SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 11,2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, Andrias, Saxe, JJ.

11914- 11914A The People of the State of New York, Respondent, Ind. 3303/05

-against-

Benjamin Anderson,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered October 31, 2008, convicting defendant, after a jury trial, of attempted robbery in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, and judgment, same court (Juan M. Merchan, J.), rendered April 28, 2010, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a concurrent term of 20 years to life, unanimously affirmed.

The verdict at issue 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 jury's credibility determinations.

The court's charge regarding robbery in the first degree under Penal Law § 160.15(4), which adhered to the pattern CJI instruction, expressly and clearly conveyed to the jury that the element of displaying what appeared to be a firearm requires the prosecution to prove, beyond a reasonable doubt, that the robbery victim perceived the item to be a firearm (*see People v Baskerville*, 60 NY2d 374, 381 [1983]). Defendant is essentially challenging the way in which the CJI charge is organized with respect to this concept, and his argument goes to form rather than substance. There is no merit to defendant's claim that the court omitted, or directed a verdict, as to an element of the crime.

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

ENTERED: MARCH 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Andrias, Saxe, JJ.

11915 Denise Thomas, Index 109630/09
Plaintiff-Respondent,

-against-

Dever Properties LLC., et al.,
Defendants-Appellants.

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

Coleman & Andrews, LLC, Bronx (Leroi J. Andrews of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 17, 2013, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this action where plaintiff tripped and fell in the freight elevator hallway of defendants' building, defendants established their entitlement to judgment as a matter of law. Defendants showed that the defect in which the heel of plaintiff's boot allegedly became stuck was trivial, and did not constitute a dangerous or defective condition (*see e.g. Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]). Defendants' expert inspected the floor area of plaintiff's accident, and described it as "a patched region of concrete" with a height

differential of less than one-eighth of an inch that was "free of chipped or damaged areas" and that formed a slight bowl-shaped depression (*see Lansen v SL Green Realty Corp.*, 103 AD3d 521 [1st Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff did not come forward with any evidence to show that this shallow, gradual depression, which is "generally regarded as trivial" (*Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [1st Dept 2000]), could have been "a trap or snare by reason of its location, adverse weather or lighting conditions or other circumstances" (*Burko v Friedland*, 62 AD2d 462, 462 [1st Dept 2009]). Plaintiff's argument that coffee or other liquids from the garbage stored near the accident site may have spilled in the area and caused her to slip is unavailing in view of her testimony that she observed no debris or liquid in the elevator hallway when she entered the building or at the time of her fall.

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

ENTERED: MARCH 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Andrias, Saxe, JJ.

11920 In re Johanys M.,
Petitioner-Respondent,

-against-

Eddy A.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for respondent.

_____

Order, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about May 17, 2013, which, to the extent appealed from as limited by the briefs, awarded sole custody of the subject child to petitioner mother, unanimously reversed, on the facts, without costs, and the parties are awarded joint custody of the child, with petitioner having primary physical custody.

The referee found that the parties had a similar ability to provide for the child financially, that there was no difference in the emotional bonds that they each had established with the child, and that the child had essentially spent an equal amount of time with each party. Nevertheless, it awarded custody to petitioner on the grounds that she no longer worked outside the home and thus was "fully available" to care for the child (and a

newborn), while respondent worked outside the home, and that respondent's testimony about petitioner was less than fully credible because it was "globally negative."

We find, to the contrary, that the record demonstrates that it is in the best interests of the child for the parties to have joint legal custody (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). As the referee noted, sharing physical custody was no longer feasible because the parties resided in different boroughs, and the child was starting school. However, there is no evidence that the parties' relationship was characterized by acrimony or mistrust (*see Lubit v Lubit*, 65 AD3d 954 [1st Dept 2009], *lv denied* 13 NY2d 716 [2010], *cert denied* 560 US 940 [2010]). Over the course of the child's life, the parties have been able to resolve any visitation or custody disputes between themselves, and they appear to have been in accord with respect to the child's best interests, despite their failure to communicate directly with each other. Respondent should not be deprived of a decision-making role in the child's life because he is unable to care for the child full time. The record shows that he has a strong interest and plays an active role in the child's life, including aggressively seeking out necessary services to foster the child's development, and that he arranged for child care while he worked. Although respondent's testimony may have

painted an unfairly negative picture of petitioner, there is no evidence that he has disparaged her in the presence of the child, and the record shows that his concern for the child's welfare is paramount.

