SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 4, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

10850 112 East 35th Street, LLC, Index 603218/07
Plaintiff-Respondent,

-against-

The New York Society of the New Church,
Defendant-Appellant.

_____

Fryer & Ross LLP, New York (Gerald E. Ross of counsel), for appellant.

Debra J. Millman, P.C., New York (Craig F. Wilson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about January 9, 2012, which, after a nonjury trial, dismissed without prejudice the first cause of action, which seeks a declaration with respect to the parties' "Utilities Agreement," and the third cause of action, which seeks money damages, and, upon the second cause of action, permanently enjoined defendant from ceasing to provide utilities to the residential building purchased by plaintiff, unanimously reversed, on the law, without costs, the first and third causes

of action reinstated, the permanent injunction vacated and the preliminary injunction reinstated, and the matter remanded for review of the Utilities Agreement pursuant to Religious Corporations Law § 12(9) and, if approved, interpretation of that agreement.

We hold that the parties' Utilities Agreement requires court approval, pursuant to Religious Corporations Law § 12(1), because it modifies the parties' previously approved Purchase Agreement (*see Beacon Term. Corp. v Chemprene, Inc.*, 75 AD2d 350, 354 [2d Dept 1980], *lv denied* 51 NY2d 706 [1980]. We remand for a determination concerning retroactive judicial approval (*see Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc. v Congregation Yetev Lev D'Satmar, Inc.*, 9 NY3d 297, 301 [2007]; Religious Corporations Law § 12[9]).

In light of plaintiff's lack of other access to gas, steam, and electricity, we find that the order granting a preliminary injunction against defendant's termination of utilities to the residential building should be reinstated and remain in effect

upon the same conditions set forth therein until this matter is resolved pursuant to our remand.

> The Decision and Order of this Court entered herein on October 24, 2013 is hereby recalled and vacated (*see* M-6089 & M-6155 decided simultaneously herewith).

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

ENTERED: FEBRUARY 4, 2014

CLERK

Gonzalez, P.J., Tom, Manzanet-Daniels, Feinman, JJ.

11460 The People of The State of New York, Ind. 26798/04
Plaintiff-Respondent,

-against-

Alejendrina Simo,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Seth L. Marvin, J.), entered on or about April 26, 2012,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 30, 2013,

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

ENTERED: FEBRUARY 4, 2014

CLERK

Friedman, J.P., Andrias, Richter, Manzanet-Daniels, Feinman, JJ.

11111-
11112 &
M-6059 In re Wilda C.,
Petitioner-Appellant,

-against-

Miguel R.,
Respondent-respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Douglas H. Reiniger, New York, for respondent.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about February 14, 2013, unanimously affirmed, without costs or disbursements.

Application by appellant's assigned counsel to withdraw is granted (*see Matter of Louise Wise Servs.*, 131 AD2d 306 [1987]).

We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

M-6059 ***Wilda C. v Miguel R.***

Motion to be relieved as counsel granted.

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

ENTERED: FEBRUARY 4, 2014

CLERK

Acosta, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

11232
M-5261 The People of the State of New York, Ind. 3643/09
Respondent,

-against-

Brandon Lewis,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered April 23, 2010, convicting defendant, after a jury trial, of assault in the second degree, attempted assault in the second degree, aggravated criminal contempt, criminal contempt in the first degree, intimidating a witness in the third degree, bribing a witness, and tampering with a witness in the third degree, and sentencing him to an aggregate term of 9⅓ to 14 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court deprived defendant of his constitutional rights when, rather than conducting the requisite "dispassionate inquiry," it summarily denied his repeated requests to proceed

pro se (*People v Smith*, 68 NY2d 737, 738 [1986], *cert denied* 479 US 953 [1986]).

A criminal defendant's right to represent himself is a fundamental right guaranteed by both the federal and state constitutions. "[F]orcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so" (*Faretta v California*, 422 US 806, 817 [1975]). The only function of the trial court, in assessing a timely request to proceed pro se, is to ensure that the waiver was made intelligently and voluntarily (*see People v Schoolfield*, 196 AD2d 111, 115 [1st Dept 1994], *lv denied* 83 NY2d 915 [1994]). This requirement is not satisfied "simply by repeated judicial entreaties that a defendant persevere with the services of assigned counsel, or by judicial observations that a defendant's interests are probably better served through a lawyer's representation" (*People v Smith*, 92 NY2d 516, 521 [1998]).

Defendant's requests to proceed pro se were denied by the court without any inquiry whatsoever. At the *Huntley* hearing on February 18, 2010, after requesting a new attorney, defendant stated, "If I can't get reassignment of counsel, at least let me go pro se, represent myself," explaining that for over three months counsel had failed to provide him with information about

his case. The court, without asking a single question, immediately replied, "I don't think so." When defendant asked, "Is it possible if I can go pro se?" the court responded, "Anything is possible, sir, but you clearly don't want to go pro se. You just want me to assign a new lawyer."

Defendant then stated, "If I can't get a reassignment of counsel, I would like to go pro se." He further explained that he wished to proceed pro se because his attorney "ha[d] no information about [his] case," and "ha[d]n't asked [him] nothing about [his] case," and "[didn't] know what [was] going on." The court did not inquire further but merely recited the procedural history of the case and stated, "I presume you have gotten copies of your motions and of the response," failing to understand "what else [he] want[ed] to know about [his] case." When defendant reiterated that his attorney "didn't know [his] side of the story," the court stated, "Well, apparently you're willing enough to talk, Mr. Lewis, but all you do in the back is yell, [and it's] hard to tell a story by yelling."

During a recess on the third day of trial, defendant again made a request to "go pro se." The court did not grant the request. Following a recess and apparently referring to the colloquy during the *Huntley* hearing, the court stated:

> [W]e had a very lengthy conversation, Mr. Lewis and I, with regard to his unexplained request for new counsel, and when I said, 'no,' he said that if I didn't give him a new lawyer he would go pro se, *which is denied, an unconditional request to go pro se*. So we will not deal with it any further and I will not deal with it any further now.

On February 18th, which was prior to the start of trial, when defendant stated that he wished to "go pro se," the court's "only function" was to inquire as to whether defendant was "aware of the disadvantages and risks of waiving his right to counsel" (*Schoolfield*, 196 AD2d at 115; *Smith*, 68 NY2d at 739 [trial court violated defendant's rights when it summarily rejected defendant's pro se request without determining whether it was knowingly and intelligently made]; *People v Youngblood*, 225 AD2d 346, 346 [1st Dept 1996] [reversing and remanding for new trial where court, prior to jury selection, summarily denied defendant's request to proceed pro se on the basis of counsel's statement that the defendant was not satisfied with counsel's representation], *lv denied* 88 NY2d 888 [1996]).

The fact that defendant's request to proceed pro se had been preceded by an unsuccessful request for new counsel did not render the request equivocal. "A request to proceed pro se is not ipso facto 'equivocal' merely because it is made in the alternative" (*People v Hayden*, 250 AD2d 937, 938 [3rd Dept 1998]

lv denied 92 NY2d 879 [1998]). The Court of Appeals has recognized that a pro se defendant is frequently motivated by dissatisfaction with trial strategy or a lack of confidence in counsel (*People v McIntyre*, 36 NY2d 10, 16 [1974]). Here, it was only after the court made it perfectly clear that new counsel would not be appointed that defendant specifically asked to represent himself (*see People v Anderson*, 41 AD3d 274 [1st Dept 2007], *lv denied* 9 NY3d 959 [2007]).

Defendant was not hesitant to represent himself, nor were his requests "overshadowed" by numerous requests for new counsel, obstreperous demands or severely disruptive behavior (*compare People v Jiminez*, 253 AD2d 693 [1st Dept 1998], *lv denied* 92 NY2d 1033 [1998]). Indeed, even the court characterized his request as "unconditional." Nonetheless, without asking a single question or stating its reasons, let alone conducting a "thorough inquiry" as to whether the decision to waive the right to counsel and represent himself was undertaken knowingly and voluntarily, the court denied defendant's application. This was error of a constitutional magnitude.

People v Gillian (8 NY3d 85 [2006]) does not compel a different result. The defendant in *Gillian* proceeded to trial with a new attorney, raising no further objection, thus

abandoning his request to proceed pro se.

We need not decide whether defendant's untimely midtrial request required further action by the court (*see Matter of Kathleen K. [Steven K.]*, 17 NY3d 380 [2011]; *People v McIntyre*, 36 NY2d at 17). The critical error here occurred before the trial commenced.

Since we are ordering a new trial, we find it unnecessary to discuss defendant's other arguments, except that we find that the verdict was based on legally sufficient evidence and was not against the weight of the evidence.

M-5261 *People v Brandon Lewis*

Motion to strike reply brief denied.

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

ENTERED: FEBRUARY 4, 2014

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11372N In re Gaoussou Kane, Index 102890/11
Petitioner-Respondent,

-against-

Fiduciary Insurance Company of America,
Respondent-Appellant.

_____

Brand, Glick & Brand, P.C., Garden City (Peter M. Khrinenko of counsel), for appellant.

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Harlan S. Budin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol E. Huff, J.), entered April 30, 2012, which granted the petition to vacate the arbitration awards, and remanded the matter for a new arbitration before a new arbitrator, unanimously reversed, on the law, without costs, and the arbitration awards reinstated.

The arbitral awards, rendered in compulsory arbitration, were not irrational or contrary to settled, and therefore should have been confirmed. Respondent insurer's disclaimer, based strictly upon primacy of coverage, was not so absolute or unequivocal as to constitute a repudiation of the policy (*see Seward Park Hous. Corp. v Greater N.Y. Mut. Ins. Co.*, 43 AD3d 23, 30 [1st Dept 2007]). The arbitrators were therefore correct that petitioner was required, but failed, to comply with the

conditions precedent to coverage found in the implementing no-fault regulations. He did not submit timely written proof of claim to the insurer, including the particulars regarding the nature and extent of the injuries and treatment received and contemplated (11 NYCRR 65-1.1, 65-24[c]).

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

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

ENTERED: FEBRUARY 4, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11625 The People of the State of New York, Respondent, 69A/87 2615/87

-against-

Herbert Sheppard, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie C. Brennan of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Rossi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Patricia Nunez, J.), entered on or about November 18, 2010, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant a downward departure to level two (see *People v Cintron*, 12 NY3d 60, 70, *cert denied sub nom. Knox v New York*, 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 418, 421 [2008]). Neither defendant's age (late 40s) nor any of the other factors cited by defendant warranted a downward departure, given the seriousness

of his sex offenses against seven different victims, including offenses against a child (*see e.g. People v Thomas*, 105 AD3d 640 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]; *People v Ward*, 83 AD3d 561 [1st Dept 2011], *lv denied* 17 NY3d 707 [2011]).

