

William Reiner, et al.,
Defendants,

Hunts Point Live Poultry
and Slaughterhouse, Inc.,
Defendant-Appellant.

_____

Arthur Morrison, Hawthorne, for appellant.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered September 26, 2011, which denied the motion of defendant Hunts Point Live Poultry and Slaughterhouse Inc. to vacate its default and for leave to serve its proposed verified answer, unanimously reversed, on the law, without costs, and the motion granted.

The complaint, which was verified by counsel, was "purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215" (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]; citing *Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]; *Joosten v Gale*, 129 AD2d 531, 534-535 [1st Dept 1987]). In alleging only that plaintiff fell from a ladder while doing construction-related work, plaintiff's

affidavit failed to provide the motion court with evidence sufficient to satisfy the court as to the prima facie validity of defendant's liability for the stated claims (*see Manhattan Telecom. Corp. v H&A Locksmith, Inc.*, 82 AD3d 674, 674 [1st Dept 2011], citing *Feffer*, 210 AD2d at 61; *Giordano v Berisha*, 45 AD3d 416 [1st Dept 2007]; CPLR 3215[f]). Accordingly, the default order entered was a nullity (*see Natradeze v Rubin*, 33 AD3d 535 [1st Dept 2006]), and defendant's remaining contentions, including its claim that it demonstrated a reasonable excuse for its default and a meritorious defense, need not be reached.

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

ENTERED: MARCH 12, 2013

CLERK

Tom, J.P., Andrias, Moskowitz, Román, JJ.

7029-
7030 Morpheus Capital Advisors LLC,
Plaintiff-Appellant,

-against-

UBS AG, et al.,
Defendants-Respondents.

Index 650335/09

_____

Kornstein Veisz Wexler & Pollard, LLP, New York (William B. Pollard, III of counsel), for appellant.

White & Case LLP, New York (Kenneth A. Caruso of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 18, 2011, modified on the law, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered January 4, 2011, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Román, J. All concur except Tom, J.P. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
Karla Moskowitz
Nelson S. Román, JJ.

7029-7030
Index 650335/09

_____x

Morpheus Capital Advisors LLC,
Plaintiff-Appellant,

-against-

UBS AG, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the judgment of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 18, 2011, dismissing the complaint with prejudice, and from the order, same court and Justice, entered January 4, 2011, granting defendants' motion to dismiss the complaint.

Kornstein Veisz Wexler & Pollard, LLP, New York (William B. Pollard, III and Amy C. Gross of counsel), for appellant.

White & Case LLP, New York (Kenneth A. Caruso and Peter E. Wilhelm of counsel), and Chadbourne & Parke, LLP, New York (Jeffrey I. Wasserman of counsel), for respondents.

ROMÁN, J.

In 2008, during the financial crisis that left many financial services companies holding billions of dollars in "toxic assets" (undervalued and underperforming assets), plaintiff and defendant UBS Real Estate Securities, Inc. (UBSRE) entered into an agreement whereby plaintiff was to act as UBSRE's "financial advisor and investment banker in the proposed sale of certain of [UBSRE's] student loan warehouse loan facilities (the 'Transaction')." The agreement gave plaintiff the "exclusive right to solicit counterparties for any potential Transaction involving the Student Loan Assets during the term of this Agreement." Moreover, according to the agreement, upon the closing of "the Transaction," plaintiff would be paid a success fee for its services, which would be calculated as a percentage of the "Transaction Amount,"

> "defined as the agreed value of the Student Loan Assets which are transferred or sold to a third party, *or in respect to which the risk of first loss is assumed by a third party, in one or a series of transactions*" (emphasis added).

Alleging that defendants breached the agreement, plaintiff sued, claiming, inter alia:

> "On October 16, 2008, during Morpheus' exclusivity period, Defendant UBS AG reached an agreement with the Swiss National Bank ('SNB') and a third party fund (the

> 'Stabilization Fund') whereby the student loan assets [held by UBSRE] would be sold to the Stabilization Fund. *This deal . . . relieve[d] UBS AG and UBSRE of the risk of any further loss with respect to those assets* . . . [and that] [b]y entering into that agreement . . . UBSRE . . . breached the Agreement with Morpheus" (emphasis added).

Defendants moved for pre-answer dismissal of the complaint pursuant to CPLR 3211(a)(1) and (a)(7). Holding that defendants had established both a frustration of purpose defense and that the complaint failed to state a cause of action against UBS AG, the motion court granted defendants' motion in its entirety. Plaintiff appealed, and upon a review of the record, we conclude that the motion was erroneously granted to the extent it sought dismissal of the claims asserted against UBSRE.

The motion court erred in dismissing the complaint pursuant to CPLR 3211(a)(1) (defense founded on documentary evidence) on the ground that the purpose of the parties' agreement was frustrated by SNB's creation of the Stabilization Fund (Fund) into which UBSRE could deposit its allegedly toxic assets and free itself of the risk involved in maintaining such debt on its books, and that UBSRE was thus relieved of any duty to pay the success fee.

