SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 14, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9037 ACA Financial Guaranty Corp., Index 650027/11
Plaintiff-Respondent,

-against-

Goldman, Sachs & Co.,
Defendant-Appellant.

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Sullivan & Cromwell LLP, New York (Richard H. Klapper of counsel), for appellant.

Kasowitz Benson Torres & Friedman LLP, New York (Marc E. Kasowitz of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 24, 2012, which, to the extent appealed, denied defendant's motion to dismiss the causes of action for fraudulent inducement and fraudulent concealment, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the amended complaint.

Plaintiff alleges that it was fraudulently induced to issue a financial guaranty for a portion of an investment by defendant's misrepresentation that a nonparty hedge fund was

taking a long position in the investment when in fact, such fund was actually a short seller, which was influencing the selection of the reference portfolio it was effectively betting against.

The motion court erred when it denied defendant's motion to dismiss plaintiff's causes of action for fraud. While we agree that plaintiff adequately pleaded all of the requisite elements comprising a fraud claim (*Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006] ["To make a prima facie claim of fraud, the complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury."]), plaintiff's amended complaint nevertheless fails to establish justifiable reliance as a matter of law. Indeed, plaintiff fails to plead that it exercised due diligence by inquiring about the nonpublic information regarding the hedge fund with which it was in contact prior to issuing the financial guaranty, or that it inserted the appropriate prophylactic provision to ensure against the possibility of misrepresentation (*see Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 76 AD3d 310, 320-321 [1st Dept 2010]),), *affd* 17 NY3d 269 [2011]. In *Centro Empresarial Cempresa S.A.*, we dismissed plaintiffs' complaint alleging, inter alia, fraud, holding that the fraud claim was

barred by the omission of necessary language in the release between executed by the parties (*id.*). Specifically, we stated that "if plaintiffs did not intend to release claims of fraud . . . they should have insisted on access to . . . internal books and records . . . [and] if plaintiffs did not wish to forgo suing on a fraud claim they might discover in the future, these sophisticated and well-counseled entities should have insisted that the release [barring future claims] be conditioned on the truth of the financial information provided by defendants (whether directly or through public filings) on which plaintiffs were relying. In essence, by entering into the 2003 sale of their interests in reliance on defendants' unverified representations concerning [defendant's] financial condition, without inserting into the agreement a prophylactic provision to ensure against the possibility of misrepresentation plaintiffs may truly be said to have willingly assumed the business risk that the facts may not be as represented" *(id.)* [internal quotation marks, citations and ellipses omitted]; *see also Graham Packaging Co., L.P. v Owens-Illinois, Inc.*, 67 AD3d 465 [1st Dept 2009]; *Permasteelisa, S.p.A. v Lincolnshire Mgt., Inc.*, 16 AD3d 352 [1st Dept 2005]; *cf. DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]).

Here, in agreeing with the motion court's denial of defendant's motion, the dissent attempts to distinguish our holding in *Centro Empresarial Cempresa S.A.* (76 AD3d 310), where we held that a fraud claim is barred where a sophisticated and well-counseled entity fails to include an appropriate prophylactic provision in the agreement governing the transaction from which the legal dispute arises to ensure against the possibility of misrepresentation (*id.* at 320-321). Since the release in that action was part and parcel of the agreement between the parties, we reject the dissent's attempt to limit our holding in *Centro Empresarial Cempresa S.A.* to cases where contracting parties fail to insert in a release appropriate prophylactic provisions to ensure against the possibility of misrepresentation. Proof that our holding in *Centro Empresarial Cempresa S.A.* is not so limited is found in *Graham Packaging Co.* (67 AD3d 465), where we affirmed the dismissal of defendants' counterclaim for fraudulent concealment since they failed to, inter alia, insert "a prophylactic provision in the *settlement agreement* to limit their exposure" (*id.* at 465 [emphasis added]). Similarly, in *Permasteelisa, S.p.A.* (16 AD3d 352), we affirmed dismissal of plaintiff's cause of action for fraud when, inter alia, it failed to insert "a prophylactic provision in the

purchase agreement to ensure against the possibility of misrepresentation" (*id.* at 352 [emphasis added]).

Equally unavailing is the dissent's attempt to distinguish this case from *Centro Empresarial Cempresa S.A.* on the ground that the relationship between the parties here was not adversarial, thereby implying that our holding in *Centro Empresarial Cempresa S.A.* was limited to transactions between adverse parties. Notwithstanding that in that case we noted that the parties were in an adversarial and hostile relationship (*id.* at 320-321), nothing in *Empresarial Cempresa S.A.* limited its holding to adverse transacting parties; nor could it, since parties are seldom, if ever, adversaries at the outset of a transaction, when the terms of an agreement are ordinarily crafted. Instead, parties amicably transacting business often become adversaries when, as here, they meet in court averring that one party wronged the other. A well crafted agreement should protect against this very eventuality. More specifically, because parties can seldom be certain that the representations made by other contracting parties are indeed true, they must - lest their cause of action for fraud be barred - insert the requisite prophylactic provision to ensure against the possibility of misrepresentation. Notably, the dissent's attempt

to characterize the nature of the relationship between the parties here as one of trust and good faith is belied by the allegations in plaintiff's own complaint, which, as noted by the dissent, evinces that prior to the execution of the agreement between the parties, plaintiff, via email, sought confirmation from defendant regarding the nonparty hedge fund's role and position in the transaction. Accordingly, it is clear that notwithstanding plaintiff's understanding as to the nature of the transaction and the roles of all parties concerned, it nevertheless sought assurances from the defendant presumably to prevent a misunderstanding and/or the very fraud for which it now sues.

Moreover, the dissent's position is particularly unpersuasive insofar as plaintiff could have, upon further inquiry, uncovered the nonparty hedge fund's actual position, but apparently chose not to (*Centro Empresarial Cempresa S.A.*, 76 AD3d at 319-320; *Graham Packaging Co.*, 67 AD3d at 465; *Permasteelisa, S.p.A.*, 16 AD3d at 352). Specifically, plaintiff received, inter alia, the offering circular for the transaction, which expressly disclosed that no one was investing in the first-loss tranche. This information should have alerted plaintiff that contrary to the representations made, the nonparty hedge

fund was not funding a portion of the transaction at all, let alone in the manner represented (i.e., by taking the equity or long position). Therefore, plaintiff should have questioned defendant or the non-party hedge fund; such an inquiry would have likely informed plaintiff that the nonparty hedge fund was taking a short rather than a long equity position represented. We reject the dissent's assertion, that the absence of any funding of the first loss tranche was attributable to the fact that the non-party hedge fund was purportedly funding the first-loss tranche by taking the long position on a credit default swap. This assertion does not explain why the tranche was completely unfunded, since even the funding mechanism perceived by plaintiff - the credit default swap - should have had a value and thus should have been listed in the offering circular.

In sum, plaintiff's fraud claims based on the allegation that plaintiff, a highly sophisticated commercial entity, was misled into believing that a nonparty hedge fund would take a long position in the first-loss tranche of the collateral debt obligation, in alignment with plaintiff's interests, must be dismissed because: (1) such misrepresentations were specifically contradicted by the offering circular's disclosure that no such equity position was being taken; (2) plaintiff's alleged reliance

on such misrepresentations would have been contrary to its acknowledgment (as set forth in the offering circular) that, in entering into the transaction, it was "not relying (for purposes of making any investment decision or otherwise) upon any advice, counsel or representations (whether written or oral) of [defendant] . . . other than in the final offering circular for [the transaction] and any representations expressly set forth in a written agreement with such party," and that defendant was not "acting as a fiduciary or financial or investment adviser for the purchaser"; and (3) the hedge fund's intentions with regard to this investment were not peculiarly within defendant's knowledge and plaintiff, although it was in direct contact with the hedge fund, failed to ask the hedge fund what position it intended to take in this investment (*see Danann Realty Corp v Harris*, 5 NY2d 317 [1959]; *HSH Nordbank AG v UBS AG*, 95 AD3d 185 [1st Dept 2012]).

In view of the foregoing, it is unnecessary to address defendant's remaining contentions.

All concur except Manzanet-Daniels and Clark, JJ. who dissent in a memorandum by Clark, J. as follows:

CLARK, J. (dissenting)

Plaintiff has adequately alleged justifiable reliance, inasmuch as the documentary evidence established that plaintiff performed an exercise of reasonable due diligence. I would therefore affirm the order of the motion court denying defendant's motion to dismiss.

ACA Financial Guaranty Corp., plaintiff herein, issued a financial guaranty policy that "wrapped" ABACUS 2007-ACI, a financial product known as a synthetic collateralized debt obligation (CDO).[1] A financial guarantor insurer such as plaintiff issues a policy guaranteeing payment of senior notes in or above a specified tranche in the capital structure, known as the "attachment point."

Plaintiff alleges that defendant, Goldman, Sachs & Co. (Goldman), conceived and marketed ABACUS based on a portfolio of investment securities selected by its hedge fund client, Paulson

[1] To establish a CDO, an investment bank like defendant incorporates a special purchase vehicle (SPV) to which equity investors contribute capital. In a synthetic CDO, the SPV acts as the protection seller in one or more credit default swaps (CDS) referencing a portfolio of collateral. The protection seller takes the long position, i.e., it profits if the reference portfolio performs well, and the protection buyer takes the short position, i.e., it profits if the reference portfolio performs poorly.