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

ENTERED: FEBRUARY 4, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11626 LCM Holdings GP, LLC, et al., Index 652878/12
Plaintiffs-Respondents,

-against-

Laurent Imbert,
Defendant-Appellant.

_____

Olshan Frome Wolosky LLP, New York (Thomas J. Fleming of counsel), for appellant.

Greenberg Traurig, LLP, New York (Leslie D. Corwin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffery K. Oing, J.), entered on or about November 19, 2012, which denied defendant's motion to dismiss or, in the alternative for summary judgment, as to plaintiffs' fourth cause of action for a declaration that defendant is required to sell his shares in the LLC to plaintiffs, unanimously reversed, on the law, without costs, the motion for summary judgment granted, and it is declared that defendant continues to own his shares in the subject LLC and is not required to sell his shares in the LLC to plaintiffs.

The parties' rights vis a vis each other as members of a Delaware LLC are defined by the operating agreement (*Elf Atochem N. Am., Inc. v Jaffari*, 727 A2d 286, 291 [Del 1999]). Here, the agreement lacks any indication that plaintiffs could compel the

sale of defendant's membership interests. Defendant was a manager and an employee of plaintiffs. Plaintiffs rely on section 10.03 of the agreement which allows them to compel the sale of the membership interest upon the termination of the employment of "an employee *other than a Manager*" (emphasis added). It is undisputed that defendant was a manager at the time of his termination. Thus, under the plain language of the agreement, 10.03 is inapplicable to defendant (*see Playtex FP, Inc. v Columbia Cas. Co.*, 622 A2d 1074, 1076 [Del Super 1992]). Moreover, plaintiffs' reading deprives the phrase "other than a Manager" of any effect, a result that is contrary to Delaware law (*Elliott Assocs., L.P. v Avatex Corp.*, 715 A2d 843, 854 [Del 1998] [law favors interpretation that gives effect to all terms of contract]).

Finally, where, as here, the merits of the declaratory judgment claim are resolved on the merits, the proper course is to issue a declaration in defendant's favor, not dismissal (*see Maurizzio v Lumbermen's Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

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

ENTERED: FEBRUARY 4, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11627 In re Christina Ann B.,

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

Charles P.,
Respondent-Appellant,

Cardinal McCloskey Services,
Petitioner-Respondent.

_____

Aleza Ross, Patchogue, for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

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

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about May 4, 2012, which, following a fact-finding determination that respondent father permanently neglected the subject child, terminated the father's parental rights and committed custody and guardianship of the child to petitioner Cardinal McCloskey Services and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding that respondent permanently neglected the daughter was established by clear and convincing evidence. The record demonstrates the diligent efforts by petitioner agency to

encourage and strengthen the parental relationship, including scheduling twice weekly visits with respondent and the child, referring the father to parenting classes, providing a visiting coach to attempt to help respondent improve the manner in which he interacted with the child, providing respondent extensive assistance in furtherance of his attempt to find suitable housing and arranging meetings with various individuals in order to afford respondent the opportunity to gain an understanding of his daughter's special medical needs (*see Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 429 [2012]; Social Services Law § 384-b[7][a]).

Despite these diligent efforts, respondent failed to obtain suitable housing or to avail himself of the numerous opportunities to gain insight into his daughter's special needs (*see Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]). Contrary to respondent's contentions, the agency is not charged with a guarantee that the parent succeed in overcoming his problems (*see Matter of Sheila G.*, 61 NY2d 368, 385 [1984]) and he was required to "assume a measure of initiative and responsibility" in utilizing the services and resources provided by the agency (*Matter of Jamie M.*, 63 NY2d 388, 393 [1984]).

A preponderance of the evidence supports the finding that it was in the child's best interest to terminate respondent's parental rights so the child would be freed for adoption by her pre-adoptive foster mother, with whom the seven-year-old child has been living since she was placed in foster care when she was four months old (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The evidence showed that the child thrived in her foster home and that her foster mother was devoted to ensuring that the child's special needs were properly treated. It is evident from respondent's testimony that he would not take his daughter to her current medical specialists or specialized school and would instead take her to facilities that were more convenient for him, that he does not fully comprehend his child's extensive special needs.

Contrary to respondent's contention, the circumstances presented do not warrant a suspended judgment.

Respondent failed to preserve his argument that the court improperly relied on a colloquy that took place in court in reaching its fact-finding determination (*see id.* at 145). Were we to review this claim, we would find that respondent's due process rights were not violated and that any error committed by the court was harmless as the court's reference was not material

to its substantive determinations (*see Matter of Briana R. [Marisol G.]*, 78 AD3d 437, 438-439 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]).

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: FEBRUARY 4, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11629- Index 402592/10
11630 United States Fire Insurance Company,
Plaintiff-Respondent-Appellant,

-against-

North Shore Risk Management,
Defendant-Respondent-Appellant.

- - - - -

North Shore Risk Management,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Crump Insurance Services, Inc, et al.,
Third-Party Defendants-Appellants-Respondents.

_____

The Sullivan Law Group LLP, New York (Frederick M. Klein of counsel), for Crump Insurance Services, Inc, appellant-respondent.

Kaufman Borgeest & Ryan, LLP, Valhalla (Edward J. Guardaro, Jr. of counsel), for Inter-Reco Inc., appellant-respondent.

Carroll, McNulty & Kull L.L.C., New York (Ann Odelson of counsel), for United States Fire Insurance Company, respondent-appellant.

McGaw, Alventosa & Zajac, Jericho (James K. O'Sullivan of counsel), for North Shore Risk Management, respondent-appellant.

_____

Orders, Supreme Court, New York County (Carol Edmead, J.), entered April 3, 2012 and on or about September 19, 2012, which, to the extent appealed from as limited by the briefs, granted North Shore Risk Management's request to file a separate motion for summary judgment dismissing US Fire's complaint based on

statute of limitations grounds, denied North Shore's CPLR 3211 motion to dismiss US Fire's complaint, denied that portion of Crump's motion seeking dismissal of North's Shore's third-party claim for contribution, and denied Inter-Reco's motion to dismiss the third-party complaint, unanimously modified, on the law, to grant North Shore's motion to file a separate motion for summary judgment against US Fire solely with respect to the breach of contract claim, and otherwise affirmed, without costs.

The main issue in dispute is whether the primary insurance policy issued by The Insurance Corp. of New York (Inscorp) to its insured, nonparty BFC Construction Corp., contained a single general aggregate, or a per construction site general aggregate, and thus whether US Fire's excess policy was triggered.

Since US Fire's contract claim accrued in 2001, when North Shore brokered the policies, US Fire's action, commenced in 2009 (CPLR 213), would be untimely absent some exception. US Fire's remaining tort claims against North Shore were not barred by the statute of limitations, however. Accordingly, that portion of North Shore's motion requesting leave to file a motion for summary judgment asserting a statute of limitations defense should be affirmed solely as to US Fire's breach of contract claim (*see Lamendola v Mossa*, 190 Misc 2d 147, 149 [App Term, 2d

Dept 2001], citing *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399 [1993]; see *also Varga v Credit-Suisse*, 5 AD2d 289, 292 [1st Dept 1958], *affd* 5 NY2d 865 [1958]).

North Shore's CLPR 3211 motion to dismiss US Fire's complaint was properly denied, as the documentary evidence, i.e., the affidavits and emails of North Shore and Inter-Reco personnel, do not qualify as "documentary evidence" for purposes of CPLR 3211[a][1] (*see Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]; *Rodolico v Rubin & Licatesi, P.C.*, __ AD3d __, 2013 NY Slip Op 08068 at *5 [2nd Dept 2013]).

Although the agency agreement between US Fire and North Shore shows that North Shore was required to solicit, receive and send proposals for commercial line insurance contracts, it was only through the documentation and representations presented by North Shore that the US Fire policy was issued with the express understanding that the Inscorp Policy contained a separate per project aggregate limit. Thus, while the motion court correctly dismissed North Shore's indemnification claims against the wholesale broker and underwriter third party defendants based on the absence of vicarious liability, the contribution claim remained viable against the potential tortfeasors (*see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 567-568 [1987]).

North Shore's third-party negligent misrepresentation claims, to which a three-year statute of limitations applied (*see Colon v Banco Popular N. Am.*, 59 AD3d 300, 301 [1st Dept 2009]), were timely, as there was no injury to North Shore until US Fire commenced its action against North Shore on March 27, 2009 (*see* (*Bonded Waterproofing Servs., Inc. v Anderson-Bernard Agency, Inc.*, 86 AD3d 527, 530 [2d Dept 2011]).

Further, since the documentary evidence submitted by Crump and/or Inter-Reco, including the Inscorp insurance application and declarations pages, did not resolve "all factual issues as a matter of law, and conclusively dispose[ ] of the plaintiff's claim[s]" (*Bonded Waterproofing Servs., Inc.*, 86 AD3d at 529 [internal quotation marks omitted]), that portion of the third party defendants' motions to dismiss the claim for negligent misrepresentation was properly denied. Accepting North Shore's allegations as true, the motion court also properly denied dismissal of this claim for failure to state a cause of action on the ground that discovery was necessary to determine the relationship between the parties and the promises that were made (*see Murphy v Kuhn*, 90 NY2d 266, 270-271 [1997]).

Inter-Reco's argument that there can be no liability of an agent acting on behalf of a disclosed principal (such as Inscorp)

(*see A.B.N. Jewelry v American Alliance Ins. Co.*, 242 AD2d 457 [1st Dept 1997]) was properly rejected by the motion court, as the documentary evidence establishes only that Inter-Reco historically issued the subject endorsement believing that if the designated box were left empty, the aggregate limit applied to each construction site. Since Inscorp disagrees, discovery must proceed to determine the intent of the parties.

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

ENTERED: FEBRUARY 4, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11631 The People of the State of New York, Ind. 877N/11
Respondent,

-against-

Heriberto Ruperto,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ellen M. Coin, J. at plea; Richard M. Weinber, J. at sentencing), rendered on or about March 13, 2012,

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: FEBRUARY 4, 2014

CLERK

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

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11632 Bell & Company, P.C., Index 652017/12
Plaintiff-Respondent,

-against-

Marc D. Rosen,
Defendant-Appellant,

Cameo Wealth & Creative Management,
Defendant.

_____

Leeds Brown Law, P.C., Carle Place (Rick Ostrove of counsel), for appellant.

Gary Greenberg, New York, for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered November 21, 2012, which granted plaintiff Bell & Company, P.C.'s motion for a preliminary injunction enjoining defendant Marc Rosen from, inter alia, violating the terms of a non-compete clause in an employment agreement between the parties, unanimously affirmed, without costs.