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

ENTERED: MARCH 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Andrias, Saxe, JJ.

11921 The People of the State of New York, Respondent, Ind. 70253/00

-against-

Rafael Vega, etc., Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about January 17, 2013, which denied defendant's Correction Law 168-o(2) petition to modify his sex offender classification from level two to level one, unanimously affirmed, without costs.

Defendant failed to establish a basis for the requested modification. The factors cited by defendant, including his age (mid 40s), do not warrant a modification, particularly since the underlying sex crime was committed against a child (*see People v Thomas*, 105 AD3d 640 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]). Although defendant cites the fact that he is in a long-term relationship, we note that he committed the underlying crime after that relationship had commenced. In addition, defendant

had numerous conflicts with the law after the underlying crime, including drug convictions, and he failed to establish his success at drug treatment.

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

ENTERED: MARCH 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Andrias, Saxe, JJ.

11922 Christopher V., an Infant over the Age of Fourteen Years, by his Mother and Natural Guardian, Wanda R., et al., Plaintiffs-Respondents,

-against-

James A. Leasing, Inc., et al., Defendants-Appellants.

Index 350592/09

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Colin F. Morrissey of counsel), for appellants.

Berson & Budashewitz, LLP, New York (Jeffrey A. Berson of counsel), for respondents.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about June 24, 2013, which denied defendants' motion for summary judgment dismissing the complaint in its entirety, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiffs, in opposition to defendants' summary judgment motion, raised for the first time in their supplemental bill of particulars a new serious injury claim under Insurance Law 5102(d), i.e., a "significant disfigurement" to the infant plaintiff's face. It was error for the court to consider this new injury claim (*see Torres v Dwyer*, 84 AD3d 626 [1st Dept

2011]*; Marte v New York City Tr. Auth.*, 59 AD3d 398 [2d Dept 2009]).

In any event, defendants submitted evidence showing that plaintiff did not suffer a significant disfigurement to his face as a result of the accident. At his deposition, plaintiff testified that, as a result of the accident, he received a scar on his face, which was consistent with the description in the emergency room records of an abrasion to his face. However, both the emergency room records and plaintiff's testimony contradicted the supplemental bill of particulars' allegation as to the nature and location of the scar. Moreover, at the time of plaintiff's deposition, there was no discernable scar to plaintiff's face, and both plaintiff and defense counsel had to reference a photograph to observe the alleged injury (*see e.g. Sidibe v Cordero*, 79 AD3d 536 [1st Dept 2010]).

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

ENTERED: MARCH 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Andrias, Saxe, JJ.

11923 Juan Guzman,
Plaintiff-Respondent,

-against-

170 West End Avenue
Associates, et al.,
Defendants-Appellants.

- - - - -

170 West End Avenue Owners Corp.,
Third-Party Plaintiff-
Appellant-Respondent,

-against-

Kay Waterproofing Corp.,
Third-Party Defendant-
Respondent-Appellant.

[And Other Third-Party Actions]

Ind. 22821/05
85244/06
85906/07
83947/09

_____

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina of counsel), for appellants and appellant-respondent.

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for respondent-appellant.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered August 28, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment as to liability on the Labor Law § 240(1) claim, denied defendants' motion for summary judgment dismissing the Labor Law § 240(1) claim and declined to consider their motion as to the Labor Law §

241(6) claim, granted defendants/third-party plaintiff's motion for summary judgment on their contractual indemnification claim against third-party defendant, Kay Waterproofing Corp., to the extent of conditioning the order upon a finding of negligence attributable to Kay, and denied Kay's motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to grant unconditionally defendants/third-party plaintiff's motion for summary judgment on their indemnification claim, and otherwise affirmed, without costs.