& Co., Inc. (Paulson). Plaintiff alleges that ABACUS was designed to fail so that Paulson could reap large profits by shorting the portfolio and Goldman could in turn reap huge fees.

It is standard industry practice for a "transaction sponsor," as Paulson is alleged to have been, to precommit to invest in the CDO by investing in the equity tranche. The equity tranche suffers the first loss in the event the portfolio performs poorly. As a direct result, the transaction sponsor has a strong economic incentive to have a high-quality reference portfolio.[2] The transaction sponsor normally takes the "long" position, betting that the portfolio will perform well.

Plaintiff alleges that defendant deceived it into believing that Paulson was a long investor in ABACUS, whose interests "aligned" with those of plaintiff as insurer. In fact, however, defendant knew that Paulson intended to take an enormous short position in ABACUS, i.e., that it stood to profit if the

[2] The complaint alleges that defendant accomplished this result through a separate credit default swap between defendant and Paulson, which defendant concealed from plaintiff. Plaintiff's position is that Paulson, by purchasing from defendant the protection on the reference portfolio that defendant had purchased from the SPV, became the ultimate and undisclosed protection buyer, i.e., a short investor in ABACUS with an economic incentive to select reference obligations that would default.

portfolio performed poorly.

The complaint alleges that by 2006, Paulson was convinced that the market for subprime residential mortgage-backed securities (RMBS) was on the verge of collapse. Paulson allegedly sought a way to make a billion dollar profit on the failure of a portfolio of RMBS through a single transaction. The complaint alleges that Paulson did not want to take the short position in just any portfolio of RMBS, but in one that it had selected in the belief that it was most likely to default.

The complaint further alleges that Paulson set out to find an investment bank that would structure, underwrite and sell the portfolio of RMBS, and broker Paulson's purchase of protection on the portfolio. The complaint notes that at least one investment bank approached by Paulson, Bear Stearns, declined to assist Paulson, fearing for its reputation. Scott Eichel of Bear Stearns, who met with Paulson several times, allegedly was quoted as saying that Paulson wanted "especially ugly mortgages for the CDOs, like a bettor asking a football owner to bench a star quarterback to improve the odds of his wager against the team." Eichel stated that the transaction "didn't pass ethics standards . . . We didn't think we should sell deals that someone was shorting on the other side."

Paulson thereafter approached defendant's structured products correlation trading desk. Despite an acknowledged "reputational risk," defendant agreed to underwrite the transaction on behalf of Paulson, with which defendant had done $7 billion in transactions prior to ABACUS. Defendant's internal memos plainly identified Paulson, and Paulson's economic interest in ABACUS, stating that defendant was "effectively working an order for Paulson to buy protection on [i.e., short] specific layers of the [ABACUS] capital structure."

The complaint alleges that defendant soon learned that if it were disclosed that Paulson, the transaction sponsor, intended to take a massive short position against the portfolio, it would not be able to find a portfolio selection agent for the product, much less a financial guaranty insurer who would wrap the super-senior portion of the capital structure. Less than a week before approaching plaintiff, defendant approached GSC Partners to act as the portfolio selection agent for ABACUS, explicitly disclosing that Paulson intended to short the reference portfolio. GSC declined to act as portfolio selection agent, informing defendant, "I do not have to say how bad it is that you guys are pushing this thing."

On January 8, 2007, a subsidiary of plaintiff met with

Paulson at Paulson's offices to discuss the proposed transaction including, inter alia, the RMBS to be included in the reference portfolio. In contrast to the candid disclosure made to GSC regarding Paulson's short interest, Paulson did not disclose to plaintiff's representatives that it intended to short the reference portfolio.

In response to plaintiff's emails seeking clarification regarding how Paulson intended to "participate" in ABACUS, defendant, in an email dated January 10, 2007, purported to supply a "Transaction Summary." This summary not only failed to disclose Paulson's short position, but, as alleged, it affirmatively misrepresented that Paulson had precommitted to take a long position. Defendant identified Paulson as the "transaction sponsor" – which, as noted above is typically the equity investor. Further, in an email dated January 10, defendant stated that the economic interests of Paulson and plaintiff in ABACUS were "align[ed]." In summarizing the capital structure, defendant described the 0-9% tranche, i.e., the equity tranche, as "pre-committed first loss." The CDO had not been launched, or marketed to prospective investors, making Paulson the only possible entity "pre-committed" to invest in the equity tranche. The amended complaint further alleges that on February

23, 2007, defendant again misrepresented that Paulson had agreed to be the equity investor in ABACUS during a telephone call between Goldman and ACAM (plaintiff's subsidiary), where Goldman allegedly represented that Paulson was "looking 0-10%," which describes the equity tranche, a long position.

Plaintiff alleges that defendant engaged in this misconduct notwithstanding an acknowledgment that its participation constituted a "reputational risk," and has since settled SEC civil charges arising out of the very same conduct, agreeing to pay $15 million in restitution and a civil penalty in the amount of $535 million (*see SEC v Goldman, Sachs & Co.*, 790 F Supp 2d 147 [SD NY 2011]).[3] In denying in part codefendant Fabrice Tourre's motion to dismiss the SEC complaint, the Federal District Court held that the complaint sufficiently alleged a material misrepresentation by defendant (i.e., that Paulson was an equity investor), a duty on defendant's part to disclose the truth (i.e., that Paulson was in fact taking a short position), and scienter (*id.* at 162-163).

[3] Although defendant settled the SEC action without admitting or denying the substantive allegations of the complaint, defendant acknowledged that it was a "mistake" not to include in the ABACUS marketing materials a reference to Paulson's role in the portfolio selection process and that Paulson's economic interests were adverse to CDO investors.

Plaintiff notes that the United States Permanent Subcommittee on Investigations, following an 18-month investigation, cited defendant as one of the "self-interested promoters of risky and complicated financial schemes that helped trigger the [2008 financial] crisis." With respect to ABACUS, the investment at issue, the Subcommittee concluded that defendant knew that Paulson would "profit only if [ABACUS] lost value," yet allowed Paulson to "play a major role in selecting the assets," while failing to disclose his true "investment objective."

To make a prima facie claim of fraud, a complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury (*see Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]).

Even in the absence of any affirmative misrepresentation or any fiduciary obligation, a party may be liable for nondisclosure where it has special knowledge or information not attainable by plaintiff, or when it has made a misleading partial disclosure

(*see Williams v Sidley Austin Brown & Wood, L.L.P.*, 38 AD3d 219, 220 [1st Dept 2007]; *see also L.K. Sta. Group, LLC v Quantek Media, LLC*, 62 AD3d 487, 493 [1st Dept 2009]).

This appeal turns on whether plaintiff has adequately alleged the element of reasonable reliance. The majority finds that plaintiff cannot establish reasonable reliance as a matter of law because plaintiff allegedly failed to make an inquiry concerning nonpublic information regarding the investment prior to issuing the financial guaranty, and failed to insert an "appropriate prophylactic provision" to protect itself against defendant's deception.

I am compelled to disagree with this line of reasoning. It neither comports with the factual record nor the law on this issue. The offering circular, the document alleged to have triggered plaintiff's duty to inquire, merely states that the hedge fund did not issue equity notes. It does not imply that there was no equity investor or that "no one was investing in the first-loss tranche." It simply lists $50 million in original principal amount for class A-1 notes, $142 million for class A-2 notes, and $0 for "FL" (first loss) notes.

The complaint alleges that long investors can participate in the capital structure of a synthetic CDO such as ABACUS either by

purchasing notes or by selling protection on a specified tranche in the capital structure (*see* amended complaint at ¶ 18). Given this description, there is a reasonable inference that plaintiff understood the absence of equity notes to mean that Paulson intended to "take a long position in the equity tranche of ABACUS through a [credit default swap]," by selling protection on the 0-10% tranche instead of purchasing notes (*see* amended complaint at ¶ 60).

Although plaintiff is a sophisticated business entity, based on the unique set of facts presented in this appeal, the duty to perform due diligence was fulfilled, when, as here, plaintiff asked defendant about Paulson's position, defendant made specific and detailed representations that conformed with the industry standard for a similarly situated transaction, and defendant's misrepresentation was not discoverable through any public source of information. This Court held in *HSH Nordbank AG v UBS AG* (95 AD3d 185 [1st Dept 2012]) that the misrepresentation of risk relating to the notes at issue was discoverable through an exercise of reasonable due diligence within the means of a financial institution of the plaintiff's size and scope, because "the unreliability of credit ratings" was "common knowledge among participants in [the relevant] market" (*id.* at 193). Thus,

"[f]ar from being peculiarly within [the defendant's] knowledge, the reliability of the credit ratings could be tested against the public market's valuation of rated securities" (*id.* at 196).

In this matter, defendant concealed the credit default swap whereby Paulson became the undisclosed protection buyer in ABACUS with interests adverse to plaintiff. Far from being "common knowledge," this interest was not discoverable through any publicly available source of information. As such, the allegations presented do not establish that plaintiff failed to exercise reasonable due diligence to protect itself from defendant's misrepresentation.