"The doctrine [of frustration of purpose] applies when a change in circumstances makes one party's performance virtually

worthless to the other, [thereby] frustrating his purpose in making the contract" (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 508 [2011] [internal quotation marks omitted]). However, the defense is not available when the event preventing performance was foreseeable (*Warner v Kaplan*, 71 AD3d 1, 6 [2009], *lv denied* 14 NY3d 706 [2010]), or where the party asserting the defense "through the conduct of its principals, was responsible for the events which transpired" (*VJK Prods., Inc. v Friedman/Meyer Prods., Inc.*, 565 F Supp 916, 921 [SDNY 1983]).

A motion to dismiss premised on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*see Goshen v Mutal Life Ins. Co. of N.Y.*, 98 NY3d 314, 326 [2002]). Here, while defendants aver that the creation of the Fund frustrated the purpose of the agreement, they nevertheless fail to establish that defense with documentary evidence. The very documents defendants submit in support of their motion establish that the creation of the Fund was in fact foreseeable and contemplated by the parties in the agreement. Specifically, the agreement contains a provision compensating plaintiff in the event of a transaction where the risk of loss was, as alleged here, assumed by a third party. Accordingly, in premising plaintiff's

compensation on the sale, transfer or, as here, assumption of UBSRE's student loan assets by another, the Fund's creation and UBSRE's transfer of its assets thereto was foreseeable.

Furthermore, the documents submitted by defendants in support of their motion also fail to establish that the creation of the fund was, in and of it itself, the event which frustrated the purpose of the agreement. Specifically, these documents fail to conclusively establish that the creation of the Fund, rather than defendants' decision to avail themselves of it, rendered plaintiff's performance under the agreement – finding a purchaser for the very assets that UBSRE transferred into the Fund – "virtually worthless" to UBSRE (*VJK Prods., Inc.*, at 920-921). Therefore, defendants fail to establish their frustration of purpose defense as a matter of law.

The dissent asserts that the agreement itself, which defendants submitted in support of their motion to dismiss, establishes defendants' right to dismissal. Specifically, the dissent notes that the portion of the agreement entitled "Scope of Engagement" requires plaintiff to "[i]dentify, introduce and assess appropriate investors." Similarly, the dissent notes that the portion of the agreement that contemplates payment to plaintiff when the "Student Loan Assets . . . are transferred or sold to a third party, or . . . [when] the risk of first loss is

assumed by a third party, in one or a series of transactions," precludes compensation to plaintiff because UBSRE transferred its assets to the Fund created by SNB, a party that plaintiff did not and could not introduce to UBSRE. The crux of the dissent's argument, therefore, is that the agreement grants plaintiff an exclusive agency rather than an exclusive right to sell. Thus, the dissent concludes, defendants did not breach the agreement, because plaintiff did not broker UBSRE's transfer of its toxic assets into the Fund, and under the circumstances, plaintiff has no cause of action for breach of contract. While we agree that plaintiff was granted only an exclusive agency, we disagree that plaintiff fails to state a cause of action for breach of contract or that defendants established a defense based on documentary evidence.

The dissent correctly notes that generally under an exclusive agency agreement no liability to pay commissions arises absent the participation of the party to whom the exclusive agency is granted (*U.S. No. 1 Laffey Real Estate v Hanna*, 215 AD2d 552, 553 [2d Dept 1995], *lv denied* 87 NY2d 804 [1995]). We further agree with the dissent to the extent it notes that here the agreement only confers an exclusive agency to plaintiff insofar as it does not expressly prohibit UBSRE from finding a buyer for its toxic assets and thereafter engaging in a self-

brokered sales transaction (*see Carnes Communications, Inc. v Dello Russo*, 305 AD2d 332, 332 [1st Dept 2003]). However, the dissent erroneously contends that since plaintiff only had an exclusive agency and did not introduce UBSRE to the Fund, the agreement precludes a breach of contract claim.

A review of the agreement establishes that while plaintiff was only granted an exclusive agency, the agreement nevertheless gave plaintiff "the exclusive right to solicit counterparties for any potential Transaction involving the Student Loan Assets during the term of this Agreement." Read broadly, the allegations in the complaint, which on a motion to dismiss pursuant to CPLR 3211(a)(7) we deem as true (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]), state a cause of action for breach of contract.

Specifically, the complaint alleges "[t]he Agreement provided Morpheus with the 'exclusive right to solicit counterparties' for any potential transaction," and premises the breach of contract claim on, inter alia, UBSRE's failure to give plaintiff the right to solicit counterparties before transferring its assets to the Fund (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [the essential elements of a cause of action for breach of contract are the existence of a contract,

the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages]). Contract provisions should be given their plain and ordinary meaning (*Rosalie Estates. v Colonia Ins. Co.*, 227 AD2d 335, 336 [1st Dept 1996]), and when clear, a contract ought to "be enforced according to its terms" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004][internal quotation marks omitted]). Accordingly, since the agreement required UBSRE to give plaintiff the opportunity to solicit a counterparty prior to transferring its assets into the Fund, and since plaintiff pleads a breach of that very term, the complaint states a cause of action for breach of contract. This is true, even if, as asserted by the dissent, the agreement only granted plaintiff an exclusive agency rather than an exclusive right to sell.