On appeal, defendant Rosen argues that contrary to the motion court's finding, plaintiff's failure to comply with the terms of the termination clause requiring that he be given two weeks' notice and severance pay, constituted a breach of the employment agreement thereby rendering the agreement's non-compete clause unenforceable (*see DeCapua v Dine-A-Mate, Inc.*,

292 AD2d 489, 491 [2d Dept 2002]). It is undisputed that on April 23, 2012 defendant gave notice of his intent to leave plaintiff's employment. There is an issue of fact, however, with respect to what subsequently transpired between the parties. Plaintiff maintains that defendant's last day of employment was May 18, 2012, while defendant maintains that there was an agreement that he would stay on until July 15, 2012 to assist with the transition of client accounts. He further maintains that plaintiff abruptly terminated his employment on May 18, without notice or severance. Accordingly, there is an issue of fact as to whether the parties' relationship continued to be governed by the employment agreement after April 23.

The existence of this issue of fact does not require the denial of the preliminary injunction since plaintiff has, on this record, demonstrated a likelihood of success on the merits, irreparable injury absent the preliminary injunction, and a balancing of the equities weigh in its favor (*see Four Times Sq. Assoc. v Cigna Invs.*, 306 AD2d 4, 5 [1st Dept 2003]). Defendant does not dispute that he solicited plaintiff's clients, rather, as noted, he argues that plaintiff's alleged breach rendered the non-compete clause unenforceable. Plaintiff has shown that if defendant is permitted to continue soliciting and representing

its clients it will suffer a loss of business (*see Willis of N.Y. v DeFelice*, 299 AD2d 240, 242 [1st Dept 2002]). With respect to the balance of the equities, in contrast to plaintiff's showing of irreparable harm, there is no basis to conclude that defendant will suffer significant professional hardship from the limited restraint since he is permitted to retain the business of the clients he brought to plaintiff (*see Willis*, 299 AD2d at 242).

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

ENTERED: FEBRUARY 4, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11633 Victoria David, etc., Index 16628/05
Plaintiff-Respondent,

-against-

Philip Martin Hutchinson, D.O., et al.,
Defendants,

Daniel Cerbone, M.D.,
Defendant-Appellant.

_____

Dwyer & Taglia, New York (Peter R. Taglia of counsel), for appellant.

Irom, Wittels, Freund, Berne & Serra, P.C., Bronx (Richard W. Berne of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered March 20, 2013, which, insofar as appealed from, denied defendant Daniel Cerbone, M.D.'s cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the cross motion granted, and the amended complaint dismissed as against defendant Daniel Cerbone, M.D. The Clerk is directed to enter judgment accordingly.

In this action for medical malpractice, plaintiff alleges, inter alia, that defendant Cerbone, an emergency room (ER) attending, and Dr. Philip Martin Hutchinson, a surgeon, failed to properly treat and diagnose plaintiff's decedent during a January 18, 2003 ER visit at defendant St. Barnabas Hospital, leading to

her death on February 9, 2004, more than one year later. At the time of her visit to the ER, Dr. Cerbone was concerned that decedent, who had undergone gallbladder removal surgery eleven days earlier and was complaining of pain at the operative site and abdomen, may have been suffering from a post-operative infection. Accordingly, he, inter alia, requested a surgical consultation which was provided by defendant Dr. Hutchinson. Dr. Cerbone, agreed with the diagnosis or impression, reached by Dr. Hutchinson, of Clostridium difficile infection and decedent was treated with intravenous fluids and an antibiotic. She was discharged later that day in stable condition, after her abdominal complaints had resolved.

On January 22, 2003, decedent presented to Our Lady of Mercy Medical Center, where she was found to have two large liver abscesses and right pleural effusion. On January 27, the abscesses were drained and the condition was noted to have been resolved as of the time of her discharge on February 13, 2003. Thereafter, decedent suffered from a series of complications, leading to repeated hospitalizations and nursing home stays, and developed, *inter alia*, an MRSA infection secondary to decubitus ulcers. On February 9, 2004, decedent died in a nursing home.

Dr. Cerbone made a *prima facie* showing of entitlement to judgment as a matter of law by submitting and/or relying upon, among other things, his expert affirmation, the opinions of other defense experts, and decedent's medical records. Significantly, Dr. Cerbone's expert opined that imaging studies were not indicated given the absence of a fever, significant abdominal tenderness, rebound, and guarding, and that there was no reason to suspect a liver abscess or admit decedent after she remained stable (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). Additionally, one of the defense experts opined that the treatment rendered at St. Barnabas was not causally related to decedent's death, as her liver abscesses had long resolved by the time of her death and the conditions she subsequently developed were unrelated to the abscesses.

In opposition, plaintiff failed to raise a triable issue of fact. Her surgical expert did not address any of the contraindications as to the severity or nature of decedent's illness upon presentment to the ER, which, as indicated above, included a lack of fever, lack of significant abdominal tenderness, guarding or rebound tenderness, the fact that the surgical site was found to be clean and healing nicely, and that decedent was noted to be stable and comfortable for hours prior

to discharge (*see Limmer v Rosenfeld*, 92 AD3d 609, 609-610 [1st Dept 2012]; *Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1st Dept 2007]).

Moreover, rather than identify any basis to suspect the presence of liver abscesses, plaintiff's expert maintained that testing for a post-operative infection would have led to the discovery of the abscesses. However, the failure to investigate a condition that would have led to an incidental discovery of an unindicated condition, does not constitute malpractice (*see Curry v Dr. Elena Vezza Physician, P.C.*, 106 AD3d 413, 413 [1st Dept 2013]; *Rivera v Greenstein*, 79 AD3d 564, 568 [1st Dept 2010]). Additionally, plaintiff's expert failed to causally relate the alleged four-day delay in diagnosis and treatment of the post-operative infection and/or liver abscesses to decedent's death (*see Mortensen v Memorial Hosp.*, 105 AD2d 151 [1st Dept 1984]).

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

ENTERED: FEBRUARY 4, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11634- Index 307211/10
11634A-
11634B-
11634C Malco Realty Corp.,
Plaintiff-Appellant,

-against-

Westchester Condos, LLC,
Defendant,

New York City Acquisition
Fund LLC, et al.,
Defendants-Respondents.

_____

Bronstein, Gewirtz & Grossman, LLC, New York (Edward N. Gewirtz of counsel), for appellant.

Loeb & Loeb LLP, New York (Sara J. Crisafulli of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered November 23, 2011, which granted the motion of defendant Westchester Condos (WC) to dismiss the complaint and cancel the notice of pendency, unanimously modified, on the law, to the extent of denying WC's motion to dismiss the amended complaint's first cause of action for breach of contract, and otherwise affirmed, without costs. Judgment, same court and Justice, entered April 3, 2012, dismissing the amended complaint with prejudice as against defendants New York City Acquisition Fund LLC (the Fund) and JP Morgan Chase Bank, N.A. (Chase) (together

the Fund), unanimously affirmed, without costs. Appeal from order, same court and Justice, entered March 29, 2012, which granted the Fund's motion to dismiss the amended complaint, unanimously dismissed, without costs, as subsumed in the appeal from the April 3, 2012 judgment. Order, same court and Justice, entered October 16, 2012, which, to the extent appealable, denied plaintiff's motion for renewal of the November 2011 order, unanimously affirmed, without costs. Appeal from so much of the October 16, 2012 order as denied plaintiff's motion for reargument of the November 2011 order, unanimously dismissed, without costs, as taken from a nonappealable order.

Plaintiff and WC entered into a real estate transaction which, publicly, centered around a written contract of sale of a property at 2044 Westchester Avenue, in the Bronx (the property), for a stated purchase price of $6 million, dated as of December 4, 2007. The December 2007 contract was signed by plaintiff's principal Isaac Gansburg (Isaac) and by Nediva Schwarz on behalf of WC. In the first cause of action of its amended complaint, plaintiff seeks to recover an alleged unpaid balance of $2.9 million on the purchase price.

The motion court found that documentary evidence established that the December 2007 contract was a sham document, and that the

sales transaction was actually governed by a two-page handwritten agreement, dated January 8, 2008, which set the full purchase price at only $3.1 million. The January 2008 agreement, however, was signed only by Schwarz, on behalf of her partner, as purchaser, and by Joseph Gansburg, Isaac's son and plaintiff's president, as seller.

In our view Joseph's signature on the January 2008 agreement cannot be said to have bound plaintiff, a corporate entity, because plaintiff is mentioned nowhere in that simple document. Accordingly, WC has failed to conclusively establish that plaintiff is bound by the January 2008 agreement, rather than by the December 2007 agreement which was actually recorded in connection with the transaction (*see Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006]). Hence, WC's motion to dismiss plaintiff's contractual claim, premised on documentary evidence in the form of the January 2008 agreement, should be denied.

The motion court nonetheless properly dismissed the amended complaint's second and third causes of action seeking, in effect, imposition of a vendor's lien against the property. On November 25, 2011, WC conveyed the property to a third-party bona fide purchaser for value. At the time of this conveyance, there was

no notice of pendency in effect, as plaintiff did not seek a stay of the November 2011 order cancelling the notice of pendency. It is well-settled that, when a "complaint involving title to or the right to possess and enjoy real property has been dismissed on the merits and there is no outstanding notice of pendency or stay, the property owner has a right to transfer or otherwise dispose of the property unrestricted by the dismissed claim" (*Da Silva v Musso*, 76 NY2d 436, 440 [1990]). This is so even where the "purchaser who has acquired the property for value during the pendency of a claimant's appeal" has "actual knowledge of the appeal" (*id.* at 442; *see Sakow v 633 Seafood Rest.*, 1 AD3d 298, 299 [1st Dept 2003]).

These principles dispose of the issue of plaintiff's notice of pendency and vendor's lien. Indeed, a vendor's lien is not "enforceable against a bona fide purchaser" (*Village of Philadelphia v FortisUS Energy Corp.*, 48 AD3d 1193, 1195 [4th Dept 2008]; *see Hopper v Hopper*, 103 AD2d 911, 913 [3d Dept 1984]).

Plaintiff contends that WC's conveyance to 2035 Newbold was a "sham transfer" to an "affiliated entity with the same control group and for no valuable consideration." This contention lacks merit. The November 2011 conveyance was recorded to have been

effected for $3,185,000, and the record indicates that significant transfer taxes, totalling over $96,000, were paid. Nor is there any record evidence that the November 2011 vendee is controlled by WC. In any event, because plaintiff "failed to obtain a stay of the order canceling the notice of pendency," the November 2011 vendee should be "deemed a bona fide purchaser for value" (*P.A.C.W.S., Ltd. v Reineke*, 175 AD2d 154, 155 [2d Dept 1991]). Moreover, to the extent that plaintiff wished to challenge the November 2011 conveyance, it was incumbent on it to add the vendee as a defendant to this action or otherwise obtain jurisdiction over that third party.