The majority's reliance on *Centro Empresarial Cempresa S.A. v América Móvi, S.A.B. de C.V.* (76 AD3d 310 [1st Dept 2010], *affd* 17 NY3d 269 [2011]) to support the proposition that plaintiff failed to exercise due diligence is misplaced. In that action, plaintiffs alleged that they were induced to sell their minority interest in a mobile telephone company based on misrepresentations made by defendants concerning the value of the venture (76 AD3d at 311). This Court held that plaintiffs' claims alleging fraud were barred by the broad general release plaintiffs granted to defendants in connection with the sale of their interest (*id.* at 318-322). Moreover, we held that

plaintiffs chose to cash out their interests without insisting on defendants' verification of the value or conditioning the deal on the accuracy of the information, thereby assuming a business risk, especially in light of the adversarial relationship between the parties (*id*. at 320-321).

Here, in contrast, there is no general release or similar agreement at issue. The majority does not rely on general disclaimers to preclude the claims of misrepresentation. Further, the relationship between plaintiff, a monoline bond insurance company (the financial guarantor insurer), and defendant, an investment bank, is not an adversarial one. The investment bank's role is to provide a structure, orchestrate the transaction, and market the CDO to investors. It is important to note that plaintiff alleges that defendant structured this transaction as if it were a typical CDO where the transaction sponsor is a long investor. While plaintiff did not condition participation based on verification of Goldman's representations, plaintiff did not assume a business risk since the proposed transaction and alleged misrepresentation/concealment conformed to the industry standard for this particular type of transaction. Goldman had peculiar knowledge of Paulson's role in the transaction, and the misrepresentation was not detectable through

any public information. Plaintiff sought to protect its interest in the transaction by confirming Paulson's role via email and telephone calls. Thus, given the structure of the transaction and the financial instrument at issue, plaintiff's fraud claim does not fall within the purview of cases holding that such a claim is barred where the parties failed to insert an appropriate prophylactic provision in their agreement stating that their representations were true (*contra Graham Packaging Co., L.P. v Owens-Illinois, Inc.*, 67 AD3d 465 [1st Dept 2009]; *cf. DDJ Management, LLC v Rhone Group, L.L.C.*, 15 NY3d 147, 153, 156 [2010][reasonable reliance sufficiently alleged where plaintiff obtained representations and warranties that financial statements were not materially misleading]).

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

ENTERED: MAY 14, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Feinman, JJ.

9338 Anderson & Anderson, LLP-Guangzhou, et al., Plaintiffs-Appellants, Guangdong Huatu Law Firm, Plaintiff, -against- North American Foreign Trade Corp., Defendant-Respondent. Index 651010/11

Anderson & Anderson, LLP, New York (David C. Buxbaum of counsel), for appellants.

Schlam Stone & Dolan, LLP, New York (Richard H. Dolan of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered February 14, 2012, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the breach of contract cause of action pursuant to CPLR 3211(a)(1) and (7), unanimously reversed, on the law, with costs, and the motion denied.

Plaintiffs, law firms, sue to recover contingency fees allegedly due under written retainer agreements dated December 29, 2005 and June 24, 2009. Plaintiffs were retained under both agreements to enforce an arbitration award in the courts of the People's Republic of China. The retainer agreements provided for

the payment of plaintiffs' fees out of the judgment creditor's assets that were to be obtained and reduced to cash. The entire premise of the motion to dismiss is that plaintiffs are relegated to recovery in quantum meruit because they were supposedly discharged by defendant, their client. Defendant bases its claim of discharge upon plaintiffs' knowledge of an October 2010 transaction by which defendant, through additional counsel, sold its rights under the arbitration award and released its lien on the judgment creditor's assets in exchange for cash. In granting the motion, the court adopted defendant's argument that the retainer agreement lost its purpose and plaintiffs' services were no longer needed once the sale was effected. We reverse.

Although no particular formality is required, the discharge of an attorney is effected by "[a]ny act of the client indicating an unmistakable purpose to sever relations . . ." (*see Costello v Bruskin*, 58 AD2d 573 [2nd Dept 1977]). The motion should not have been granted because the amended complaint and the documents attached to it set forth no facts from which an unmistakable purpose to sever the attorney-client relationship can be discerned. Defendant proffers nothing to refute the complaint's assertion that defendant sold its rights under the arbitration award through *additional* (but not substituted) counsel. A motion

to dismiss for failure to state a cause of action "must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]).

Moreover, although it expired on December 31, 2009, the 2009 retainer agreement provided for the payment of the agreed upon contingency fee if a judgment granting enforcement of the arbitral decision was issued by the Chinese court prior to the expiration date. It is undisputed that a copy of such a judgment issued by the Shenzhen Intermediate People's Court on November 3, 2009 is annexed to the complaint. Based on the foregoing, defendant has not demonstrated that documentary evidence conclusively establishes a defense to plaintiffs' contract cause of action as a matter of law (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

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

ENTERED: MAY 14, 2013

CLERK

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

9359 Luisa Hamer, Index 110618/07
Plaintiff-Appellant-Respondent,

-against-

The City of New York,
Defendant,

The New York City Department
of Education, etc.,
Defendant-Respondent-Appellant.

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

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

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Judgment, Supreme Court, New York County (Lottie E. Wilkins, J.), entered March 5, 2012, after a jury trial, awarding plaintiff damages for pain and suffering, upon a verdict apportioning liability 75% to plaintiff and 25% to defendant Department of Education (DOE), unanimously reversed, on the law, and the matter remanded for a new trial on both liability and damages, without costs.

On January 30, 2007, plaintiff, then 60 years old, broke her left femur when she tripped and fell on a raised piece of concrete on the sidewalk abutting premises occupied by Public School 128. In the months prior to the accident a custodian at

the school, whose duties included inspecting the sidewalk for defects and tripping hazards, had twice submitted work requests to the DOE's Division of School Facilities with respect to that portion of the sidewalk, which he considered such a hazard.

Dr. Jeffrey Geller performed surgery on plaintiff on the day of the accident, having diagnosed her with a super-condylar femur fracture on the left leg, the area of the thigh directly above the knee. The X ray revealed that it was an "intra-articular" break, with multiple fracture lines, which went across the femur and into the joint, resulting in friction which could lead to arthritis. One day after the accident, Dr. Geller performed an open reduction, with internal fixation, repairing the fracture by realigning the broken bones and inserting a plate and screws.

Five days after the accident, plaintiff was able to walk around the hospital with a walker, accompanied by a physical therapist. She remained in the hospital for two weeks after surgery. Upon discharge, Dr. Geller instructed plaintiff, among other things, not to put excess weight on her leg, as she was at a high risk of falling or reinjuring herself. After discharge, plaintiff received two months of home- care services, where she ambulated with a walker and learned to use crutches for the stairs. She later received therapy at the hospital. By May

2007, plaintiff was treating her pain with Tylenol and medicated patches. She continued to use a walker, but only at home, and used crutches only to negotiate the stairs in her building.

After her discharge, Dr. Geller next saw plaintiff on March 19, 2007. At that time, plaintiff was using a walker and was partially weight-bearing. Dr. Geller noted that the surgical incision had healed well, that plaintiff had limited range of motion in her knee but no knee instability, that the knee was moving and tracking well, and that plaintiff had no pain. While plaintiff did not return for a scheduled appointment in May 2007, Dr. Geller noted that "[b]y her report however, she is doing well." Dr. Geller later testified at trial that for a typical person with the type of injury suffered by plaintiff it takes a year to recover muscle strength and two and three months for the bones to heal, but that the broken bone never really takes on its normal shape. In addition, scar tissue forms during the healing process, leading to stiffness and swelling. He further testified that plaintiff's fall caused her left leg fracture, that plaintiff would always have limited range of motion in her knee and some degree of scar tissue in the surrounding muscle, and would likely develop arthritis due to the intra-articular nature of the fracture. Dr. Geller also stated that the arthritis would

be painful and was generally treated with a knee replacement.

In August 2007, plaintiff was visiting a house in the Poconos when she felt weakness in her left leg while walking and fell. She was driven back to New York, where Dr. Geller diagnosed her with a new, transverse fracture in the middle of her left femur, near the top of the implant, where the uppermost screw had been placed. Dr. Geller repaired the fracture by inserting additional hardware into the leg. Plaintiff stayed in the hospital on the orthopedic floor for eight days and was then transferred to the rehabilitation floor for nine days. After her discharge from the second surgery, plaintiff used a walker for three or four months, and then used a cane.

Plaintiff next saw Dr. Geller on October 15, 2007, at which time, as he noted in a report, she was "feeling great with basically no pain," had "great range of motion," her incision was well healed, and she could advance to weight-bearing, as tolerated. However, he testified at trial that at the time she was taking Percocet for pain and limping badly. Dr. Geller prescribed physical therapy and encouraged plaintiff to advance from using a walker to a cane. Plaintiff did not return for her next appointment and Dr. Geller never saw her again.

In 2009, plaintiff stopped walking with a cane and, in July

2009, she stopped attending physical therapy. Her leg continues to bother her periodically, preventing her from going outside without assistance and from walking more than two blocks without needing to stop. Her leg pain also prevents her from doing many of the things she did before the accident, such as attending church, visiting her grandchildren and taking them to school, and shopping for groceries.

Several evidentiary disputes arose during trial. One led to a ruling refusing to allow Dr. Geller to opine as to the cause of the second fracture or whether it was related to the initial injury. In doing so, the court noted that, while plaintiff's supplemental verified bill of particulars gave notice of "impaired gait causing post-surgical fall resulting in fracture of the ... femoral shaft," Dr. Geller's report, furnished pursuant to CPLR 3101(d), had not indicated that he would opine as to the causal relationship between the first and second surgery. At the close of evidence, the court granted the DOE's motion to strike all testimony given regarding plaintiff's second injury and second surgery.