Moreover, just as defendants' documentary evidence fails to establish their frustration of purpose defense, they similarly fail to establish that they did not breach the agreement. In other words, nothing submitted by defendants establishes a defense to the allegations in the complaint that defendants were required to give plaintiff the right to solicit a counterparty to any transaction involving the loan assets, including the one at issue here.

Paradoxically, the dissent notes that plaintiff never

introduced UBSRE to any counterparties and then argues - in complete disregard of the portion of the agreement requiring that UBSRE afford plaintiff the right to solicit a counterparty - that in transferring its student loan assets to the Fund, defendants did not breach the agreement. According to plaintiff's complaint, it is UBSRE's alleged failure to afford plaintiff the opportunity to solicit a counterparty for the instant transaction, as required by the agreement, that forms one basis for plaintiff's breach of contract claim. Thus, plaintiff has pleaded a cause of action for breach of contract.

Nor does this portion of the agreement seek to impermissibly grant plaintiff either an exclusive right to sell or a right of first refusal. As to an exclusive right to sell, we have already held that the agreement grants plaintiff only an exclusive agency. Accordingly, we need not elaborate further. As to a right of first refusal, whether the agreement grants plaintiff such a right, is an issue we need not reach because it is raised solely by the dissent. Suffice it to say, however, that a plaintiff's failure to plead that it had a viable counterparty for UBSRE's toxic loan assets would not, standing alone, preclude a breach of contract claim based upon a defendant's failure to adhere to a right of first refusal provision. Indeed, "[t]he obvious effect of the right of first

refusal is to give to the nonselling party a power to control and restrict the other party's right to sell to a third party" (*LIN Broadcasting Corp. v Metromedia, Inc.*, 74 NY2d 54, 62 [1989]). The clause itself, therefore, operates as a restriction by preventing a party from making a sale without first making the first refusal offer (*id.*). As a result, the selling party has fully complied with its obligations under the first refusal clause by "not selling without first making the required offer, the nonselling party has received the bargained-for performance" (*id.*). Hence, if the parties have bargained for notification of an impending sale to the party who holds the right of first refusal, the failure to provide such notice, as is alleged here, constitutes sufficient grounds for a breach of contract claim.

To the extent that the agreement unambiguously and without limitation contemplates compensation to plaintiff when "the risk of first loss is assumed by a third party, in one or a series of transactions," and does not limit compensation to plaintiff only if it introduced such third party to UBSRE, we also find merit to plaintiff's contention that the agreement mandated compensation for any transaction involving UBSRE's toxic assets during the term of the agreement. Nor can it be said, as posited by the dissent, upon a review of this provision that the parties sought to preclude compensation upon action by SNB, which in creating

the Fund acted "as a regulator charged with overseeing the financial health of the Swiss banking System." Accordingly, the dissent ignores the well settled tenets that we must be guided by the clear and express language of the agreement and "that courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co., Inc.*, at 475 [internal quotation marks omitted]).

Additionally, while it is certainly true that the portion of the agreement requiring the plaintiff to "[i]dentify, introduce and assess appropriate investors" is indicative of the intent to compensate plaintiff only when USBRE sold its toxic assets to a party introduced by plaintiff, this provision, to the extent it is at odds with the provision requiring compensation solely when "the risk of first loss is assumed by a third party, in one or a series of transactions," merely creates an ambiguity, warranting denial of defendants' pre-answer motion to dismiss (*see Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401, 403 [1st Dept 2010] [because at least two reasonable interpretations of contract language are possible, the provision is ambiguous and dismissal "pre-answer before the development of a full factual record as to the parties' intent" is not appropriate]; *Hambrecht & Quist Guar. Fin., LLC v El Coronado Holdings, LLC*, 27 AD3d 204 [1st Dept

2006]). Rather than conceding that the ambiguity precludes granting defendants' motion, however, the dissent proceeds to impermissibly engage in either speculation or contract interpretation. Specifically, the dissent, diminishing the import of a clear contractual provision, states that the "obvious explanation for the contractual reference to assumption of the risk of loss is the potential for entering into a credit default swap arrangement." This attempt to interpret and reconcile contractual provisions that are susceptible of more than one interpretation, and therefore ambiguous, is clearly inappropriate in the context of a motion to dismiss (*Telerep* at 403).