Plaintiff's appeal from the October 2012 order, insofar as it denied reargument, should be dismissed as taken from a nonappealable order (*see D'Andrea v Hutchins*, 69 AD3d 541, 542 [1st Dept 2010]; *Parker v Marglin*, 56 AD3d 374, 374-375 [1st Dept 2008]). To the extent that plaintiff genuinely sought and was denied renewal, it is well-settled that the "subsequent retention of an expert is not proper grounds for renewal" (*Sullivan v Harnisch*, 100 AD3d 513, 514 [1st Dept 2012]). This is all the more so where, as here, plaintiff offered no reasonable excuse

for its failure to submit its expert affidavit in opposition to WC's dismissal motion.

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: FEBRUARY 4, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11636 In re Nishe Rasheen G.,

Dependent Child Under Eighteen
Years of age, etc.,

Earl Rasheen G., etc.,
Respondent-Appellant,

Cardinal McCloskey Services, et al.,
Petitioners-Respondents.

_____

Julian A. Hertz, Larchmont, for appellant.

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

Patricia L. Moreno, Bronx, attorney for the child.

_____

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about November 26, 2012, which, upon a fact-finding determination that respondent father abandoned and permanently neglected his child, terminated his parental rights, and committed custody and guardianship of the child to petitioner agency and the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The court properly determined that respondent abandoned the child by failing to make even minimal efforts to maintain contact with the agency during his incarceration. In the context of abandonment, a showing of diligent efforts by an authorized

agency to encourage the parent's relationship with the child is not required (*see Matter of Gabrielle HH.*, 1 NY3d 549, 550 [2003]; *Matter of Omar Shaheem Ali J. [Matthew J.]*, 80 AD3d 463 [1st Dept 2011]). In any event, the agency established that it nonetheless made such diligent efforts and, therefore, the court also properly determined that respondent permanently neglected the child by failing to maintain contact, provide support, gifts or letters for the child, and by failing to address the conditions that led to the child's placement into foster care (*see Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986]).

In light of the foregoing, the court also properly determined that it was in the best interest of the child to terminate respondent's parental rights to free the child for adoption.

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

ENTERED: FEBRUARY 4, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11637-
11638-
11639 The People of the State of New York,
Respondent,

-against-

Kakhaber Gogoladze,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Ekkehart Schwarz,
Defendant-Appellant.

Ind. 1360/09

_____

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

Steven Banks, The Legal Aid Society, New York (Ellen Dille of counsel), for Ekkehart Schwarz, appellant.

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered March 15, 2010, convicting defendant Kakhaber Gogoladze, after a jury trial, of robbery in the second degree and grand larceny in the second degree, and sentencing him to concurrent terms of 5 years and 1⅔ to 5 years, unanimously affirmed. Judgment, same court and Justice, rendered February 25, 2010, convicting defendant Ekkehart Schwarz, after a jury

trial, of robbery in the first degree, two counts of robbery in the second degree and grand larceny in the second degree, and sentencing him to concurrent terms of 8 years, 8 years and 5 to 15 years, and order, same court and Justice, entered on or about June 7, 2012, which denied Schwarz's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Defendant Schwarz's argument that the evidence was insufficient to establish his accessorial liability is unavailing. As to each of the two incidents at issue, the evidence supports reasonable inferences that Schwarz intended to forcibly steal property and was liable for the acts of his two codefendants (*see* Penal Law § 20.00). Schwarz did not preserve his challenges to the proof supporting other elements of the crimes of which he was convicted, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

We also reject each defendant's claim that the verdict was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations.

The court properly denied Schwarz's CPL 440.10 motion, in which he alleged ineffective assistance of counsel. The trial

record and the submissions on the motion establish that Schwarz received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Schwarz has not shown that any of his counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived him of a fair trial or affected the outcome of the case. In particular, many of Schwarz's lawyer's alleged omissions involved matters that were adequately pursued by the lawyers for Gogoladze and the other jointly tried codefendant, and Schwarz has not established that his counsel's failure to duplicate cocounsels' efforts was objectively unreasonable, or that it caused any prejudice (*see People v Ross*, 209 AD2d 730 [2d Dept 1994], *lv denied* 84 NY2d 1038 [1995]). Schwarz's counsel's other alleged errors and omissions were of minor significance.

Under the circumstances present, the prosecutor did not have a duty to "correct" testimony by the victim that was inconsistent with an interview report. The interview notes were available to defendants, who had a full opportunity to use them for impeachment purposes to the extent they saw fit, and there has been no showing of prejudice (*see e.g. People v Reckovic*, 100

AD3d 427, 428 [1st Dept 2012], *lv denied* 20 NY3d 1103 [2013]). Schwarz's constitutional claims relating to this issue are without merit.

The court properly exercised its discretion in admitting into evidence two documents that were found on the computer of the jointly tried third defendant. These documents were relevant to issues such as intent, and their probative value exceeded any potential for prejudice (*see generally People v Scarola*, 71 NY2d 769, 777 [1988]; *People v Alvino*, 71 NY2d 233, 242 [1987]).

The court properly exercised its discretion in denying defendant Gogoladze's request to introduce certain intercepted phone conversations. This evidence constituted hearsay having no relevant purpose other than to prove the truth of the matter asserted (*see People v Reynoso*, 73 NY2d 816, 818-819 [1988]). Gogoladze did not preserve the theories of admissibility he asserts on appeal, or his claim that he was constitutionally entitled to introduce this evidence (*see People v Lane*, 7 NY3d 888, 889 [2006]). Since Schwarz did not join in the application, he did not preserve either a state law or a constitutional claim (*see People v Buckley*, 75 NY2d 843, 846 [1990]). We decline to review any of these unpreserved claims in the interest of justice. As an alternative holding, we reject them on the

merits.

Schwarz's related claim that the prosecutor made an improper summation remark concerning defense access to the intercepted conversations does not warrant reversal, since the court's instructions were sufficient to prevent any prejudice. Schwarz's remaining challenges to the prosecutor's opening and closing statements are unpreserved (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

The court's instruction on whether a factual omission may constitute a prior inconsistent statement was in accordance with the law (*see People v Bornholdt*, 33 NY2d 75, 88-89 [1973], *cert denied sub nom. Victory v New York*, 416 US 905 [1974]). Schwarz's remaining challenges to the court's charge are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

We decline to invoke our interest of justice jurisdiction to dismiss the noninclusory concurrent counts of second-degree robbery and second-degree grand larceny of which defendant

Schwarz was convicted (*see People v Black*, 66 AD3d 512, 513 [1st Dept 2009], *lv denied* 13 NY3d 937 [2010]).

We perceive no basis for reducing either defendant's sentence.

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

ENTERED: FEBRUARY 4, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11640 Polo Electric Corp., Index 652421/10
Plaintiff-Appellant,

-against-

New York Law School,
Defendant-Respondent,

"John Doe#1," et al.,
Defendants.

_____

Marc E. Elliott, P.C., New York (Marc E. Elliott of counsel), for appellant.

Schiff Hardin LLP, New York (Frank L. Wagner of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 23, 2012, which granted defendants' motion to dismiss the first, third, and fourth causes of action of the amended complaint, to dismiss the amended complaint in its entirety as against defendant Pavarini McGovern, LLC, and to declare that any remaining damages claims for additional work, delay, or acceleration were precluded by the parties' contract, unanimously affirmed, without costs.

The causes of action relating to additional work, delay and acceleration of scheduled work were properly dismissed, as the alleged cause of the delays was within the contemplation of the "no damages for delay" clauses in the parties' contract (*see*

Corinno Civetta Constr. Corp. v City of New York, 67 NY2d 297, 313-314 [1986]; *Bovis Lend Lease (LMB), Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135 [1st Dept 2013]). No exceptions to enforcement of those clauses are applicable or were agreed to by the parties.

The motion court also properly determined that plaintiff was not wrongfully terminated and that, under the contract, defendants could reduce plaintiff's contractual work. In addition, plaintiff is precluded from recovery on a theory of unjust enrichment by the existence of the contract (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Defendant Pavarini McGovern, LLC, an agent of the disclosed principal, defendant New York Law School, was not personally bound (*see Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964]).

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

ENTERED: FEBRUARY 4, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11642 Thomas A. Mike, Index 108385/10
Petitioner-Respondent,

-against-

91 Payson Owners Corp., et al.,
Respondents-Appellants.

_____

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

Barry, McTiernan & Moore, LLC, New York (Laurel A. Wedinger of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered August 5, 2013, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was injured after he allegedly slipped and fell on ice obscured by new snow that was on the sidewalk in front of the building where he lived. Although defendants, the owner and property manager of the building, established that it was snowing when plaintiff fell, the conflicting expert affidavits as to the weather conditions that existed on the day of and days prior to the accident raised triable issues as to whether the ice that allegedly caused the accident was formed before the storm, as opposed to being created by the precipitation from the storm in progress (*see Bogdanova v Falcon Meat Mkt.*, 107 AD3d 638, 639

[1st Dept 2013]; *Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 567 [1st Dept 2011]). Defendants also failed to indicate when the sidewalk had last been inspected or cleaned of snow and ice (*see Bojovic v Lydig Bejing Kitchen, Inc.*, 91 AD3d 517 [1st Dept 2012]), and their showing of their general cleaning procedures is insufficient to satisfy their burden of establishing that they lacked notice of the alleged condition prior to the accident (*see Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d 412 [1st Dept 2013]). Plaintiff's affidavit does not conflict with his deposition testimony (*see Alvia v Mutual Redevelopment Houses, Inc.*, 56 AD3d 311, 312 [1st Dept 2008]).

Defendant property manager's fact-based argument that it cannot be held liable under the Administrative Code is raised for the first time on appeal, and we decline to review it (*see e.g. Ta-Chotani v Doubleclick, Inc.*, 276 AD2d 313 [1st Dept 2000]). Were we to review the argument, we would find it unavailing.

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

ENTERED: FEBRUARY 4, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11643 The People of the State of New York, Docket 39111C/10
Respondent,

-against-

Andrew Brightharp,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (William McGuire, J.), rendered on or about November 3, 2011, unanimously affirmed.

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

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

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

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

ENTERED: FEBRUARY 4, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, JJ.

11644N In re Tri-Rail Construction, Inc., Index 113454/11
Petitioner-Respondent,

-against-

Environmental Control Board
of the City of New York, etc.,
Respondent-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for appellant.