Another dispute arose regarding plaintiff's testimony. Plaintiff testified through a Spanish interpreter. Through the interpreter, plaintiff testified that she fell "[o]n the sidewalk

by the curb," after her foot got caught on a raised, cracked piece of concrete, near the school's cafeteria. She later clarified that the area of her fall was "not near the curb" and then stated that it was "close to the curb." During cross-examination, plaintiff's counsel, outside the presence of the jury, alerted the court that he had a "tricky issue with translation." He explained "I've spoken to the plaintiff about [it] and I just spoke with her son. My understanding is she is saying the [Spanish] word acera for curb, which to her means sidewalk. I think she's been saying sidewalk." The interpreter then explained that "acera means anywhere from the edge of a building until where the curb begins in the street" and that the word "curb" is "translated as ditch, canaleta, ditch. It's not really a curb per se." The interpreter further stated that "I don't know if [plaintiff] understands the difference" between the curb and sidewalk. When the DOE's counsel asked the interpreter if, when he used the word "curb," he interpreted that word for plaintiff, the interpreter answered "I said to her sidewalk, which means the entire edge, the entire surface." He also stated that he translated the word "curb" as "acera."

Plaintiff's counsel then sought permission to ask plaintiff questions intended to clarify what she meant when she testified

regarding where she fell. The court denied the request, ruling that plaintiff was "very emphatic" when she said had not fallen close to the curb, and that, in any event, she was clear about where she fell when shown pictures of the accident site. Nevertheless, during the DOE's summation, its counsel referred to plaintiff's statements that she fell near the curb as one of "eight inconsistencies, eight differences, eight things that say she didn't fall where she said she fell."

Finally, plaintiff sought a missing witness charge with respect to a physician, Dr. Westerbrand, whom the DOE had designated as a medical expert but did not call to testify at trial. The DOE opposed the request, contending that Dr. Westerbrand was out of state and not under its control. However, it offered no support that such was the case. Nevertheless, the court declined to give the charge, noting that only the initial injury was at issue at trial, and that the nature of that injury was undisputed.

At the close of evidence, defendant City moved to dismiss the complaint on the grounds that the City had no prior written notice of the defect which caused plaintiff's fall. The DOE moved to dismiss on the basis that it was not the owner of the property where the accident occurred. The court granted the

City's motion, and denied the DOE's.

The jury rendered a verdict finding that, while the DOE's negligence in maintaining the sidewalk adjacent to its property was a substantial cause of plaintiff's injury, plaintiff's negligence was also a substantial cause. The jury apportioned 25% of the liability to the DOE and 75% of the liability to plaintiff. The jury awarded plaintiff $40,000 for past pain and suffering and $15,000 for future pain and suffering for one year. Plaintiff moved to set aside the verdict as against the weight of the evidence, seeking additur. The court denied the motion, finding that the jury could have reasonably concluded that the lasting effects of the initial injury were relatively minor.

The DOE argues on appeal that the action should have been dismissed as against it because it did not own the sidewalk where plaintiff fell. New York City Charter § 521(a) provides that "title to all property ... acquired for school or educational purpose ... shall be vested in the city, but under the care and control of the board of education for the purposes of public education, recreation and other public uses." Education Law § 2554(4) affirmatively charges the DOE with responsibility for "the care, custody, control and safekeeping of all school property or other property of the city used for educational,

social or recreational work." The DOE contends that these provisions are inapplicable to this case because the sidewalk on which plaintiff fell is not used for educational purposes, so it had no duty to maintain it. However, it cites no authority to support its position that the DOE's duty does not extend outside the school walls.

There is no statute or regulation which squarely designates the DOE as responsible for maintaining public areas outside school buildings. However, it is uncontested that the custodian of the school adjacent to the sidewalk where plaintiff slipped considered it his responsibility to search for defects in the sidewalk and to submit requests directly to the DOE to have them repaired. Under those circumstances, where there was evidence that the DOE affirmatively undertook the duty to maintain the sidewalk, the court was well within its discretion in submitting the question of the DOE's negligence to the jury (*see Mudgett v Long Is. R.R.*, 81 AD3d 612, 613 [2d Dept 2011]).

As to plaintiff's request for a new trial on damages, we first address the court's preclusion of testimony from Dr. Geller concerning plaintiff's second accident and its consequences. CPLR 3101(d)(1) provides that, upon request, parties must identify those expected to be called as experts and "disclose in

reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify ... and a summary of the grounds for each expert's opinion." However, the failure to serve a CPLR 3101(d) notice with regard to a *treating* physician, such as Dr. Geller, is not grounds for preclusion of the physician's expert testimony as to causation where there has been disclosure of the physician's records and reports, pursuant to CPLR 3121 and 22 NYCRR 202.17 (*see Breen v Laric Entertainment Corp.*, 2 AD3d 298 [1st Dept 2003]*; Ryan v City of New York*, 269 AD2d 170 [1st Dept 2000]. As this Court observed in *Breen*: "Where ... a plaintiff's intended expert medical witness is a treating physician whose records and reports have been fully disclosed ... a failure to serve a CPLR 3101(d) notice regarding that doctor does not warrant preclusion of that expert's testimony on causation, since the defendant has sufficient notice of the proposed testimony to negate any claim of surprise or prejudice" (2 AD3d at 299-300). We have further held that a treating physician "[can] testify as to the cause of the injuries even though he expressed no opinion as to causation in the previously exchanged report" (*Finger v Brande*, 306 AD2d 104, 104 [1st Dept 2003]).

The DOE is correct that Dr. Geller's records and reports do not causally relate plaintiff's first and second fractures. Indeed, while Dr. Geller's February 3, 2009 narrative report discussed plaintiff's initial and subsequent fractures, it did not, in any way, attribute the second fracture to the first one. Likewise, the operative report for the second surgery did not causally relate the two injuries. Nevertheless, the supplemental bill of particulars, to the extent it alleged "impaired gait causing post-surgical fall resulting in fracture of the ... femoral shaft," indicated a causal link between the two fractures sufficient to place the DOE on notice of plaintiff's theory. The DOE's argument that Dr. Geller's testimony failed to connect the second fall to the initial injury is disingenuous because, of course, he was precluded from giving such testimony.

Since the DOE failed to establish the critical element of surprise, the court improvidently exercised its discretion in precluding Dr. Geller from testifying as to the second injury. Further, there is a reasonable likelihood that the jury's inability to consider the second injury, which was very serious and required surgery, had an effect on the damages award.

Plaintiff further argues that the Court committed reversible error in refusing to issue a missing witness charge with respect

to Dr. Westerbrand, the defense expert. "A missing witness charge should be granted when the opposing party has shown that the uncalled witness is knowledgeable about a material issue upon which evidence is already in the case, that the witness would naturally be expected to provide noncumulative testimony favorable to the party who has not called the witness and that the witness is available to that party" (*Germe v City of New York*, 211 AD2d 480, 480 [1st Dept 1995]).

Here, plaintiff satisfied each of these elements. First, the DOE failed to offer support that Dr. Westerbrand was unavailable. Second, clearly the doctor was knowledgeable about plaintiff's physical condition. Finally, his testimony would have been noncumulative, and would naturally have been expected to favor the DOE, which, after all, designated him as its medical expert. That Dr. Westerbrand's report in fact noted that, upon his examination of plaintiff, there were abnormal ranges of motion in her leg, only bolsters plaintiff's contention that the charge was appropriate. Further, the fact that Dr. Westerbrand conducted his examination after the second surgery is irrelevant, because the DOE can only speculate in arguing that any testimony he had to offer would not have been probative as to the first injury.

Plaintiff contends that a new damages trial is necessary not only because of these evidentiary errors, but also because the total award of $55,000 for past and future pain and suffering is inadequate and deviates materially from reasonable compensation. Dr. Geller's and plaintiff's unrefuted testimony established that, as a result of the accident, plaintiff fractured her left femur, which required open reduction and internal fixation, with a two-week long hospital stay, followed by a course of physical therapy. Plaintiff's injury required her to use a walker and then a cane to ambulate for some time and resulted in the restriction of her activities of daily living.

Given the injury and its sequella, the jury's pain and suffering awards deviate materially from reasonable compensation. By way of comparison, in *Alfonzo v Metropolitan Tr. Auth.* (103 AD3d 563 [1st Dept 2013]), an award of $450,000 for past pain and suffering and $800,000 for future pain and suffering was considered appropriate where a 52-year-old plaintiff fractured her wrist, requiring open reduction and internal fixation, and suffered reduced ranges of motion and a likelihood of progressive arthritis. Other reported decisions similarly suggest that the jury award was incongruent with what would have reasonably been

expected for the injury suffered by plaintiff (*see Lowenstein v Normandy Group*, 51 AD3d 517 [1st Dept 2008][$300,000 award for past pain and suffering and $850,000 award for future pain and suffering sustained where the plaintiff, in her 60s, suffered a fractured ankle, which was treated with open reduction and internal fixation and a shoulder fracture]; *Ruiz v New York City Tr. Auth.*, 44 AD3d 331 [1st Dept 2007][$100,000 for past pain and suffering and $200,000 for future pain and suffering where 46-year old plaintiff underwent surgery for a fractured right ankle, involving open reduction and internal fixation with a plate and screws]).