The motion court properly dismissed plaintiff's action against defendant UBS AG since plaintiff's complaint fails to state a cause of action against it. Generally, in order to pierce the corporate veil, it must be established that "(1) the owners [of a corporation] exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Moreover, when a complaint fails to plead that the parent company engaged in self-dealing, commingled funds, or lacked corporate formalities, a complaint seeking to pierce the

corporate veil should be dismissed for failing to state a cause of action (*see Hartej Corp. v Pepsico World Trading Co.*, 255 AD2d 233, 233 [1st Dept 1998]; *cf. International Credit Brokerage Co. v Agapov*, 249 AD2d 77, 78 [1st Dept 1998]). Lastly, since adequate corporate capitalization sufficient to meet contingent liability is a factor when determining the merit of a veil-piercing claim, the failure to plead this element warrants dismissal of a complaint asserting an alter-ego claim (*see ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 [2011]; *Allstate ATM Corp. v E.S.A. Holding Corp.*, 98 AD3d 541, 542 [2d Dept 2012]; *Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073, 1075 [2d Dept 2012]).

Here, while plaintiff pleads that "UBS AG controlled, directed and dominated UBSRE with respect to the Transaction with the Stabilization Fund and SNB involving the Student Loan Assets," it nevertheless fails to plead the additional elements of self-dealing, commingling of funds, lack of corporate formalities, and that UBSRE was undercapitalized, elements which are required when pleading an alter ego cause of action (*ABN AMRO Bank, N.V.* at 229; *Allstate ATM Corp.* at 542; *Grammas* at 1075; *Hartej Corp.* at 233). In fact, the conclusory allegations in the complaint amount to nothing more than allegations that UBS AG made decisions for UBSRE. Thus the complaint was properly

dismissed as against UBS AG (CPLR 3211[a][7]; *Dabrowski v ABAX Inc.*, 64 AD3d 426, 427 [1st Dept 2009]). Insofar as the dismissal of the complaint against USB AG was for the failure to state a cause of action, such dismissal "is without prejudice to the right of plaintiff to apply at Special Term upon a proper showing for leave to plead again" (*Antel Oldsmobile-Cadillac v Sirus Leasing Co.,Div. of Sirius Enters.* 101 AD2d 688, 689 [4th Dept 1984]; CPLR 3211[e]; *Sanders v Schiffer*, 39 NY2d 727 [1976]; *Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 27-28 [2d Dept 2008]).

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

Accordingly, the judgment of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 18, 2011, dismissing the complaint with prejudice, should be modified on the law, without costs, to the extent of vacating that part of the judgment dismissing the complaint as against defendant UBS Real Estate Securities, Inc., and directing that dismissal of the complaint as against defendant UBS AG be without prejudice, and otherwise affirmed, without costs. The appeal from the order of

the same court and Justice, entered January 4, 2011, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur except Tom, J.P. who dissents in an Opinion.

TOM, J.P. (dissenting)

The majority misconstrues a mere definition as the expression of the parties' entire brokerage agreement, thereby transforming a contract that expressly confers the exclusive right to deal (exclusive agency) into one that confers the exclusive right to sell, in contravention of the rule that a court may not "rewrite the terms of an agreement under the guise of interpretation" (*see 85th St. Rest. Corp. v Sanders*, 194 AD2d 324, 326 [1993]; *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Under an exclusive agency contract, no liability to pay a commission is incurred where the property is transferred to a purchaser located by the client, without the participation of either the contracting broker or any other (*e.g. U.S. No. 1 Laffey Real Estate v Hanna*, 215 AD2d 552 [2d Dept 1995], *lv denied* 87 NY2d 804 [1995]). Nor will a contract "be construed to create an exclusive right to sell unless it expressly and unambiguously provides for a commission upon sale by the owner or excludes the owner from independently negotiating a sale" (*Far Realty Assoc. Inc. v RKO Del. Corp.*, 34 AD3d 261, 262 [1st Dept 2006]). Because it is conceded that the subject property was transferred without the intervention of any broker, it is unnecessary to reach the issue of whether the purpose of the brokerage agreement was frustrated. To the extent the

question is pertinent, it should be noted that no explanation has been offered as to why the purpose of the parties' agreement was not frustrated by the absence of any market for the property.

On a pre-answer motion to dismiss, the issue is whether a cause of action exists, not whether the complaint properly states one (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]), an issue that presents a question of law for the court (*see Rajagopalan v Mount Sinai Med. Ctr.*, 2 AD3d 232 [1st Dept 2003]). While plaintiff has attempted to frame the pleadings to fit within a cause of action for breach of a brokerage contract, specifically an exclusive right to sell contract, what transpired was not within the contemplation of the parties or their agreement, and plaintiff cannot recover under the instrument.

Briefly stated, this is an action to recover a broker's fee in the amount of $2,887,500 under an agreement between plaintiff Morpheus Capital Advisors (MCA) and defendant UBS Real Estate Securities (UBSRE), a subsidiary of the Swiss banking giant defendant UBS AG. The agreement dated September 19, 2008 recites that "UBS Real Estate Securities, Inc. . . . has chosen to engage Morpheus Capital + Advisors LLC ('MCA') as its financial advisor and investment banker in the proposed sale of certain of its student loan warehouse loan facilities ('the Transaction')." Section 1, entitled "Scope of Engagement," specifies 10 services

to be provided by MCA, first and foremost: "Identify, introduce and assess appropriate investors," as to which UBSRE agreed that "MCA shall have the exclusive right to solicit counterparties for any potential Transaction involving the Student Loan Assets during the term of this Agreement."