Rabinowitz & Galina, Mineola (Maxwell J. Rubin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered March 8, 2012, which, inter alia, granted the petition to set aside respondent's denial of petitioner's requests to vacate default judgments on the First and Second Notices of Violation (NOVs), and granted hearings on the violations, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

The record demonstrates that the subject NOVs were properly served on petitioner pursuant to Business Corporation Law § 306(b), and petitioner defaulted on both NOV hearing dates. Petitioner failed to demonstrate that it fulfilled the requirements set forth in 48 RCNY 3-82(c), inasmuch as it failed to request a new hearing within one year of the time it learned

of the existence of the violations. Petitioner also failed to request a stay of entry of the default judgments for "good cause shown" within 30 days of respondent mailing the notices of default (New York City Charter § 1049-a[d][1][h]). Furthermore, contrary to petitioner's argument that it was an improper party, the letter allegedly constituting such evidence shows that the NOVs were issued prior to petitioner being terminated from the construction project.

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

ENTERED: FEBRUARY 4, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11645 The People of the State of New York, Ind. 2582/11
Respondent,

-against-

Johnnie Robinson,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered January 10, 2012, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of five years, unanimously affirmed.

Since defendant's allegedly exculpatory statement at sentencing cannot be construed as a motion to withdraw his plea, his claim that the court should have inquired into the voluntariness of the plea is unpreserved (*see People v Lopez*, 71 NY2d 662, 665 [1988]), and we decline to review it in the interest of justice. As an alternate holding, we find the claim to be without merit. The plea allocution record establishes that the plea was voluntary, and that nothing cast doubt on defendant's guilt. In the absence of a plea withdrawal motion,

no inquiry was necessary (*see e.g. People v Byrne*, 37 AD3d 179 [1st Dept 2007]). In any event, defendant's statement at sentencing that he "had no weapons" was consistent with his plea to attempted

possession, as well as with the underlying facts.

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

ENTERED: FEBRUARY 4, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11646 In re Irfan Karakus, et al., Index 100499/13
Petitioners,

-against-

New York City Department of Consumer Affairs,
Respondent,

_____

Moira C. Brennan, New York, for petitioners.

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

_____

Determination of respondent Department of Consumer Affairs (DCA), dated March 13, 2013, which, after a hearing, determined that petitioners violated Administrative Code of the City of New York § 20-254(c), imposed monetary penalties, and revoked the pedicab license of petitioner Cycle Stone, Inc., unanimously annulled, without costs, and the petition brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Doris Ling-Cohan, J.], entered May 15, 2013), granted.

Upon randomly stopping a pedicab owned by petitioner Cycle Stone and operated by petitioner Diallo, who had leased it for the day, officers of the New York City Department of Parks and Recreation subjected it to an inspection and issued citations, in the form of "notices of hearing," to both owner and driver,

charging that the pedicab's taillights and turn lights were non-operational, in violation of Administrative Code § 20-254. Diallo was charged with a third infraction for failing to issue a receipt to his passengers. Although Cycle Stone was not expressly apprised that the agency was considering revocation of its license if the violations were sustained at the hearing, we find that the notice and hearing requirements of due process were satisfied. Petitioners are charged with the knowledge that Administrative Code of the City of New York § 20-261 authorizes the Commissioner to suspend or revoke a pedicab business license for (inter alia) violation of "any law applicable to the operation of a pedicab business." Further, the record makes clear that petitioners' counsel was aware of the possible penalties and made specific arguments against revocation of Cycle Stone's license.

However, the DCA's determination must be annulled. Although we agree with respondent that the pedicab industry is pervasively regulated and that under the "closely regulated business exception," a warrant is not a prerequisite for a finding that the inspection was constitutional (*see People v Quackenbush*, 88 NY2d 534, 542 [1996]), we find that the officers' conduct was not reasonable within the meaning of the Fourth Amendment and Article I, § 12 of the New York State Constitution. Even assuming a

compelling government interest in surprise inspections of pedicabs in the absence of particularized suspicion, such stops do not meet constitutional standards unless "undertaken by 'some system or uniform procedure, and not gratuitously or by individually discriminatory selection'" (*Quackenbush*, 88 NY2d at 544 n5, *quoting People v Ingle*, 36 NY2d 413, 419 [1975]). The record indicates that petitioners' pedicab was selected for on-the-spot inspection based on the discretion of one or more officers, not pursuant to a uniform procedure or subject to any objective standard.

Further, on the facts of this case, the exclusionary rule applies to bar use of the evidence at the administrative proceeding, based on a "'balancing [of] the foreseeable deterrent effect against the adverse impact on the truth-finding process'" (*Matter of Boyd v Constantine*, 81 NY2d 189, 195 [1993] [quoting *People v Drain*, 73 NY2d 107, 110 [1989]).

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

ENTERED: FEBRUARY 4, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11647 Geraldo Ramos, Index 305771/08
Plaintiff, 83856/09

-against-

The Pet Market West 57th Street, Inc., et al,
Defendants-Appellants.

- - - - -

The Pet Market West 57th Street, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Boleshaw Dumicz, et al.,
Third-Party Defendants,

VL Electrical, Inc.,
Third-Party Defendant-Respondent.

_____

Milber, Makris, Plousadis & Seiden, LLP, White Plains (David C. Zegarelli of counsel), for appellants.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Harriet Wong of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered June 19, 2012, which, insofar as appealed from as limited by the briefs, granted third-party defendant VL Electrical, Inc.'s motion for summary judgment dismissing common-law contribution and apportionment claims as against it, unanimously affirmed, without costs.

Although the record presents an issue of fact as to the ownership of the ladder from which plaintiff fell, that issue is

not material to the disposition of VL Electrical's motion for summary judgment, since VL Electrical owed no duty to plaintiff, and "ha[d] [no] part in causing or augmenting the injury for which contribution is sought" (*see Raquet v Braun*, 90 NY2d 177, 183 [1997]). VL Electrical was not present at the time of the accident, had not supplied plaintiff with the ladder, had no supervision, direction or control over plaintiff's work, and had no duty to provide him with safe equipment (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *Vargas v New York City Tr. Auth.*, 60 AD3d 438, 441 [1st Dept 2009]).

We have considered defendants and third-party plaintiff's remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 4, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11648 The People of the State of New York, Ind. 6637/03
Respondent,

-against-

Rafael Sanabria,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered on or about February 24, 2011,

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

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

ENTERED: FEBRUARY 4, 2014

CLERK

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

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11649-
11650-
11651 Index 105381/08

Joseph Pipia, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Turner Construction Company, et al.,
Defendants-Respondents-Appellants.

_____

Hofmann & Schweitzer, New York (Paul T. Hofmann of counsel), for appellants-respondents.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Peter T. Shapiro of counsel), for Turner Construction Company, The City of New York, Governor's Island Preservation and Education Corp., New York City Economic Development Corporation, and Trevcon Construction Inc., respondents-appellants.

O'Connor Redd, LLP, Portchester (Michael P. Hess of counsel), for J.E.S. Plumbing & Heating Corp., respondent-appellant.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 18, 2012, which denied plaintiffs' motion for summary judgment as to liability on the Labor Law §§ 240(1) and 241(6) claims as against defendants Turner Construction Company, Governor's Island Preservation and Education Corporation (GIPEC), and Trevcon Construction Inc., granted the cross motion by the aforesaid defendants and defendants City of New York and New York City Economic Development Corporation (NYCEDC) for summary judgment dismissing the complaint, and sub silentio denied the motion by all the aforesaid defendants for summary judgment on

their cross claims against defendant J.E.S. Plumbing & Heating Corp. (JES), unanimously modified, on the law, to grant plaintiffs' motion for partial summary judgment on the Labor Law § 240(1) claim as against Turner and GIPEC, to deny the motion by all defendants except JES (hereinafter, defendants) for summary judgment dismissing the Labor Law § 240(1) claim as against Turner and GIPEC and the Labor Law § 200 and common-law negligence claims as against Trevcon to the extent they are based on the alleged defective hole in the float stage, and to grant defendants' motion for summary judgment on the cross claims against JES for breach of contract to procure insurance for Turner, Trevcon and NYCEDC, and otherwise affirmed, without costs. Appeal therefrom by JES, unanimously dismissed, without costs, as taken by a non-aggrieved party. Order, same court and Justice, entered June 18, 2012, which denied as moot defendant JES's motion for summary judgment dismissing the cross claims against it, unanimously modified, on the law, to grant the motion as to the cross claims for contractual indemnification of defendants GIPEC, Turner, and Trevcon and the cross claims for breach of contract to procure insurance for GIPEC and the City, and otherwise affirmed, and appeal therefrom by plaintiffs and defendants unanimously dismissed, without costs, as taken by non-aggrieved parties. Order, same court and Justice, entered June

20, 2012, which denied as moot plaintiffs' motion to strike certain affirmative defenses or vacate the stipulation of discontinuance of the negligence action as against defendant JES, unanimously affirmed, without costs.

Since the accident in which plaintiff Joseph Pipia (hereinafter plaintiff) was injured occurred in navigable waters, and plaintiff, an employee who was covered by the Longshore and Harbor Workers' Compensation Act (LHWCA) (33 USC § 901 *et seq.*), has been receiving benefits thereunder, federal maritime law is applicable to this case (*see Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169 [1st Dept 2005]). Plaintiff may not sue his employer, JES, since the LHWCA "precludes recovery of damages against [the injured worker's] employer" (*Lee v Astoria Generating Co., L.P.*, 13 NY3d 382, 390 [2009], *cert denied* __ US __, 131 S Ct 215 [2010]). Plaintiff's arguments in support of his motion to vacate the stipulation of discontinuance against JES are unavailing.

Plaintiff is also barred from asserting any claims other than Labor Law § 200 and common-law negligence claims against Trevcon, the vessel owner (*see* 33 USC § 933; *Eldoh v Astoria Generating Co., L.P.*, 81 AD3d 871, 874 [2d Dept 2011]). Contrary to plaintiff's contention, the float stage involved in his accident constituted a "vessel" for purposes of the LHWCA (*see*

Stewart v Dutra Constr. Co., 543 US 481 [2005]). While it consisted of wooden planks bolted together, had limited weight capacity and could only be moved short distances from the pier, it was regularly used to carry workers and materials around the water. Although it generally was tied to land structures with a line, it sometimes was untied to allow a worker to move to a different location to pick up materials from the pier. Like the vessel at issue in *Stewart*, which "navigate[d] short distances by manipulating its anchors and cables" (543 US at 484), the float stage, which had no motor, was moved across the water by a combination of a line and a long wooden stick. "[A] reasonable observer, looking to the [float stage]'s physical characteristics and activities, would . . . consider it to be designed to [a] practical degree for carrying people or things on water" (*Lozman v City of Riviera Beach*, __ US __, 133 S Ct 735, 741 [2013]).

The LHWCA does not, however, preempt any of plaintiff's claims against GIPEC and Turner, the project owner and general contractor, respectively, since the state Labor Law is not inconsistent with federal maritime law (*see Cammon v City of New York*, 95 NY2d 583, 589-590 [2000]; *Olsen*, 16 AD3d at 171). Moreover, notwithstanding the federal government's grant of part of Governor's Island to GIPEC, plaintiff's accident, which arose from repairs being made to a pier in a narrow waterway between

Governor's Island and Brooklyn, was essentially local in character (*see Cammon*, 95 NY2d at 590; *Olsen*, 16 AD3d at 171).