Finally, plaintiff seeks a new trial on liability on the basis of the confusion surrounding the use and translation of the Spanish word "acera." She argues that the jury was left with an impression that she was unsure of where she fell, and consequently found the DOE only 25% liable for the accident. Indeed, in its summation, the DOE focused on certain perceived inconsistencies in plaintiff's testimony. It is not unreasonable to assume that the jury, as urged by the DOE's counsel, questioned plaintiff's credibility in part based on her testimony, as translated by the interpreter, that she fell near the curb, when at other times she maintained that she fell on the

sidewalk. Indeed, based on this record, it is difficult to imagine another reason for a finding that plaintiff was 75% culpable for this trip-and-fall accident. A review of the transcript, particularly the extensive colloquy over whether the interpreter's use of the word "acera" misconstrued what counsel meant when they used the words "curb" and "sidewalk," and whether his use of the words "sidewalk" and "curb" misconstrued what plaintiff meant when she used the word "acera," reveals that there was, at the very least, palpable confusion concerning the word. Had the court permitted plaintiff's counsel, in light of the confusion, to ask plaintiff questions intended to ensure that the jury heard an accurate description of where plaintiff fell, such credibility concerns may well have been eliminated. Under the circumstances, the court's simply pointing out plaintiff's testimony that she fell on the "sidewalk" was insufficient to

rectify the error in translation, since the jury may have still been left with the impression that plaintiff was confused (*see People v Kowlessar*, 82 AD3d 417, 418 [1st Dept 2011]).

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

ENTERED: MAY 14, 2013

CLERK

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

9399 In re Joanna Stergiou, Index 103370/11
Petitioner-Appellant,

-against-

New York City Department of Education,
Respondent-Respondent.

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Lichten & Bright, P.C., New York (Daniel R. Bright of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered March 5, 2012, which, after a hearing, denied the petition to vacate an arbitration award, and granted respondent's motion to confirm the award and dismiss the petition, unanimously reversed, on the law, without costs, the petition granted, respondent's motion denied, and the matter remanded for the hearing officer to take testimony from the child complaining witness, G.A., in the presence of petitioner, and any necessary further proceedings consistent herewith.

Petitioner's exclusion from the administrative hearing during the testimony of the only eyewitness to her alleged hitting of a student – the student himself – violated her

constitutional right to confront the witnesses against her (*see Matter of Daniel Aaron D.*, 49 NY2d 788, 791 [1980]). Nothing in the record indicates that a compelling competing interest warranted the exclusion. There is no finding that petitioner's presence would cause trauma to the student or substantially interfere with his ability to testify. Indeed, the record contains no indication at all of the basis for the exclusion.

Petitioner contends that in addition to her constitutional right she had an absolute right to confront witnesses under Education Law § 3020-a. However, she waived that argument by failing to object on the record to her exclusion from the hearing. In any event, there is no such absolute right under § 3020-a (*see generally Austin v Board of Educ. of City School Dist. of City of N.Y.*, 280 AD2d 365 [1st Dept 2001]).

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

ENTERED: MAY 14, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, Feinman, JJ.

9648- Index 104216/10
9648A Carol Sokol,
Plaintiff-Respondent,

-against-

Paul A. Lazar, DPM,
Defendant-Appellant.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for appellant.

Sanocki, Newman & Turret, LLP, New York (David B. Turret of counsel), for respondent.

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Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered September 18, 2012, after a jury trial, in plaintiff's favor, unanimously modified, on the facts, to vacate the award for future pain and suffering and to direct a new trial on that issue, unless plaintiff stipulates, within 30 days of service of a copy of this order with notice of entry, to a reduction of the award for future pain and suffering from $600,000 to $450,000 and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered July 11, 2012, which denied defendant's posttrial motion to set aside the jury's verdict on damages for future pain and suffering, unanimously

dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff, who was 57 years old at the time of the trial, sustained injuries to her right foot as a result of defendant podiatrist's negligent performance of a bunionectomy. Under the circumstances, we find that the award for future pain and suffering deviates materially from reasonable compensation to the extent indicated (CPLR 5501[c]; *compare Pouso v City of New York*, 22 AD3d 395 [1st Dept 2005]; *Hixson v Cotton-Hanlon, Inc.*, 60 AD3d 1297 [4th Dept 2009]).

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

ENTERED: MAY 14, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9902 737 Park Avenue Acquisition LLC, Index 110399/11
Plaintiff/Counterclaim Defendant, 590927/11

-against-

Barry Shalov, et al.,
Defendants/Counterclaim Plaintiffs.

- - - - -

Barry Shalov, et al.,
Third-Part Plaintiffs-Appellants,

-against-

Katz 737 Corporation,
Third Party Defendant-Respondent.

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Kasowitz, Benson, Torres & Friedman LLP, New York (David M. Friedman of counsel), for appellants.

Matalon Shweky Elman PLLC, New York (Howard I. Elman of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 11, 2012, which, to the extent appealed from, granted third-party defendant's motion to dismiss the third-party complaint, unanimously affirmed, without costs. Appeal from so much of the order as granted plaintiff's motion to dismiss the fourth, ninth, tenth, thirteenth, fifteenth and sixteenth affirmative defenses, unanimously withdrawn in accordance with the stipulation of the parties.

The 1995 lease upon which defendants, as tenants, base their

third-party claims was superseded by the 2009 lease. The 2009 lease stated twice, in boldfaced upper-case letters, that the tenants lacked any right to renewals, and contained a merger clause barring claims under preceding agreements (*see Purchase Partners II, LLC v Westreich*, 50 AD3d 499 [1st Dept 2008], *lv denied* 12 NY3d 702 [2009]). The tenant husband, who did not sign the 2009 lease, is estopped to deny his wife's authority to sign on his behalf, because, inter alia, he ratified the lease by accepting the benefits of its two-year extension at below-market-rate rent without promptly seeking to rescind (*see Dinhofer v Medical Liab. Mut. Ins. Co.*, 92 AD3d 480 [1st Dept 2012], *lv denied* 19 NY3d 812 [2012]).

It does not avail defendants to claim unilateral mistake because their failure to read the 2009 lease, despite its prefatory caution that they do so and the common-law rule reflected therein, bars their claim of reasonable reliance on its "renewal lease" heading as a matter of law (*see Hutchinson Burger, Inc. v Hutch Rest. Assoc., L.P.*, 100 AD3d 531 [1st Dept 2012]; *Vulcan Power Co. v Munson*, 89 AD3d 494 [1st Dept 2011], *lv denied* 19 NY3d 807 [2012]). Moreover, the 28-page 2009 lease differed in various respects from the earlier leases that the tenants previously signed. Apart from the plain contents of the

2009 lease, the then owner was not under a duty to disclose the 2009 changes (*see Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491 [1st Dept 2006]).

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

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

ENTERED: MAY 14, 2013

CLERK

Andrias, J.P., Saxe, Freedman, Román, JJ.

10039 20-35 86th Street Realty, LLC, Index 600805/10
Plaintiff-Appellant,

-against-

Tower Insurance Company of New York,
Defendant-Respondent.

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Razis & Ross, P.C., Astoria (George J. Razis of counsel), for appellant.

Mound Cotton Wollan & Greengrass, New York (Tania A. Gondiosa of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered April 17, 2012, which granted defendant's motion to dismiss the complaint to the extent of staying the action pending the determination of the criminal case against the alleged arsonist, and denied plaintiff's motion to dismiss the second, third, fourth, fifth and sixth affirmative defenses, unanimously modified, on the law, to grant plaintiff's motion as to the second, third and sixth affirmative defenses, and to vacate the stay, and otherwise affirmed, without costs.

Plaintiff building owner seeks a judgment declaring that defendant has an obligation to defend and indemnify it in connection with a building fire that, inter alia, left several people dead or injured. Following a police and fire department

investigation, an individual was arrested and indicted on charges of, inter alia, arson in the fourth degree and assault in the first and second degrees. Defendant disclaimed coverage under the liability insurance policy it issued to plaintiff on the ground that plaintiff's claims apparently involved bodily injury arising from an assault or battery committed by the accused arsonist and that the insurance does not apply to bodily injury arising from assault and/or battery or any act or omission in connection with any assault and/or battery. The motion court stayed this action pending determination of the criminal action on the ground that that determination is necessary to a determination of the applicability of the assault and battery exclusion to plaintiff's claims.

Civil assault and battery are intentional acts, and the assault offenses with which the accused arsonist is charged do not include the intent to harm a specific individual (*compare* PJI 2d 3:2 [assault]; 3:3 [battery], *with* Penal Law 120.10[4] [assault in the first degree]; 120.05[6] [assault in the second degree]). Thus, assuming that the insurance policy exclusion is triggered by civil, rather than criminal, assault or battery, the critical inquiry is whether the accused arsonist, in allegedly causing the fire, intended to harm any occupant of the building.

Although the determination of the criminal action is therefore not necessary to a determination of the application of the exclusion, the criminal trial may shed light on the accused arsonist's motives, including whether he intended to harm anyone inside the building. In any event, the criminal trial may enable defendant to obtain access to evidence and witnesses that will assist in determining whether the exclusion applies. Based on representations made at oral argument, the criminal trial has been concluded and, thus, the stay should be lifted.