Drafted as an exclusive agency (exclusive right to deal) contract, the agreement provides limited protection to MCA against a sale arranged by another broker. Section 5, "Termination of Engagement – Exclusivity," provides that if UBSRE "completes any Transaction with a party or parties ('Investor') (1) introduced to the Company by MCA, (2) introduced to the Company by another party other than MCA, but MCA performed substantially all the services set forth herein in Section 1 prior to the termination of this Agreement, then MCA shall be entitled to its full fees as described above, until March 31, 2009."

There is no question that disposition of the subject student loan assets was not the result of any efforts by MCA or any other broker. In October 2008, the Swiss National Bank, in an attempt to stabilize its national financial market, issued a press release announcing measures intended to assist UBS AG by strengthening its capital base, including "the possibility to transfer illiquid assets to a special purpose vehicle (SPV) for

orderly liquidation," together with an agreement with UBS AG for "long-term financing and orderly liquidation of illiquid securities and other troubled assets in the amount of no more than USD 60 billion." On November 27, 2008, the SNB established a stabilization fund (the StabFund) to receive impaired assets.[1] The first quarter 2009 report indicates that UBS AG made three asset transfers to the StabFund: $15.4 billion in December 2008, $22.2 billion in March 2009 and $15.7 billion in April 2009. The parties have not provided any documentation of these transfers, and while the record contains excerpts from a "master assignment agreement" disclosing the transfer, on April 3, 2009, of "Student Loans identified on Schedule II hereto" and "Student Loans identified on Schedule IV hereto," the referenced schedules are not included in the record. Thus, the actual date on which the student loan assets subject to the parties' agreement were transferred to the StabFund remains a question of fact, including whether the transfer was effected during the time period governed by the parties' agreement so as to obligate UBSRE to pay MCA the success fee sought, as urged by MCA.

[1] According to the fourth quarter report purchase for 2008, the SNB provided a loan "in the amount of 90% of the price to be paid by the fund" for the acquired assets. The balance of 10% took the form of a direct equity contribution by the central bank.

UBS AG and UBSRE brought the instant pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7).[2] Supreme Court dismissed the complaint as against UBS AG on the ground that it was not a party to the agreement and as against UBSRE on the ground that the purpose of the contract was frustrated by the intervention of the SNB. While MCA disputes these rulings, it has no basis for recovery under the instrument, and the complaint was appropriately dismissed against defendants under CPLR 3211(a)(7).

MCA does not pretend that it introduced to UBSRE a party that was ready, willing and able to purchase the property offered for sale (*see Curtis Props. Corp. v Greif Cos.*, 212 AD2d 259, 263 [1st Dept 1995]), that is, a "counterparty" pursuant to section 1 of the agreement. Rather, MCA claims entitlement to payment of the success fee under the exclusivity provision of the agreement.

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[2] The motion to dismiss was made on the record, the accompanying affirmation does not set forth the legal grounds on which dismissal is sought, and the memoranda of law are not part of the record. MCA, in opposing the motion, accused UBS of making "fact-based arguments" and failing to provide it with an October 2008 contract concerning the transfer of the student loan assets (not included in the record) which, the reply indicated, had already been disclosed by UBS. MCA then submitted, by way of sur-reply, an application to amend the complaint to add a claim to reform the contract, to which UBS responded. Appropriately, the latter application is not addressed in the decision and judgment and is not before us on appeal (*see Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625-626 [1st Dept 1995]).

MCA contends that the transfer (or, at least, the equitable transfer) of the property took place during the life of the agreement which, the complaint states, expired on December 31, 2008. MCA contends that the establishment of the special purpose vehicle by the SNB to receive impaired assets held by UBS AG effectively transferred the risk of loss on the student loan portfolio from UBSRE to the StabFund. In support of this argument, it alludes to the agreement's definition of "Transaction Amount," on which the brokerage fee is calculated:

> "For purposes of this Agreement, the 'Transaction Amount' is defined as the agreed value of the Student Loan Assets which are transferred or sold to a third party, or in respect to which the risk of first loss is assumed by a third party, in one or a series of transactions."

MCA further argues that this provision establishes that the creation of the StabFund was anticipated by the parties' agreement so as to defeat UBSRE's claim of frustration of purpose.

To accept MCA's reasoning requires casting the SNB in a role it clearly does not play – that of broker. The exclusivity provision requires payment of the success fee if UBSRE "completes any Transaction with a party . . . introduced to the Company by another party other than MCA . . . prior to the termination of this Agreement." To qualify under MCA's theory of recovery, this

Court would be required to accept the notion that the SNB "introduced" UBS AG to the StabFund.