Plaintiff is entitled to summary judgment on his Labor Law § 240(1) claim as against GIPEC and Turner. Although his injuries resulted directly from his fall on the float stage, at the same level where he had been working, he fell while struggling to avoid the elevation-related risk of falling into the water (*see Pesca v City of New York*, 298 AD2d 292 [1st Dept 2002]; *see also Dooley v Peerless Importers, Inc.*, 42 AD3d 199 [2d Dept 2007]). Defendants failed to refute plaintiff's expert professional engineer's affidavit setting forth numerous devices that could have provided additional protection against falling off the float stage. We also reject Turner's argument that it cannot be held liable pursuant to Labor Law § 240(1) because it was merely a construction manager. Notwithstanding that its contract with GIPEC referred to Turner as a consultant, rather than a general contractor, Turner served as a general contractor for purposes of the statute since it was obligated to perform the larger facilities management project for GIPEC of which plaintiff's project was a part, hire all subcontractors and other personnel necessary to complete the project, and coordinate their work to ensure the timely completion of the project (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]).

In light of the foregoing, we need not address plaintiff's common-law negligence and Labor Law §§ 200 and 241(6) claims against GIPEC and Turner (*see Fanning v Rockefeller Univ.*, 106 AD3d 484 [1st Dept 2013]).

The Labor Law § 200 and common-law negligence claims are predicated, in part, on plaintiff's having fallen onto his back after his foot got caught in rebar that had been installed across a hole in the float stage that was uncovered. Plaintiff's expert opined that the hole should have been covered. Trevcon, which owned the float stage and supplied it to plaintiff's employer, failed to establish that it lacked notice of this condition or that the condition was not dangerous (*see Raffa v City of New York*, 100 AD3d 558 [1st Dept 2012]).

Trevcon established its entitlement to the dismissal of the Labor Law § 200 and common-law negligence claims predicated on other conditions, and plaintiff failed to raise triable issues of fact as to those conditions. There is no evidence that plaintiff's fall was caused by algae on the float stage. Nor can plaintiff hold Trevcon responsible for the effect of waves on the float stage or the absence of a "wave watcher." Waves were "an obvious condition known to plaintiff," a 54-year-old foreman who had been working on the site for several months (*see Keane v Chelsea Piers, L.P.*, 71 AD3d 593, 594 [1st Dept 2010]). To the

extent plaintiff claims that his accident resulted from the means or methods of his work, Trevcon cannot be held liable because the record fails to show that it exercised the requisite supervisory control (*see generally Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). Although Trevcon supplied the float stage and a Trevcon employee had previously assisted plaintiff and another JES worker on the float stage, no Trevcon employees had been present on the site for about a week leading to the accident. Moreover, plaintiff testified that a JES supervisor was the person who instructed him on how to perform the work.

As the owner of the vessel, Trevcon is barred by the LHWCA from asserting its contractual indemnification claims against JES, plaintiff's employer. "The employer [of a covered person injured due to "the negligence of a vessel"] shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void" (33 USC § 905[b]).

GIPEC and Turner are not entitled to contractual indemnification pursuant to the subcontract between Trevcon and JES, because a provision in a subcontract incorporating standard clauses from the main contract by reference does not include indemnification clauses (*see Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260, 261 [1st Dept 2008]).

JES implicitly concedes that it failed to obtain insurance naming Trevcon, Turner, and NYCEDC as additional insureds. However, its obligation to procure insurance did not apply to GIPEC and the City of New York, since they were not named in that provision of the subcontract (*see id.*).

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

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

ENTERED: FEBRUARY 4, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11652 Jennifer Mendoza, Index 260343/11
Plaintiff,

-against-

Farmers Insurance Company,
Defendant-Appellant,

Motor Vehicle Accident Indemnification
Corporation, also known as MVAIC,
Defendant-Respondent.

_____

John C. Buratti & Associates, New York (Julie M. Sherwood of counsel), for appellant.

Marshall & Marshall, PLLC, Jericho (Jeffrey Kadushin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about October 3, 2012, which, after a framed issue hearing, found that defendant Farmers Insurance Company is obligated to provide plaintiff with coverage for the subject accident, unanimously affirmed, with costs.

Mandatory arbitration is the sole available remedy pursuant to 11 NYCRR § 65-4.11 and Insurance Law § 5105 and § 5221(b)(6) in order to determine issues of coverage between insurance carriers and defendant Motor Vehicle Accident Indemnification Corporation (MVAIC). The fact that appellant submitted its "contentions," which included the affirmative defense of no coverage due to cancellation of the policy, establishes that it

was aware of the arbitration proceeding, and yet did not appear, seek an adjournment to present the necessary documentation regarding the cancellation, or file a petition to vacate the arbitration award pursuant to CPLR 7511. Thus, appellant had a "full and fair opportunity to contest the decision" (*Matter of American Ins. Co. (Messinger--Aetna Cas. & Sur. Co.)*, 43 NY2d 184, 192 [1977]), and failed to do so.

The issue in both actions was the alleged cancellation of the insurance policy, which was decided by the arbitrator. The fact that plaintiff now seeks bodily injury benefits does not alter this result, as there is no evidence that the parties arbitrated under an agreement to limit the preclusive effect of the arbitration decision (*cf. Kerins v Prudential Prop. & Cas.*, 185 AD2d 403, 404 [3d Dept 1992]).

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

ENTERED: FEBRUARY 4, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11656 The People of the State of New York, Ind. 5685/09
Respondent, 5450/09

-against-

Raul Lora,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J.), rendered on or about February, 2, 2011,

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

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

ENTERED: FEBRUARY 4, 2014

CLERK

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

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11657 Sven Grasshoff, Index 650832/12
Plaintiff-Respondent,

-against-

Aaron Etra,
Defendant-Appellant.

_____

William M. Pinzler, New York, for appellant.

Lax & Neville LLP, New York (Raquel Terrigno of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 29, 2013, which denied defendant's motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, with costs.

In this action for, inter alia, breach of contract, breach of fiduciary duty, negligent misrepresentation, and conversion, in which plaintiff alleges that defendant violated his contractual and fiduciary obligations by disbursing funds from an escrow account contrary to the terms of the contract and without authority, the motion court properly denied defendant's motion. We note that on this pleading motion we are unable to determine the authenticity of defendant's signature on the contract. The complaint sufficiently pleads the causes of action asserted (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; CPLR 3211[a][7]).

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

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

ENTERED: FEBRUARY 4, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11658 The People of the State of New York, Ind. 3044/06
Respondent,

-against-

Luis Ortiz,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Joseph Nursey of counsel), and Jones Day, New York (Jordan Cerruti of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Catherine M. Reno of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered January 24, 2011, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a persistent felony offender, to a term of 23 years to life, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

The court properly determined that the doctrine of collateral estoppel did not require preclusion of all evidence pertaining to defendant's possession, use or threatened use of a razor blade, since he failed to meet his heavy burden to establish that the jury at his first trial necessarily decided these particular factual issues in his favor (*see People v Acevedo*, 69 NY2d 478, 487 [1987]). "[C]ollateral estoppel should be applied sparingly in criminal cases" (*People v O'Toole*,

__NY3d__, 2013 NY Slip Op 08193, *3).

At defendant's first trial, which led to reversal by this Court (69 AD3d 490 [1st Dept 2010]), defendant was acquitted of first-degree burglary and robbery but convicted of second-degree burglary. Based on a "practical, rational reading" (*Acevedo*, 69 NY2d at 487), of the record of the first trial, including the evidence presented and the issues raised, we conclude that a "rational jury could have grounded its decision on an issue other than that which the defendant seeks to foreclose from consideration" (*People v Goodman*, 69 NY2d 32, 40 [1986]).

Moreover, it is apparent in this case that "the *Acevedo* rule [could not] practicably be followed if a necessary witness [were] to give truthful testimony" (*O'Toole*, 2013 NY Slip Op 08193 at *4). As we indicated on the prior appeal, the case turned on the credibility issue of whether the incident was an altercation or a home invasion. Thus, the presence of the razor blade was essential to completing the complaining witnesses' narrative and establishing the criminal intent element of burglary, and defendant was properly precluded from "tak[ing] unfair advantage of the dilemma that *Acevedo* creates for the People" (*id.*).

None of the issues raised by defendant relating to his impeachment by way of a statement made by his attorney warrant reversal. The court properly admitted a statement made at arraignment by defendant's counsel, who was also trial counsel,

to impeach defendant after he testified to a different version of the events (*see People v Brown*, 98 NY2d 226, 232-233 [2002]). At the arraignment, the attorney stated that defendant was the source of the information, and the attorney was clearly acting as defendant's authorized agent when she provided this information to the arraignment court for her client's benefit (*see People v Moye*, 11 AD3d 212 [1st Dept 2004], *lv denied* 4 NY3d 766 [2005]; *see also People v Kallamni*, 14 AD3d 316 [1st Dept 2005], *lv denied* 4 NY3d 854 [2005]), notwithstanding her assertion at trial that she had inaccurately conveyed her client's version of the incident. Introduction of the statements did not require the People to call counsel as a witness against her client (*see People v Castillo*, 94 AD3d 678, 679 [1st Dept 2012], *lv denied* 19 NY3d 971 [2012]), and the People never sought to do so.

Defense counsel moved for a mistrial, claiming, among other things, that she would have to testify on her client's behalf to explain the inaccuracy in her arraignment statement. The court properly exercised its discretion in denying that drastic remedy, because the court, with the participation of the parties, took sufficient steps to prevent defendant from being prejudiced. To the extent the advocate-witness rule was implicated in this case, it only involved the ethical rule against testifying *for* one's client (*see People v Berroa*, 99 NY2d 134, 140 [2002]). Unlike the stipulation in *Berroa*, here the stipulation to the attorney's

testimony was sufficient to both protect defendant's interests regarding the impeachment issue and to avoid an advocate-witness problem.

By failing to make timely and specific objections, defendant failed to preserve his challenges to the prosecutor's summation (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. Defendant also failed to preserve any of his present constitutional claims regarding the admission of the arraignment statement and the related issues, including his claim that he was deprived of his right to conflict-free counsel. We decline to review any of these unpreserved claims in the interest of justice. As an alternative holding, we reject them on the merits.

A new sentencing proceeding is required because the court imposed a longer sentence than the one defendant received after his first trial, and there was no "record articulation of some event becoming known or available only after the first sentence

and justifying the more severe sentence" (*People v Van Pelt*, 76 NY2d 156, 161 [1990]). In light of this determination, we do not reach defendant's contention that his sentence should be reduced in the interest of justice.