In light of the foregoing, the motion court correctly denied plaintiff's motion to dismiss the affirmative defenses based on the assault and battery exclusion and the lack of bodily injury caused by an accident or occurrence. However, defendant did not refer in its disclaimer of coverage to a failure to comply with the policy terms or a failure to cooperate, and those grounds may not be asserted as affirmative defenses (*see* Insurance Law § 3420[d]; *Benjamin Shapiro Realty Co. v Agricultural Ins. Co.*, 287 AD2d 389 [1st Dept 2001]). Defendant's recourse for an insufficiently specific complaint was to move under CPLR 3024(a)

for a more definite statement or to amend its answer as of right under CPLR 3025, within 20 days after service of the answer, or, after 20 days, move for leave to amend. Defendant may not override the statute by reserving a right to amend in its answer.

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

ENTERED: MAY 14, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10047 David Glynos, Index 113984/11
Plaintiff-Respondent,

-against-

Andreas Dorizas,
Defendant-Appellant.

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Zinker & Herzberg, LLP, Smithtown (Jeffrey Herzberg of counsel), for appellant.

Koulikourdis & Associates, Bronx (Peter John Koulikourdis of counsel), for respondent.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered July 18, 2012, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss plaintiff's cause of action for breach of contract, unanimously affirmed, with costs.

The court properly determined that the action is not barred by Real Property Law § 442-d, which provides that an unlicensed person may not bring an action to recover a commission for facilitating the sale of real estate. The contract between the parties did not provide for plaintiff, who is not a licensed real estate broker, to receive a commission based on the sale of the property. Rather, it provided that, upon the sale of the property at a specified minimum selling price, plaintiff would be

paid a bonus for, inter alia, past management services rendered by him. In addition, although plaintiff was motivated to see the property sell above the minimum price, he was not the procuring cause of the real estate transaction. Defendant retained and paid a real estate broker to sell the property (*see Transaction Advisory Servs., LLC v Silver Bar Holding, LLC*, 38 AD3d 241 [1st Dept 2007]; *Kavian v Vernah Homes Co.*, 19 AD3d 649 [1st Dept 2005]).

The court also properly determined that plaintiff's breach of contract claim was not barred by the statute of limitations. The alleged breach for nonpayment under the terms of the contract did not occur until the property was sold, less than six years before the action was commenced (*see* CPLR §213; *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]).

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

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

ENTERED: MAY 14, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10048 In re Vinson J.,

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

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Israel P. Inyama, New York, for appellant.

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

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Order, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about May 9, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second and third degrees, assault in the second and third degrees and criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its evaluation of any inconsistencies in testimony.

A juvenile delinquency adjudication with probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), given the serious and violent nature of the underlying offense, as well as appellant's poor academic and attendance record at school. These factors outweighed appellant's lack of a prior record and the other mitigating factors he cites.

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

ENTERED: MAY 14, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10049 Fanny Rosado, Index 302345/08
Plaintiff-Appellant,

-against-

R & E Corp., et al.,
Defendants-Respondents.

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

Law Offices of Mahon VanHaaster LLP, Nyack (Michael J. Mahon of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danzinger, J.), entered April 27, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that while walking down the produce aisle in defendants' supermarket, she slipped on a wet condition on the floor near the vegetable display, where an automatic sprinkler system was used to water the vegetables at regular intervals. The owner, who did not witness the accident, testified that a mat was always present in front of the display to catch the run-off

and protect against injuries. However, plaintiff maintained that no mat was present where she fell. Accordingly, there is an issue of fact, and summary judgment should have been denied.

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

ENTERED: MAY 14, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10050 Carlos J. Cruz, et al., Index 350183/09
Plaintiffs-Appellants,

-against-

G. Martinez, Jr., et al.,
Defendants-Respondents.

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Mallilo & Grossman, Flushing (Francesco Pomara, Jr. of counsel), for appellants.

Law Offices of Burke, Gorden & Conway, White Plains (Sami P. Nasser of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about April 11, 2012, which granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury pursuant to Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiffs Cruz and Peralta, and Peralta's then 13-year-old son, Peter Clark, allege that they suffered serious injuries in a motor vehicle accident that occurred in December 2008. Cruz alleged permanent injury to his neck and back, Peralta alleged permanent injury to her lower back, and Clark alleged various injuries, including anxiety disorder and facial lacerations.

Defendants made a prima facie showing that plaintiffs Cruz and Peralta did not suffer any serious injury. Defendants

submitted the affirmed report of their orthopedist, who found full range of motion in all planes of the affected body parts (*see Mitrotti v Elia*, 91 AD3d 449, 449-450 [1st Dept 2012]), and of their radiologist, who opined that the conditions shown in the MRIs taken of Cruz's lumbar and cervical spine and Peralta's lumbar spine were "chronic and degenerative" in origin and that there was no evidence of acute traumatic injury (*Graves v L&N Car Serv.*, 87 AD3d 878, 879 [1st Dept 2011]). The orthopedist also opined that the lower back injuries Peralta sustained in a prior motor vehicle accident would explain the findings of the X ray and MRI taken after the subject accident (*see Mitrotti*, 91 AD3d at 450). As to all three plaintiffs, defendants contended that they had failed to explain their complete cessation of treatment less than six months after the accident (*Pommells v Perez*, 4 NY3d 566, 574 [2005]).

In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs' radiologist observed disc desiccation in the MRIs of Cruz and Peralta, which supports the findings of defendants' radiologist that their injuries were chronic and degenerative. In these circumstances, their treating physician's conclusory opinion that there was a causal connection between the injuries and the subject accident, was insufficient to raise an

issue of fact (*see Graves*, 87 AD3d at 879). Further, none of the plaintiffs adequately explained their gap or cessation of treatment. Plaintiff Cruz testified at his deposition that he had no reason for stopping treatment, but then submitted an affidavit asserting that he stopped when his no-fault benefits expired, which was insufficient to raise a bona fide issue (*see Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 253 [1st Dept 2011]). Plaintiff Peralta's claim, asserted for the first time in her affidavit opposing summary judgment, that she stopped receiving treatment for her alleged injuries when her no-fault benefits ended, was inadequate in light of her testimony that she had health insurance through her employment except for a nine-month period (*see Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012]).

With respect to Clark, defendants met their prima facie burden by submitting their orthopedist's affirmation finding no limitations in range of motion of the lower back, and Clark's deposition testimony that he received no stitches for his lacerations and received no medical treatment for any of his claimed injuries after completing six months of physical therapy. In opposition, plaintiffs provided no objective medical evidence of injury or limitations, and Clark's subjective descriptions of

facial lacerations were insufficient to meet the statutory threshold (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). Even if an anxiety disorder could constitute a "serious injury" within the meaning of the Insurance Law, the affidavit of Benjamin Hirsch, Ph.D., who evaluated Clark once, did not raise an issue of fact. Indeed, Hirsch, who did not set forth his expert credentials, noted that he did not perform any objective neuropsychological tests, since Clark did not describe any symptoms of neuropsychological distress (*id.*). Lastly, Clark never made any allegation of scarring or significant disfigurement in the bill of particulars (*see Torres v Dwyer*, 84 AD3d 626, 626 [1st Dept 2011]), and he did not present sufficient evidence to support this claim.

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

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

ENTERED: MAY 14, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10052- Index 104253/08
10052A Joseph Stashkevetch,
Plaintiff-Appellant,

-against-

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

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Storch Amini & Munves, P.C., New York (Mattew Kane of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elliott M. Davis of counsel), for respondents.

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Order, Supreme Court, New York County (Geoffrey D. S. Wright, J.), entered on or about November 21, 2011, which granted plaintiff's motion to reargue defendants' in limine motion to dismiss the complaint and upon reargument, adhered to the prior order, same court and Justice, entered on or about September 27, 2011, granting defendants' motion pursuant to CPLR 4404 based on the inadequacy of the notice of claim, unanimously affirmed, without costs. Appeal from the September 27, 2011 order, unanimously dismissed, without costs.

In this action for personal injuries allegedly sustained by plaintiff when his bicycle hit a depression in a grassy area, after he was diverted from the bicycle path in a City park due to

cleaning activities by defendants' employees on a retaining wall, defendants moved to dismiss at the close of plaintiff's case, on the ground, first raised by the trial court, that the notice of claim was inadequate. As defendants concede, and we agree, the trial court improvidently granted the motion on this ground. On reargument, the court also improvidently raised the doctrine of assumption of risk sua sponte. Nevertheless, dismissal of the complaint is warranted on the alternate ground, raised before the trial court, that defendants' employees were engaged in a governmental function giving rise to the governmental immunity defense. Diverting traffic to protect the public from the harsh chemicals used in the cleaning process was a discretionary act performed by public employees in the exercise of reasoned judgment (*see Valdez v City of New York*, 18 NY3d 69 [2011]; *Wittorf v City of New York*, 104 AD3d 584 [1st Dept 2013]). Accordingly, the City cannot be liable for this conduct and the motion to dismiss the complaint was properly granted.

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

ENTERED: MAY 14, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10053 Daniel Fanning, Index 104435/10
Plaintiff-Respondent,

-against-

The Rockefeller University, et al.,
Defendants-Appellants.

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Cornell Grace, P.C., New York (Keith D. Grace of counsel), for appellants.

Hogan & Cassell, LLP, Jericho (Michael Cassell of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 13, 2012, which granted plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), and denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim was properly granted. Plaintiff established prima facie entitlement to judgment as a matter of law through testimony that when the unsecured ladder on which he was working suddenly moved, he fell, causing him to sustain injury (*see Betancur v Lincoln Ctr. for the Performing Arts, Inc.*, 101 AD3d 429 [1st Dept 2012]; *Krejbich v Schimenti Constr. Co., Inc.*, 94 AD3d 668 [1st Dept 2012]). He was not required to present

further evidence that the ladder was defective (*see Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [1st Dept 2002]).