There are several deficiencies in this concept. First, as the complaint acknowledges, UBS AG was the party responsible for the transfer of its subsidiary's assets, not UBSRE itself.[3] Second, the StabFund, the special purpose vehicle set up to receive the impaired assets, was not a party that could be "introduced" (by MCA or any other broker) to either UBS entity since it did not exist until created at the instance of the SNB (which provided all of the financing necessary to the StabFund's operation). Third, in creating the fund, the SNB did not function in the role of broker but in its official capacity as a regulator charged with overseeing the financial health of the Swiss banking system.[4] As the largest bank in Switzerland, UBS AG hardly needed to be "introduced" to the SNB, and it is naive to attempt to apply a commercial brokerage agreement to

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[3] The complaint implicitly concedes that the transfer was effected by UBSRE's parent, alleging that "UBS AG controlled, directed and dominated UBSRE with respect to the Transaction with the Stabilization Fund and SNB involving the Student Loan Assets." Thus, it alleges that "UBSRE, as controlled, directed and dominated by UBS AG, breached the exclusivity provision in the Agreement."

[4] The SNB performs in a capacity similar to that of the United States Federal Reserve, implementing monetary policy and ensuring financial system stability under constitutional mandate.

regulatory action undertaken to ward off a threat to the financial stability of a sovereign nation's banking system. Nothing in the parties' agreement suggests that they intended the success fee to be payable as a result of regulatory action taken with respect to the distressed student loan assets. Finally, to accept the majority's reasoning that transfer to the StabFund of the risk of loss on the impaired assets would require construing the agreement as an exclusive right to sell contract, in contravention of the express recitation that it confers only "the exclusive right to solicit [potential] counterparties" to acquire the assets or assume any potential loss.

In short, the fatal defect in the complaint is that it provides no reason why a contract entered into in a commercial context for a commercial purpose should be applied to regulatory action undertaken by a central bank in its supervisory capacity. Does MCA – or the majority – seriously suggest that had the Federal Reserve Bank directed UBS AG to transfer the subject student loan assets to Sallie Mae (SLM Corporation; originally, the Student Loan Marketing Association), MCA would thereby be entitled to its success fee under the agreement?

To arrive at its disposition, the majority attaches undue significance to the definition of "Transaction Amount," which contemplates not only a transaction in which the distressed

assets are acquired but also one in which the risk of loss is assumed. They fabricate from this oblique reference the conclusion that the parties must have anticipated the creation of the StabFund because, with its creation, the risk of loss was effectively removed from UBSRE. This interpretation completely ignores the agreement's provision that "MCA shall receive a Success Fee payable upon the closing of the Transaction" and the definition's own reference to the assumption of risk "by a third party, in one or a series of transactions." Clearly, the agreement conditions payment of the success fee on the occasion of a *transaction*, not merely the *prospect* of a transaction, intended to transfer the risk of loss.[5] At best, MCA has alleged an equitable transfer involving the subject property, which fails to satisfy the terms of the exclusivity provision that UBSRE complete a *transaction* with a party *introduced* to it by (1) MCA or (2) "another party . . . prior to the termination of this Agreement" to be entitled to payment of a success fee.

Construing a passing reference to the transfer of risk of loss as an expression of the parties' anticipation that the SNB

[5] The majority fails to distinguish between the agreement's fees and expenses provision, setting the amount of the success fee to be paid (Section 2), and the exclusivity provision, establishing the conditions under which the success fee is payable (Section 5), under which MCA claims payment is due.

would create a special purpose vehicle to receive the distressed assets is an untoward conceptual leap. The obvious explanation for the contractual reference to assumption of the risk of loss is the potential for entering into a credit default swap arrangement, by which the counterparty introduced to UBSRE agrees (for a fee) to bear the loss resulting from any impairment in the value of the assets. Under this scenario, ownership remains with UBSRE, and there is no transfer of the assets to provide a valuation date. Hence, the alternative reference to the date the risk of loss is assumed. This construction is supported by a carve out in the agreement providing that no success fee is payable in the event (among others) that a credit default swap or derivative transaction is consummated with one of two named parties.

Another deficiency in the majority's position is that the brokerage agreement provides for an exclusive agency ("the exclusive right to solicit counterparties"), not an exclusive right to sell. A party that enters into an exclusive agency provision with a broker is free to transfer the subject property to a buyer that the seller locates or, as here, independently locates the seller (*see U.S. No. 1 Laffey Real Estate*, 215 AD2d at 553; *Far Realty Assoc. Inc.*, 34 AD3d at 262). To reach the contrary conclusion that a success fee was earned by MCA when the

risk of loss was transferred to the StabFund, the majority abrogates a fundamental principle of contract interpretation and strains to find an ambiguity where none exists. As stated by the Court of Appeals, the objective "in searching for the probable intent of the parties . . . is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations" (*Sutton v East Riv. Sav. Bank*, 55 NY2d 550, 555 [1982] [internal quotation marks omitted]; *see also Greenwich Vil. Assoc. v Salle*, 110 AD2d 111, 114 [1st Dept 1985] ["In construing the terms of a contract, the judicial function is to give effect to the parties' intentions"]).