We decline to consider Kay's argument that Labor Law § 240(1) is inapplicable since it is raised for the first time on appeal (*see Mayo v Metropolitan Opera Assn., Inc.*, 108 AD3d 422, 424 [1st Dept 2013]). Were we to consider the argument, we would reject it. Plaintiff established that his injuries were caused, at least in part, by the absence of proper protection as required by the statute. The evidence demonstrates that he was struck by a 100-pound electrical cable that fell from a height of approximately 27 stories because it was improperly secured to a scaffold. Plaintiff was not required to show that the cable was being hoisted or secured when it fell (*see Mercado v Caithness Long Is. LLC*, 104 AD3d 576, 577 [1st Dept 2013]).

In view of the foregoing, Kay's contentions regarding the

Labor Law § 241(6) claim are academic (*Carchipulla v 6661 Broadway Partners, LLC*, 95 AD3d 573, 574 [1st Dept 2012]).

Defendants' contract with Kay provided that Kay would indemnify "the Owner Parties" for any "liability or claims for damages [or] injuries . . . arising . . . as the result of any event or occurrence which arises in connection with the Work." Thus, indemnification is not premised upon Kay's negligence. Since there is no dispute that plaintiff's injuries arose out of the contract "Work," defendants are unconditionally entitled to indemnification by Kay (*see Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]). Although the indemnification clause appears to indemnify defendants for their own negligence, it is nevertheless enforceable by virtue of the "savings" language of the clause ("to the fullest extent permitted by law") (*Williams v City of New York*, 74 AD3d 479, 480 [1st Dept 2010]). There is no view of the evidence that would support a conclusion that defendants were actually negligent. Their liability is purely vicarious under Labor Law § 240(1). Thus, enforcement of the indemnification provision does not run afoul of General Obligations Law § 5-321 (*Dwyer*, 98 AD3d at 884-885).

We reject Kay's argument that defendants 170 West End Avenue Owners Corp. and 170 West End Avenue Associates are not entitled to indemnification because only 170 West End Avenue Condominium

is specifically identified as the "Owner" in the contract. Kay's obligation is not limited to the "Owner," but includes "the Owner Parties and their respective officers, board members, agents and employees." 170 West End Avenue Associates is the managing agent of the premises, and 170 West End Avenue Owners Corp. is the actual owner of the premises.

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

ENTERED: MARCH 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Andrias, Saxe, JJ.

11924- 11924A — In re Alice McIntosh, Plaintiff-Appellant, — Index 112314/11

-against-

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

_____

Law Offices of Stewart Lee Karlin, P.C., New York (Stewart L. Karlin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondents

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Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered January 16, 2013, dismissing the complaint, pursuant to an order, same court and Justice, entered on or about November 21, 2012, which, inter alia, granted defendants' motion to dismiss the amended complaint, unanimously reversed, on the law, without costs, the judgment vacated and the motion to dismiss denied. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Applying the liberal pleading standards applicable to employment discrimination claims under the State and City Human

Rights Law (HRL) (*see e.g. Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009]; Executive Law § 296[1][a]; Administrative Code of City of NY § 8-107[1][a]), plaintiff has stated causes of action for violations of both the State and City HRLs based on age and race discrimination.

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

ENTERED: MARCH 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Andrias, Saxe, JJ.

11925- Index 652636/12
11926 308 West 78th Corp., 652634/12
Plaintiff-Appellant,

-against-

360 9 Rest, LLC, etc., et al.,
Defendants-Respondents.

- - - - -

308 West 78th Corp.,
Plaintiff-Appellant,

-against-

D&E Holdings and Management, LLC, et al.,
Defendants-Respondents.

_____

Zane and Rudofsky, New York (Eric S. Horowitz of counsel), for appellant.

Schillinger & Finsterwald, LLP, White Plains (Peter Schillinger of counsel), for respondents.

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Orders, Supreme Court, New York County (Joan M. Kenney, J.), entered June 17, 2013, which denied plaintiff's motion for an order granting summary judgment on its claims, striking defendants' affirmative defenses and dismissing the counterclaims, unanimously modified, on the law, to the extent of striking the affirmative defenses other than the second, third and fourteenth, which remain to the extent that they allege that plaintiff failed to state a cognizable cause of action, that defendants did not default on obligations under the settlement

agreement, and that plaintiff waived any alleged default, and to dismiss all counterclaims, and otherwise affirmed, without costs.