Defendants failed to raise a triable issue of fact by presenting conflicting evidence with regard to whether the A-frame ladder was 6 or 10 feet and whether it was made of wood or fiberglass, since the statute was violated under either description (*see Lipari v AT Spring, LLC*, 92 AD3d 502, 504 [1st Dept 2012]). Defendants' argument that plaintiff was the sole proximate cause of his accident because he chose a ladder too short for the work he was performing is speculative and thus, fails to raise an issue of fact (*see Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472, 473 [1st Dept 2008]).

In light of the grant of plaintiff's motion for partial summary judgment on liability, defendants' arguments regarding

plaintiff's claims for common law negligence and Labor Law §§ 200 and 241(6) are academic (*see Carchipulla v 6661 Broadway Partners, LLC*, 95 AD3d 573 [1st Dept 2012]).

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

ENTERED: MAY 14, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10054 The People of the State of New York, Ind. 4441/10
Respondent,

-against-

Paul Pacheco,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered October 21, 2011, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to concurrent terms of three years, and two to four years, respectively, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence

disproved defendant's justification defense beyond a reasonable doubt. There is no basis for disturbing the jury's credibility determinations. The testimony of a disinterested eyewitness generally corroborated the victim's account of the incident.

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

ENTERED: MAY 14, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10055-
10056 Index 105513/09

Mitzvah Inc., doing business as
Pisa Brothers Travel,
Plaintiff-Respondent,

-against-

Pauline Power, et al.,
Defendants-Appellants.

_____

Epstein Becker & Green, P.C., New York (Lauri F. Rasnick of counsel), for appellants.

Creedon & Gill P.C., Northport (Peter J. Creedon of counsel), for respondent.

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Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 15, 2011 and July 16, 2012, which, insofar as appealed from as limited by the briefs, upon defendants' motions to dismiss the complaint and for summary judgment, denied the motions as to the third, fourth, and sixth causes of action, unanimously modified, on the law, to dismiss all claims against defendant Brookes, and otherwise affirmed, without costs.

The motion court properly determined that plaintiff had standing to assert its claims for unfair competition (third cause of action), misappropriation of trade secrets (fourth cause of action), and tortious interference with prospective business

relationships and economic advantage (sixth cause of action). Defendant Power allegedly misappropriated substantial client information from her former employer (Pisa Brothers) prior to resigning and going to work for the corporate defendant (Altour), a competitor travel agency. Power, with Altour's authorization, allegedly utilized Pisa Brother's customer lists to, inter alia, promptly notify prior customers she serviced at her former employment of her new association with Altour. She also allegedly used Pisa Brothers' client information to cause a transfer of existing vacation bookings, from Pisa Brothers to Altour, which had the effect of transferring earned commissions.

Plaintiff's allegations, which are supported by evidence in the record, assert a cognizable stake to its claim for damages, as well as continuing damages, arising from defendants' conduct (*see generally Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 154-155 [1994]). The evidence raises factual issues as to whether Power deceptively removed client lists and copies of client folders, and transferred client bookings at Pisa Brothers to Altour, resulting in damages to plaintiff, which purchased Pisa Brothers' business only months after the purchase-sale negotiations commenced. The evidence demonstrates that plaintiff potentially lost value to the

business assets purchased, in the form of lost commissions, lost "over-ride" bonus money, and an apparent loss of good will of Pisa Brothers' clients.

The argument that Power was not under plaintiff's employ at any time, and was not subject to noncompetition agreements, or other written policies governing the use of client information at Pisa Brothers, does not undermine plaintiff's evidence that it purchased Pisa Brothers' client information, good will and trade name, and that the client information at Pisa Brothers was not readily available, and was deceptively removed by Power to the advantage of Altour and to plaintiff's likely financial injury.

The motion court correctly found that a triable issue existed as to whether Pisa Brothers' compilation of client lists over an 80-year period, along with folders containing clients' personal information, after years of advertising and assisting clients, constituted trade secrets, which plaintiff paid good value to purchase (*see Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993]). The misappropriated Pisa Brothers client information was not readily known, or available in the cruise trade industry, and as defendants' own conduct substantiates, such information was discoverable only through their deceptive efforts (*see Stanley Tulchin Assoc. v Vignola*, 186 AD2d 183, 185 [2d Dept 1992]).

The evidence also raises factual issues to support the cause of action alleging that defendants engaged in unfair competition by misappropriating client information plaintiff had negotiated to purchase from Pisa Brothers, and using it to defendants' commercial advantage (*see Electrolux Corp. v Val-Worth, Inc.*, 6 NY2d 556, 567-568 [1959]; *ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 476-478 [2007]).

Triable issues of fact exist in connection with plaintiff's sixth cause of action alleging that defendants had utilized Pisa Brothers' misappropriated client information to tortiously interfere with plaintiff's prospective business relationships with the former clients of Pisa Brothers, as well as with the economic advantage plaintiff had sought to gain by paying good value to purchase Pisa Brothers' client information and good will. While the cause of action entails a higher standard for culpable conduct than would a claim for tortious interference with contract, inasmuch as a plaintiff must set forth that the claimed interference constituted a crime or an independent tort (*see Carvel Corp. v Noonan*, 3 NY3d 182 [2004]), here, there was evidence of intentional, wrongful acts by defendants, including evidence suggesting that Pisa's computers were hacked and that client signatures were forged by Power on booking-transfer documents.

On plaintiff's concession, we dismiss the action against Nancy Brookes.

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

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

ENTERED: MAY 14, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10057 In re Chun Po So, Index 401422/12
Petitioner,

-against-

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

_____

Andrew L.T. Green, New York, for petitioner.

Kelly D. MacNeal, New York (Elena Madalina Andrei of counsel), for respondents.

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Determination of respondent New York City Housing Authority (NYCHA), dated April 11, 2012, which, after a hearing, approved the decision to deny petitioner's grievance, 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 October 23, 2012), dismissed, without costs.

Substantial evidence supports NYCHA's determination that adding petitioner's daughter as a permanent tenant in the household would create an overcrowding situation in violation of NYCHA's occupancy standards and would unfairly provide a windfall to her daughter to the detriment of other potential tenants (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d

222, 231 [1974]). NYCHA's occupancy standards do not permit an additional person to permanently join a household in a one-bedroom apartment unless that person is a spouse, domestic partner, or child under the age of six (*see Matter of Bashmet v Hernandez*, 87 AD3d 866, 866 [1st Dept 2011]). Although petitioner has a disability requiring essentially 24-hour care, her disability was reasonably accommodated by the offer to permit her adult daughter to reside in the apartment on a temporary basis, which she can continue to do as long as petitioner requires her assistance (*see* Executive Law § 296; Administrative Code of City of NY § 8-107[5][a][l], [15]).

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

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

ENTERED: MAY 14, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10058 Samuel Felton, Index 303132/10
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 2, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, an experienced basketball player who had played on the subject court on numerous occasions, was injured when, while heading toward the rim to take a shot, his ankle twisted and he heard his knee "pop," causing him to fall to the ground. Plaintiff observed that the court was cracked, repaired and uneven, which he believed to be the cause of his fall. Under the circumstances, dismissal of the complaint was proper since plaintiff assumed the risks associated with playing basketball or warming up to play basketball on this outdoor basketball court

(*McKey v City of New York*, 234 AD2d 114, 115 [1st Dept 1996] [internal quotation marks omitted]; *see Judge v City of New York*, 101 AD3d 560 [1st Dept 2012]; *Ortiz v City of New York*, 101 AD3d 446 [1st Dept 2012]). That plaintiff was coaching adolescents rather than playing in an organized game at the time of his injury does not warrant a different determination (*compare Trupia v Lake George Cent. School Dist.*, 14 NY3d 392 [2010]).

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

ENTERED: MAY 14, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10060-
10061 Index 651494/11

Alberto Vilar, et al.,
Plaintiffs-Appellants,

-against-

John Rutledge, et al.,
Defendants-Respondents.

_____

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (David C. Burger of counsel), for appellants.

Hoguet Newman Regal & Kenney, LLP, New York (John J. Kenney of counsel), for John Rutledge and Charles Parker, respondents.

Dechert LLP, New York (Linda C. Goldstein of counsel), for Munder Capital Management, Inc., respondent.

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Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered March 14, 2012 and March 20, 2012, which, inter alia, respectively, granted the individual defendants' motion and defendant Munder Capital Management, Inc.'s (Munder) motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiffs' argument that they were entitled to payment when the independent directors/defendants entered into a management agreement with a new investment advisor following the arrests of the individual plaintiffs is unavailing, as plaintiffs had no right to continue managing the Amerindo Technology Fund (the Fund). The unambiguous provisions of the Investment Company Act and the investment advisory agreement gave the independent

directors unqualified authority to terminate or renew the agreement (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005]). At the time the independent directors appointed Munder as the Fund's interim investment advisor (on June 3, 2005), the agreement had already expired (on May 31, 2005). Thus, after the agreement's expiration, the independent directors had unfettered discretion to renew (or not renew) the agreement (*see Navellier v Sletten*, 262 F3d 923, 935 [9th Cir 2001], *cert denied* 536 US 941 [2002]). Further, the entire basis of plaintiffs' asserted property right is their allegation that they planned to seek over $10 million for the sale of management rights to the Fund from unnamed buyers, yet plaintiffs make no allegation that they actually could have sold the Fund to the unnamed manager for that amount, particularly in a market that was devalued due to the individual plaintiffs' arrest.