Contrary to the majority's position, there was no breach of the brokerage agreement since it is undisputed that plaintiff never introduced any counterparty to UBS. The majority reads the exclusivity provision in a vacuum, without regard for its stated purpose, effectively elevating the nature of the parties' agreement to an exclusive right to sell (*see e.g. Barnet v Cannizzaro*, 3 AD2d 745, 746 [2d Dept 1957]). The agreement explicitly confines the scope of MCA's engagement to "the exclusive right to solicit counterparties." The exclusivity provision requires payment of the success fee only if UBSRE "completes any Transaction with a party . . . introduced to the Company by another party other than MCA, but MCA performed

substantially all the services set forth herein in Section 1 . . . " Read in context of the contract as a whole and according due regard to the parties' plainly stated intentions as to the scope of MCA's engagement, the provision protects only MCA's exclusive right to deal, and the use of the term "introduced" clearly implicates intervention by another broker. Since it is undisputed that no other broker was involved, UBSRE was free to dispose of the subject assets to a party located either by it or its parent and alleged alter ego, and the success fee is not payable (*see Far Realty Assoc. Inc. v RKO Del. Corp.*, 34 AD3d at 262; *Solid Waste Inst. v Sanitary Disposal*, 120 AD2d 915, 916 [2d Dept 1986] [exclusive agency contract "merely excludes the employment of another broker by the owner in making a sale"]). Significantly, plaintiff's complaint mentions nothing of plaintiff's "substantial performance" - or any performance at all pursuant to section five of the agreement.

To the extent the agreement might be considered ambiguous, as the majority postulates, there is merit to the argument advanced by defendants. However, the purpose of the parties' agreement was frustrated not by the intervention of the SNB, specifically, but by the circumstances that prompted its intervention – the lack of a market for the subject securities. It is for this reason that they are referred to as "toxic assets"

– nobody wants to hold them. Nor do central banks have any desire to see such assets come to market. Permitting the market to establish a highly discounted value for toxic assets held by major banks would have a highly negative effect on the amount of the banks' required capital reserves, if not their very solvency, and this explains the need for central bank purchases of such assets. While MCA invites this Court to indulge in the fiction that the SNB introduced UBSRE to the StabFund it established and to treat the fund and the central bank as discrete entities, the reality is that the SNB, as the party providing 100% of the funds to effectuate the StabFund's asset acquisitions ($54 billion in long-term financing and $6 billion in direct equity investment), is the effective purchaser. Given the necessary and longstanding working relationship between UBS AG and the SNB, it should be clear that if any party can be said to have located the ultimate purchaser, it was UBS AG. Realistically, it was the SNB, as central bank, that orchestrated and financed the transfer from UBS AG to the StabFund, as the central bank's agent.

The proposition advanced by the majority that UBSRE was under the obligation to afford MCA an opportunity to solicit a counterparty to the transaction before transferring the assets to the StabFund is unsupported by any cited authority. As stated at the outset, the applicable authority is to the contrary. It is

well established that under a brokerage contract such as this, which bestows only the exclusive right to deal, a seller incurs no liability to pay a commission where the subject property is transferred to a purchaser located without the participation of any broker. The majority, while purporting to interpret the contract to give its language "plain and ordinary meaning," impermissibly adds to its terms. Engrafted onto the parties' agreement is an ill-defined right akin to an augmented right of first refusal in favor of a counterparty yet to be located by MCA. This hypothetical counterparty is then afforded the preemptive right to acquire the distressed assets ahead of the purchaser located by UBSRE. The practical effect of such an arrangement, as the Court of Appeals observed, "is to bind the party who desires to sell *not to sell* without first giving the other party the opportunity to purchase the property at the price specified" (*Lin Broadcasting Corp. v Metromedia, Inc.*, 74 NY2d 54, 60 [1989]). However, such a right cannot be left to implication but must, of necessity, be incorporated into an express agreement (*see e.g. id.* at 57; *American Broadcasting Cos. v Wolf*, 52 NY2d 394, 397-398 [1981])).

The obvious difficulty that arises in connection with a right of first refusal bestowed in futuro is the amount of time to be allotted to the broker to locate a suitable counterparty to

acquire the distressed assets (or to assume the risk of loss they entail). Since the Court of Appeals has rejected the proposition that a right of first refusal remains open for the period of time *specified* in a contract (*Lin Broadcasting Corp.*, 74 NY2d at 62), it is difficult to imagine the Court embracing the notion that where, as here, no time is specified by agreement, the right should be deemed irrevocable for an indefinite period while the unknown party who may exercise that right can be located. Once again, MCA does not purport to have a counterparty ready, willing or able to purchase the illiquid assets. Finally, as a purely practical consideration, there is simply no possibility that MCA could locate a prospective counterparty willing to acquire the assets on the terms offered by the SNB.