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

ENTERED: FEBRUARY 4, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11659 Abu Dhabi Commercial Bank, P.J.S.C., Index 115417/10
Plaintiff-Appellant,

-against-

Credit Suisse Securities (USA) LLC, et al.,
Defendants-Respondents,

The McGraw-Hill Companies, Inc.,
doing business as Standard & Poor's
Ratings Services, et al.,
Defendants.

_____

Lewis Baach PLLC, New York (Eric L. Lewis of counsel), for appellant.

Bingham McCutchen LLP, New York (Susan F. DiCicco of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 3, 2012, which granted plaintiff Abu Dhabi Commercial Bank, P.J.S.C.'s (ADCB) motion for leave to renew and, upon renewal, adhered to a prior determination granting defendants Credit Suisse Securities (USA) LLC and Credit Suisse International's (Credit Suisse) motion to dismiss the claims for fraud, fraudulent inducement, and fraudulent concealment pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, with costs.

Plaintiff ADCB alleges that defendant Credit Suisse fraudulently induced it to enter into a restructuring transaction, causing it to lose a substantial portion of its

original $40 million investment and face additional potential liability in excess of its investment. In a prior determination, Supreme Court dismissed the fraud claim on the ground that the allegations of misrepresentation and justifiable reliance are undermined by the warnings of risks and disclaimers in the selling and transaction documents. In seeking leave to renew, ADCB relies on documents produced by a nonparty, purportedly showing that Credit Suisse engaged in self-dealing in executing the restructuring transaction, and criminal indictments and a civil complaint in federal proceedings against several Credit Suisse bankers who allegedly engaged in a massive scheme involving mismarking and mispricing of assets similar to those involved in the restructuring transaction here.

A motion for leave to renew a prior motion "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2], [3]; *American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473, 476 [1st Dept 2006]). Here, ADCB has not set forth reasonable justification for its failure to submit the documents demonstrating self-dealing by Credit Suisse, as those documents

were in its possession before the motion was decided (*see Rowe v NYCPD*, 85 AD3d 1001 [2d Dept 2011]). To the extent ADCB contends that those documents were part of a voluminous production of documents, such argument is unavailing (*see American Audio Serv. Bur.*, 33 AD3d at 476). Further, ADCB never made a request for additional time to review the documents before filing its opposition to defendant's motion, nor did it raise these "new" facts during oral argument on the motion two months later.

The federal indictments and complaint show new facts of mismarking and mispricing that ADCB was not aware of at the time the motion was being decided, as the indictments and complaint did not become public until six months after the court decided the motion to dismiss. Nevertheless, such evidence does not change the prior determination that ADCB has not stated a claim for fraud as the facts contained in the indictments and complaint do not show that the mismarking of assets affected the restructuring transaction. ADCB's contention to the contrary is speculative.

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

ENTERED: FEBRUARY 4, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11661 In re Marisol R.,
Petitioner-Appellant,

-against-

Atai T.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Saira Wang of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Paul A. Goetz, J.), entered on or about April 8, 2013, which dismissed the petition for an order of protection, unanimously affirmed, without costs.

Family Court lacked jurisdiction over this matter under Family Court Act § 812.

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

ENTERED: FEBRUARY 4, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11662 Kafa Investments, LLC, et al., Index 650349/08
Plaintiffs-Appellants,

-against-

2170-2178 Broadway LLC, et al.,
Defendants-Respondents.

_____

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Eliott Berman of counsel), for appellants.

Franklin R. Kaiman, New York, for respondents.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 23, 2013, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

In the agreement governing plaintiffs' sale of their interest in an entity that owned certain hotels to defendants, the co-owners of the entity, plaintiffs released defendants from "any and all claims" "known and unknown." That language bars this action for fraud arising from the alleged intentional misrepresentation of the value of the entity and the interest (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de*

C.V., 17 NY3d 269 [2011]). That defendants arguably are fiduciaries of plaintiffs does not invalidate the release, since they negotiated across the table from plaintiffs, who are sophisticated parties represented by counsel (*see id.* at 278).

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

ENTERED: FEBRUARY 4, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11663 The People of the State of New York, Ind. 2513/11
Respondent,

-against-

Darell Grimes,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 24, 2012, convicting defendant, after a nonjury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously affirmed.

The verdict 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. The

evidence supported the conclusion that defendant possessed numerous glassines of heroin with the intent to sell them.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 4, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11664N The People of the State of New York, etc.,
Plaintiff-Respondent,

-against-

Maurice R. Greenberg, et al.,
Defendants-Appellants.

Index 401720/05

Boies, Schiller & Flexner LLP, New York (Nicholas A. Gravante, Jr. of counsel), for Maurice R. Greenberg, appellant.

Kaye Scholer LLP, New York (Vincent A. Sama of counsel), for Howard I. Smith, appellant.

Eric T. Schneiderman, Attorney General, New York (Judith Vale of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 7, 2013, which denied defendants' motion for recusal of the Justice from presiding over this matter, unanimously affirmed, without costs.

The court's brief comment that its "subjective view" of its ability to be impartial governed the motion does not suggest it applied the wrong standard of review (*People v Moreno*, 70 NY2d 403, 405 [1987]; *People v Glynn*, 21 NY3d 614, 618-619 [2013]). While the court interrupted defense counsel's arguments on the standard for recusal and the underlying reasons for seeking recusal, the court had the fully briefed motion papers of both

parties setting forth all of their arguments.

To the extent that defendants challenge the court's various credibility determinations in its order, entered October 21, 2010, this Court has already adjudicated those issues and declined to reassign the matter at that time (95 AD3d 474 [1st Dept 2012], *affd* 21 NY3d 439 [2013]). In addition, as this Court previously noted, it was not error to rely on evidence in the related Gen Re criminal trial, as the convictions had not been overturned at the time of the court's ruling (*id.* at 484 n 3; *see United States v Ferguson*, 676 F3d 260, 289 [2011]).

The court's additional comments at oral argument on the recusal motion and purported improprieties at various proceedings, do not, standing alone or when combined with defendants' renewed challenges to the court's analysis in its October 21, 2010 order, demonstrate that the court improperly exercised its discretion in denying defendants' motion for recusal (*Moreno*, 70 NY2d at 405-406; *People v Grasso*, 49 AD3d 303, 306-307 [1st Dept 2008]). While the judge at times may have been irritated with defense counsel and the prolonged litigation, it cannot be said that his comments, alone or in the aggregate, caused his impartiality to be reasonably questioned (*see* 22 NYCRR 100.3[E][1]; *see also Liteky v United States*, 510 US 540, 555-556

[1994]; *Glynn*, 21 NY3d at 618; *Hass & Gottlieb v Sook Hi Lee*, 55 AD3d 433, 434 [1st Dept 2008]; *People v A.S. Goldmen, Inc.*, 9 AD3d 283, 285 [1st Dept 2004], *lv denied* 3 NY3d 703 [2004]).

Nor did the court's comments regarding the other pending motions during oral argument on the motion for recusal suggest any potential for bias. In fact, the court acknowledged that it could rule either way on defendants' pending summary judgment motion.

It also bears noting that defendants did not move for recusal until recently, after the court had ruled against them on summary judgment motions, after years of litigation before it (*see Glatzer v Bear, Stearns & Co., Inc.*, 95 AD3d 707 [1st Dept 2012]).

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

ENTERED: FEBRUARY 4, 2014

CLERK

Tom, J.P., Friedman, Freedman, Feinman, JJ.

10341 Milagros Cabrera, as Administrator of the Goods, Chattels and Credits which were of Raquel Gutierrez,
Plaintiff-Respondent,

-against-

Salvador Collazo,
Defendant,

Shelley B. Levy, as Executor of the Estate of Cary M. Tanzman, deceased, et al.,
Defendants-Appellants.

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Housman & Associates, P.C., Tarrytown (Mark E. Housman of counsel), for appellants.

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

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Order, Supreme Court, Bronx County (Sharon A. M. Aarons, J.), entered October 26, 2012, affirmed, without costs.

Opinion by Tom, J.P. All concur

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Helen E. Freedman
Paul G. Feinman, JJ.

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Milagros Cabrera, as Administrator of the Goods, Chattels and Credits which were of Raquel Gutierrez, etc.,
Plaintiff-Respondent,

-against-

Salvador Collazo,
Defendant,

Shelley B. Levy, as Executor of the Estate of Cary M. Tanzman, deceased, et al.,
Defendants-Appellants.

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Defendants appeal from an order of the Supreme Court, Bronx County (Sharon A. M. Aarons, J.), entered October 26, 2012, which, to the extent appealed from as limited by the briefs, denied the Tanzman defendants' motion to dismiss the claim of legal malpractice pursuant to CPLR 3211(a)(1) and (7).

Housman & Associates, P.C., Tarrytown (Mark E. Housman of counsel), for appellants.

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

TOM, J.P.

The remarkable defense proffered in this professional malpractice action is that an attorney who neglects a matter so that the statute of limitations runs against his client cannot be held legally accountable if the attorney happens to expire before the applicable limitations period. A cause of action for attorney malpractice requires: "'(1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages'" (*Kaminsky v Herrick, Feinstein LLP,* 59 AD3d 1, 9 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009], quoting *Mendoza v Schlossman*, 87 AD2d 606, 606-607 [2d Dept 1982]). The pleadings, as "[a]mplified by affidavits and exhibits in the record" (*Crosland by New York City Tr. Auth.*, 68 NY2d 165, 167 [1986]), contain allegations from which these elements can be made out and, thus, state a viable cause of action so as to survive a pre-answer motion to dismiss the complaint.

This legal malpractice action was brought by plaintiff Milagros Cabrera against defendants Shelley B. Levy, as executor of the estate of Cary M. Tanzman, Esq., and the Law Office of Cary M. Tanzman (collectively, the Tanzman defendants) and Salvador Collazo, who participated in plaintiff's representation. The Tanzman defendants brought a pre-answer motion to dismiss the

complaint for failure to state a cause of action based on documentary evidence (CPLR 3211[a][1], [7]), particularly Cary Tanzman's death certificate. The gravamen of their defense is that since the attorney-client relationship was terminated by Tanzman's death on October 24, 2010, Tanzman and his law firm cannot be held liable for any damages sustained by plaintiff as a result of the subsequent running of the statutory limitations period on November 4, 2010 (EPTL 5-4.1[1]).