Further, plaintiffs have not even tried to show how the complaint states the elements of a claim for aiding and abetting fraud, conversion, or negligence. Although plaintiffs asserted, during oral argument before the motion court, that the fraud was in "taking away the management from the plaintiff," that is insufficient to state a claim for fraud (*see* CPLR 3016[b]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Plaintiffs' claim of constructive fraud, asserted for the first

time on appeal, also fails, because, even if considered, plaintiffs have failed to allege a misrepresentation or that any of the defendants owed a fiduciary duty to them (*see Brown v Lockwood*, 76 AD2d 721, 731 [2d Dept 1980]). Based on the absence of a predicate claim for fraud, plaintiffs' claims of aiding and abetting fraud must also fail (*see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]). Plaintiffs argue that the motion court should have applied the law of some forum other than Maryland to the conversion and negligence claims; however, the deficiencies of plaintiffs' pleadings are fatal to their claims, whether Maryland or New York law is applied (*see Vigilant Ins. Co. of Am. v Hous. Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]; *Lasater v Guttmann*, 194 Md App 431, 446 [Md Ct Special App 2010], *cert denied* 417 Md 502 [2011]; *Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]; *Blondell v Littlepage*, 413 Md 96, 119 [2010]).

The motion court properly held that Amerindo Advisors was a suspended California company that lacked the capacity to initiate this lawsuit. The motion court did not give plaintiffs more time to restore Amerindo Advisors' status because they never sought it. Had plaintiffs sought leave to restore Amerindo Advisors' corporate status, the court would have had discretion to deny it

(*see Old Fashion Farms v Hamrick*, 253 Cal App 2d 233, 236 [2d Dist 1967]).

Pursuant to the forfeiture order entered in the individual plaintiffs' criminal case, they forfeited to the United States all of their "right, title, and interest in the Substitute Assets," which expressly included Amerindo Advisors. "'A forfeiture order, whether preliminary or final as to third-party claims, is a final order as to the defendant'" (*United States v Bennett*, 2004 WL 829015, *3, 2004 US Dist LEXIS 6595, *9 [SD NY 2004][citation omitted]).

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

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

ENTERED: MAY 14, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10062 The People of the State of New York, Ind. 944/10
Respondent,

-against-

Arthur J. Henry,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jared Wolkowitz 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 (Charles Solomon, J.), rendered on or about October 5, 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: MAY 14, 2013

CLERK

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

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10063 Howard Weiss, Ind. 306008/11
Plaintiff-Appellant,

-against-

Marilyn Weiss,
Defendant-Respondent.

_____

Goodman Jurist & Pandolfo, LLP, Garden City (Gregory Pandolfo of counsel), for appellant.

Allan J. Berke, New York, for respondent.

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Order, Supreme Court, New York County (Laura E. Drager, J.), entered March 21, 2012, which, inter alia, granted defendant's motion to enforce the terms of the parties' prenuptial agreement, for summary judgment dismissing the cause of action for equitable distribution of marital assets, to waive the confidentiality provisions of the parties' interim agreement for the limited purposes of the motion and the divorce action, to enforce the terms of the interim agreement, and for summary judgment dismissing the cause of action for maintenance, unanimously affirmed, without costs.

Plaintiff's claim for equitable distribution of the marital assets is barred by the parties' prenuptial agreement, which was made before the effective date of the equitable distribution

statute and is valid and enforceable (*see* Domestic Relations Law § 236[B][3]; *Carner v Carner*, 85 AD2d 589 [2d Dept 1981]). The October 1972 agreement provides that each party "waives, releases, renounces and surrenders" any "rights, claims and elections" he or she may ever have "to take any interest or share of the other's estate or property, whether now owned or hereafter acquired ... under any circumstances whatsoever, with the same force or effect as though there had never been a marriage between the parties hereto." Plaintiff has failed to identify any asset that is held in the parties' names jointly or denominated as joint property that may therefore be subject to equitable distribution. Contrary to plaintiff's contention, it is of no moment that the parties' prenuptial agreement does not contain an express waiver of equitable distribution (*see Van Kipnis v Van Kipnis*, 11 NY3d 573, 579 [2008]).

Plaintiff's assertion that he did not have independent legal advice before signing the parties' June 2009 interim agreement, without more, is an insufficient basis for invalidating that agreement (*see Levine v Levine*, 56 NY2d 42, 48 [1982]). Nor is the interim agreement, which obligates defendant to pay plaintiff maintenance in the amount of $5,200 per month, premiums for health insurance and long-term care insurance – all for life –

unconscionable (*see Christian v Christian*, 42 NY2d 63, 71 [1977]). Having been actively involved in the management of defendant's family business and investments, plaintiff was aware of the disparity in the parties' financial resources at the time they entered into the interim agreement. Nevertheless, in the agreement, he acknowledged his belief that the agreement was "fair, reasonable and in his[] own best interests." Under the circumstances, if in retrospect a provision appears inequitable, we will not "redesign the bargain arrived at by the parties" (*see id.* at 72). We find, moreover, that plaintiff ratified the interim agreement by accepting the benefit thereof for a period of 22 months before commencing this action (*see Beutel v Beutel*, 55 NY2d 957 [1982]).

Given that plaintiff seeks an award of maintenance, and defendant contends that by seeking such an award plaintiff breached the interim agreement, without a limited waiver of the confidentiality provisions of the agreement, the merits of the parties' respective claims and defenses would be incapable of

determination, and the purpose of the agreement would be defeated.

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

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

ENTERED: MAY 14, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10064 Vernetta Rivers, Index 303803/10
Plaintiff-Appellant,

-against-

Villford Realty Corporation, et al.,
Defendants-Respondents.

_____

Burns & Harris, New York (Christopher J. Donadio of counsel), for appellant.

Newman Myers Kreines Gross Harris, P.C., New York (Adrienne Yaron of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered October 18, 2011, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff slipped on calcium chloride, a substance used to treat and prevent ice conditions, while exiting her apartment building. She admitted observing the calcium chloride pellets before her fall. The record shows that the presence of the calcium chloride was open and obvious and not inherently dangerous (*see Verdejo v New York City Hous. Auth.*, ___ AD3d ___, 2013 NY Slip Op 02323 [1st Dept 2013]; *Baynes v City of New York*, 81 AD3d 423 [1st Dept 2011]). Defendants' safety consultant established that using calcium chloride to combat snow and ice conditions was a good, accepted, and safe practice, consistent

with industry standards, and that there were no standards that required removing "ice melt" when ice was not present. The expert opined that the calcium chloride would have been soft and pliable and would not have been slippery at the time of the accident, and thus, not hazardous. His affidavit was not speculative since it was based upon his review of deposition testimony, the weather report for the relevant period, his personal inspections of the premises, and a sample of the calcium chloride used there.

In opposition, plaintiff failed to raise a triable issue of fact as to the existence of a dangerous condition. Consideration of the building superintendent's deposition testimony does not alter this conclusion.

We have considered plaintiff's contention based on public policy and find it unavailing.

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

ENTERED: MAY 14, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10065N In re Hakim Quick, Jr., an infant by his mother and natural guardian, Theresa Wilson, Petitioner-Respondent, Index 350521/10

-against-

The New York City Health and Hospitals Corporation, Respondent-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for appellant.

Duffy & Duffy, Uniondale (James N. LiCalzi of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered April 25, 2011, which granted the petition for leave to serve a late notice of claim and deemed the notice of claim timely served nunc pro tunc, unanimously affirmed, without costs.

Supreme Court considered all of the relevant factors and providently exercised its discretion in granting the petition (*see* General Municipal Law § 50-e[5]). Petitioner's claim, which is premised upon faulty prenatal care, accrued when he was born on May 9, 2003 (*see LaBello v Albany Med. Ctr. Hosp.*, 85 NY2d 701, 704 [1995]) and, as an infant, he was entitled to have the statute of limitations tolled for 10 years (CPLR 208; *see Cohen v Pearl Riv. Union Free School Dist.*, 51 NY2d 256, 263 [1980];

Contreras v KBM Realty Corp., 66 AD3d 627, 628-629 [2d Dept 2009], *lv denied* 14 NY3d 701 [2010]). Accordingly, the petition, filed on or about September 28, 2010, was timely.

Petitioner also demonstrated that respondent had "actual knowledge of the essential facts constituting the claim" (General Municipal Law § 50-e(5), because it is undisputed that his mother was exclusively treated by respondent, that she was never seen or treated at any other clinic or hospital during her pregnancy, and that, at all times, respondent was in possession of her prenatal care medical records (*see Bayo v Burnside Mews Assoc.*, 45 AD3d 495 [1st Dept 2007]). This also shows that the delay would not substantially prejudice respondent (*see Bowser v New York Health & Hosps. Corp.*, 93 AD3d 608 [1st Dept 2012]). Lastly, the alleged extraordinary care that petitioner has required, which is amply supported by the record, coupled with his infancy, is a reasonable excuse for the delay (*cf. Matter of Nieves v New York Health & Hosps. Corp.*, 34 AD3d 336, 337 [1st Dept 2006]).

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

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

ENTERED: MAY 14, 2013

CLERK