Even if the contract were amenable to the remarkable construction urged, MCA has never attempted to demonstrate either that it located a potential purchaser for the assets at a price acceptable to UBSRE or that it had any reasonable prospect of doing so. It is axiomatic that the objective of any brokerage arrangement is to find a buyer who will tender a market price for the subject property to which the seller is amenable. Indeed, the condition in the brokerage agreement that UBSRE is liable to pay a success fee only if it actually consummates a transaction with a counterparty to which it has been "introduced" recognizes

rapidly deteriorating market conditions, which raised the distinct eventuality that UBSRE might find *any* price offered for its loan portfolios to be unacceptable. Thus, what MCA has not alleged – and cannot establish – is the existence of any viable market for the distressed student loans of which UBSRE sought to rid itself. The whole point behind the acquisition of such "toxic assets" by the SNB and other central banks was to avoid their depreciation to market levels by substituting an artificial valuation. What has escaped discussion is that neither UBSRE nor any other financial institution in possession of such poor quality investments would have been willing or able to dispose of them in the open market due to the devastating impact on their capital reserves, including the possibility that the reduction of required capital would render the institution insolvent. Hence, this desperate attempt by MCA to insinuate itself into the financial rescue of UBS AG by the SNB, entirely at the central bank's expense, to seek payment of a success fee the broker could not possibly hope to have earned.

In sum, there is no conceivable way that the parties' brokerage agreement can be stretched to cover the transaction arranged by the Swiss central bank (in common parlance, a "bailout"). MCA does not pretend that it earned the success fee,

and there is no equitable basis for affording it relief.

Accordingly, the judgment should be affirmed.

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

ENTERED: MARCH 12, 2013

CLERK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

BEFORE: Hon. Sallie Manzanet-Daniels
Justice of the Appellate Division

----------X
The People of the State of New York,

M-662
Ind. No. 7967/00

-against-

CERTIFICATE
DENYING LEAVE

Connie Leung,

Defendant.
----------X

I, Sallie Manzanet-Daniels, a Justice of the Appellate Division, First Judicial Department, do hereby certify that, upon application timely made by the above-named defendant for a certificate pursuant to Criminal Procedure Law, sections 450.15 and 460.15, and upon the record and proceedings herein, there is no question of law or fact presented which ought to be reviewed by the Appellate Division, First Judicial Department, and permission to appeal from the order of the Supreme Court, New York County, entered on or about November 8, 2012, is hereby denied.

Associate Justice

Dated: February 20, 2013
New York, New York

ENTERED: MAR 12 2013

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

BEFORE: Hon. David B. Saxe
Justice of the Appellate Division

----------X
Strauss Group, Ltd., et al.,
Plaintiffs-Respondents,

-against-

M-868
Index No. 114076/09

Oded Brenner, et al.,
Defendants-Appellants.
----------X

Respondent having moved pursuant to CPLR 5701(c) for leave to appeal to this Court from the order of the Supreme Court, New York County, entered on or about December 21, 2012,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

David B. Saxe
Associate Justice

Dated:

New York, New York

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

BEFORE: Hon. John W. Sweeny, Jr.
Justice of the Appellate Division

----------X
The People of the State of New York,

M-616
Ind. No. 798/2006

-against-

CERTIFICATE
DENYING LEAVE

Bryant Jackson,

Defendant.
----------X

I, John W. Sweeny, Jr., a Justice of the Appellate Division, First Judicial Department, do hereby certify that, upon application timely made by the above-named defendant for a certificate pursuant to Criminal Procedure Law, sections 450.15 and 460.15, and upon the record and proceedings herein, there is no question of law or fact presented which ought to be reviewed by the Appellate Division, First Judicial Department, and permission to appeal from the order of the Supreme Court, New York County, entered on or about September 26, 2012 (Cassandra M. Mullen, J.)is hereby denied.

Associate Justice

Dated: February 19, 2013
New York, New York

ENTERED: MAR 12 2013

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

BEFORE: Hon. Leland G. DeGrasse
Justice of the Appellate Division

----------X
The People of the State of New York,

M-658
Ind. No. 10257/95

-against-

CERTIFICATE
DENYING LEAVE

Yong Liu a/k/a Liu Yong,
Defendant.
----------X

I, Hon. Leland G. DeGrasse, a Justice of the Appellate Division, First Judicial Department, do hereby certify that, upon application timely made by the above-named defendant for a certificate pursuant to Criminal Procedure Law, sections 450.15 and 460.15, and upon the record and proceedings herein, there is no question of law or fact presented which ought to be reviewed by the Appellate Division, First Judicial Department, and permission to appeal from the order of the Supreme Court, New York County, entered on or about August 23, 2012, is hereby denied.

Dated: New York, New York
February 19, 2013

Hon. Leland G. DeGrasse
Justice of the Appellate Division

ENTERED MAR 12 2013