The wrongful death complaint alleges that plaintiff's, decedent Raquel Gutierrez, died on November 4, 2008 as a result of negligent care and treatment that was rendered by her doctors and nurses on or about October 26, 2008.[1] According to a retainer agreement dated "November 2008," Salvador Collazo was retained by decedent's sister, Porfilio Guttierrez, to commence a wrongful death action against the allegedly negligent individuals. It is not clear what work Collazo performed in the course of a year, if any, but under cover of a memorandum dated November 23, 2009, he sent the retainer agreement and medical

[1] Disciplinary proceedings against the physician were instituted by the New York State Department of Health as a result of the treatment afforded to plaintiff's decedent and two other patients. After a hearing, the State Board for Professional Medical Conduct found that the doctor "exhibited wanton disregard for basic medical practice," resulting in the revocation of his license to practice medicine in this state.

authorizations to Tanzman. On March 11, 2010, Milagros Cabrera entered into a retainer agreement with the Tanzman law office, which included a fee-sharing provision stating that while Collazo would not be actively participating in the litigation, he "shall be participating in contacts between the Law Office of Cary M. Tanzman and the client." Also taking part in communications between the client and her lawyers was Mary Cabrera, plaintiff's daughter, who served as an interpreter and, according to her affidavit, attended all relevant meetings with defendants concerning decedent's estate.

Collazo later sent Tanzman a waiver of citation, renunciation and consent to appointment of administrator dated April 6, 2010 to expedite the issuance of limited letters of administration to plaintiff. Ten days later, Collazo was convicted of immigration and visa fraud in the United States District Court for the Southern District of New York. Mary Cabrera reported that at some point during the summer of 2010, both Collazo and Tanzman ceased responding to her attempts to contact them.

In late September, Tanzman filed a certificate of lateness with Surrogate's Court stating that "another attorney" had been contacted initially by the family and "did nothing on the file for over a year." It was followed by a letter of September 30,

2010 asking that letters of administration be issued "as soon as is possible because there is a wrongful death matter associated with the above-named decedent and the Statute of Limitations will be expiring shortly." Surrogate's Court issued letters of limited administration on October 6. On October 14, Collazo was sentenced to 24 months' imprisonment on the federal immigration and visa fraud charges.[2] On October 24, Tanzman died at Memorial Sloan-Kettering Cancer Center, and the statute of limitations on plaintiff's wrongful death action expired 11 days later on November 4. No complaint was ever filed on behalf of plaintiff, and this action for professional malpractice ensued.

Other than a death certificate, there is no evidence concerning Tanzman's treatment or the course of his illness or when he was hospitalized. Nor is there any information about the nature of his law practice, beyond a letterhead that identifies three other attorneys as "of counsel." While it is clear from the letter dated September 30, 2010 that Tanzman was aware of the impending expiration of the statute of limitations against his client, it is unknown whether he took any steps to prepare a complaint for filing or whether he attempted to enlist the

[2] Collazo was disbarred by order of this Court on January 11, 2011 based on the immigration fraud conviction (*Matter of Collazo*, 81 AD3d 220 [1st Dept 2011] [Judiciary Law § 90(4)(b), (e)]).

assistance of any other attorney including the attorneys of counsel in his firm.

According to the Tanzman defendants, neglect of a client matter by an attorney is not actionable if, as here, the attorney dies before the applicable limitations period runs against the client. Granted, it has been held that, for the purpose of determining the timeliness of a professional malpractice action, the action accrues "when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court." That a cause of action might accrue when the plaintiff actually sustains a loss, however, does not require the conclusion that an attorney is absolved of responsibility for any and all consequences of his neglect of the matter simply because it occurred *prior* to accrual of an actionable claim. Giving plaintiff the benefit of every possible favorable inference that can reasonably be drawn from the pleadings (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]), as we must on a pre-answer motion to dismiss (see *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982], *cert denied* 459 US 1146 [1983]), it appears that the inaction of counsel rendered the lapse of plaintiff's cause of action not merely possible – or even probable – but inevitable. On a motion directed at the sufficiency of the pleadings, the issue is whether the facts alleged fit within any

cognizable theory of recovery, not whether the complaint is artfully pleaded (*see Hirschhorn v Hirschhorn*, 194 AD2d 768 [2d Dept 1993]), and the circumstances of this matter do not warrant dismissal of the action, at this juncture, as against the Tanzman defendants.

The extent of the duty imposed on the attorney to commence a timely action depends on the immediacy of the running of the statutory period, and no duty will be imposed where sufficient time remains for successor counsel to act to protect the client's interests in pursuing a claim (*see Golden v Cascione, Chechanover & Purcigliotti*, 286 AD2d 281 [1st Dept 2001] [defendant law firm relieved 2½ years before claim expired]). Where, as here, the expiration of the statute of limitations is imminent and the possibility that another attorney might be engaged to commence a timely action is foreclosed, there is a duty to take action to protect the client's rights.

Plaintiff is entitled to the inference that Tanzman died as a result of a chronic, terminal illness that he knew, or should have known, presented the immediate risk that his ability to represent his clients' interests might be impaired (*see Yuko Ito v Suzuki*, 57 AD3d 205, 207 [1st Dept 2008]). Here, defendants offered no evidence to elaborate on the cause or circumstances surrounding Tanzman's death. The submitted certificate of death

for Tanzman merely states that Tanzman passed away on October 24, 2010 at Memorial Sloan-Kettering Cancer Center. The record suggests that plaintiff had cancer, and that his death may have been foreseeable, but the nature and duration of his illness cannot be determined from the death certificate and defendants' other submissions. Further, the record reflects that Tanzman was well aware that Collazo could not be relied upon to assist with plaintiff's representation. According to Tanzman's own statement, Collazo had done nothing on the matter in over a year, and Tanzman's retainer agreement assigned Collazo only a limited role in the case. In any event, as of September 2010, when Tanzman expressed his concern over the running of the statute of limitations in a letter to Surrogate's Court, Collazo had been convicted on a federal criminal offense and was facing sentencing and disbarment. Plaintiff is entitled to the factual inference that, at this late juncture and mindful of his ill health, Tanzman was aware of the need to prepare and file a complaint or to arrange for one to be filed as soon as the necessary letters of administration were received. The letters of administration was issued on October 6, 2010. Tanzman neither filed a complaint nor engaged another attorney to file one in his stead despite the availability of three attorneys associated with the firm as of counsel.

No discovery has been conducted and, in the absence of any evidence that the onset of Tanzman's final episode of illness was sudden, unanticipated and completely debilitating, the failure to seek assistance with the filing of a timely complaint represents a failure to protect plaintiff's interests. Further, plaintiff was not informed that the statute of limitations was about to expire so that she could protect her claim. Milagros Cabrera stated that in August 2011, eight months after the statute of limitations of plaintiff's cause of action had expired, Tanzman's law office mailed the case file to her in response to her efforts to learn the status of the matter. It was then that Cabrera for the first time learned that Tanzman was deceased. She later discovered, after consultation with another law office, that plaintiff's claims were time-barred and that Collazo was incarcerated. Finally, even if plaintiff had been put on notice to engage another attorney to initiate the wrongful death action, no means are identified by which the case file might have been obtained from the Tanzman firm to permit substitute counsel to file a timely complaint. In short, while the statute of limitations had not yet run at the time of Tanzman's death, nothing in the record suggests that there was any available means by which plaintiff might have preserved her wrongful death action. According the facts their most favorable intendment, at

the time of Tanzman's death, the running of the statute of limitations against his client was a foregone conclusion because intervention by substitute counsel was not possible.

Expansion of the record on a "more embracive and exploratory motion for summary judgment" (*Rovello*, 40 NY2d at 634) may or may not disclose facts demonstrating that, Tanzman was suddenly struck by a fatal and totally incapacitating episode of cancer rendering him unable to engage the services of another attorney to file a timely complaint on behalf of plaintiff or to communicate the necessity to do so. Thus, it would be premature to grant defendant's pre-answer motion and summarily dismiss the professional malpractice claim on the basis of the incomplete record before us (*id.*).

The cases relied upon in support of dismissal of the complaint state only that for the purpose of determining the limitations period for an action for professional malpractice, the statute of limitations begins to run on the date the client sustains injury (*e.g. McCoy v Feinman*, 99 NY2d 295, 301 [2002]; *Glamm v Allen*, 57 NY2d 87, 95 [1982]). These cases do not state that the severance of the attorney-client relationship, due to death of the attorney, prior to the accrual of the legal malpractice action deprives the client of any remedy for the inaction or negligence of the attorney which contributed to or

resulted in the client's injury. The holding in these cases is not a bar to a legal malpractice claim against Tanzman for alleged failure, while he was alive, to notify plaintiff that he would be unable to file the summons and complaint in time or to enlist the attorneys in his firm to assist in this endeavor. This is especially so considering the short time period between the date of Tanzman's death and the expiration of the statute of limitations on plaintiff's underlying wrongful death action 11 days later.

Likewise, it has been held that the absence of any attorney-client relationship bars an action for attorney malpractice (*e.g. Fortress Credit Corp. v Dechert LLP*, 89 AD3d 615, 616 [1st Dept 2011], *lv denied* 19 NY3d 805 [2012] [allegedly faulty legal opinion relied upon was prepared by law firm retained by third parties, not by plaintiff]), as does the severance of the attorney-client relationship prior to any act of malpractice (*e.g. Clissuras v City of New York*, 131 AD2d 717 [2d Dept 1987], *appeal dismissed* 70 NY2d 795 [1987], *appeal dismissed, cert denied* 484 US 1053 [1988] [attorney withdrew after arranging for client's consultation with an actuary regarding her claim involving disputed calculation of pension benefits]). Similarly, such cases do not go so far as to hold that an attorney is absolved of liability for his part in permitting a statute of

limitations to run against a client. To the contrary, in *Clissuras*, this Court expressly noted that counsel had withdrawn from representing the plaintiff "after advising her of the four-month Statute of Limitations" (*id.* at 719). Indeed, in *Mortenson v Shea* (62 AD3d 414, 414 [1st Dept 2009]), we noted that attorneys may be held liable for, inter alia, "neglect to prosecute an action." We stated that in pursuing an action on behalf of the plaintiff, the defendants created the impression that his claim remained viable and, under those circumstances, "defendants had a duty, at a minimum, to expressly advise plaintiff that a limitations period existed," including the need to take the necessary steps to ensure that an action was timely commenced (*id.* at 415). Whether *Mortenson* establishes an affirmative duty to advise a client with respect to the running of a limitations period, which the parties dispute, is not a question requiring immediate resolution. What *Mortenson* signifies is that an attorney will be held accountable for any misconduct that contributes to damages incurred because a statute of limitations is allowed to expire against a client.

Accordingly, the order of the Supreme Court, Bronx County (Sharon A. M. Aarons, J.), entered October 26, 2012, which, to

the extent appealed from as limited by the briefs, denied the Tanzman defendants' motion to dismiss the claim of legal malpractice pursuant to CPLR 3211(a)(1) and (7), should be affirmed, without costs.

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

ENTERED: FEBRUARY 4, 2014

CLERK