The motion court properly denied plaintiff's motion for summary judgment on its claims for payment. There are issues of fact with respect to whether defendants breached their payment obligations under the settlement agreement by failing to make the payments scheduled for July 1, 2012 or whether, under the circumstances, any claim of breach of those payment obligations was waived by the conduct of the parties (*Sosnoff v Carter*, 165 AD2d 486, 492 [1st Dept 1991]).

The court erred in failing to strike the majority of the affirmative defenses and to dismiss the counterclaims, which are either lacking in factual support or meritless on their face.

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

ENTERED: MARCH 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Andrias, Saxe, JJ.

11928 The People of the State of New York, Respondent, Ind. 1935/11

-against-

Bobby Ray Mitchell,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Rahul Sharma of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J. at summary denial of motion; Patricia M. Nunez, J. at plea and sentencing), rendered October 6, 2011, convicting defendant of identity theft in the second degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Summary denial of defendant's suppression motion was proper. In light of the detailed allegations in the felony complaint available to defendant at the time of his motion, including that he had unsuccessfully used a credit card in three different stores, failed to produce identification or the PIN for the credit card, and made an apparently false claim at one store that he would obtain identification from his car, defendant's broad and cursory denial of any attempt to make the three alleged

purchases did not amount to sworn allegations of fact sufficient to support any ground for suppression, nor did they create any factual issue warranting a hearing (*see People v Burton*, 6 NY3d 584, 587 [2006]; *People v Mendoza*, 82 NY2d 415, 422 [1993]).

This case is distinguishable from *People v Rivera* (42 AD3d 160 [1st Dept 2007]) because in cases such as *Rivera,* the defendant had far more limited information at the motion stage (*see also People v Hightower*, 85 NY2d 988, 990 [1995]). Here the police cited numerous suspicious events, described above, to justify their actions. Defendant was thus required to specifically refute at least some of those allegations in order to create a factual issue requiring a hearing.

Contrary to defendant's assertions, the court did not mischaracterize or misunderstand the focus of the motion.

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

ENTERED: MARCH 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Andrias, Saxe, JJ.

11931 Anita L. Apt, et al., Index 100594/12
Plaintiffs-Appellants,

-against-

Morgan Stanley DW, Inc., et al.,
Defendants-Respondents,

Arunabha Sengupta,
Defendant.

_____

The Law Office of Christopher J. Gray, P.C., New York (Christopher J. Gray of counsel), for appellants.

Greenberg Traurig, LLP, New York (Michael P. Manning of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 11, 2012, which granted the motion of defendants Morgan Stanley DW, Inc. and Morgan Stanley & Co., Inc. (collectively Morgan Stanley) to dismiss the complaint pursuant to CPLR 3211(a)(5), unanimously affirmed, without costs.

In 2004 and 2005, nonparty Charles Winitch, while an employee of Morgan Stanley, allegedly churned trades on decedent Nellie Apt's brokerage accounts at the firm, obtaining at least $300,000 in commissions. On August 29, 2005, Morgan Stanley terminated Winitch after New York Stock Exchange investigators discovered similar churning activity by Winitch on other accounts. Plaintiff Anita Apt (Nellie's daughter) claims that

she became aware of such wrongdoing by Winitch at the earliest in 2008, while she was examining the affairs of her mother after her mother's death. Anita, in her individual and other capacities, commenced this action in January 2012.

The court correctly dismissed the action as time-barred. Actions based upon fraud must be commenced within the greater of "six years from the date the cause of action accrued" or "two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it" (CPLR 213[8]; *see Saphir Intl., SA v UBS PaineWebber Inc.*, 25 AD3d 315 [1st Dept 2006]; *TMG-II v Price Waterhouse & Co.*, 175 AD2d 21, 22 [1st Dept 1991], *lv denied* 79 NY2d 752 [1992]).

Here, the wrongful conduct occurred at the latest on August 29, 2005 when Morgan Stanley terminated Winitch. Thus, the action, commenced in January 2012, more than six years later, is untimely. Contrary to plaintiffs' contention, the complaint alleges no facts showing that Morgan Stanley fraudulently concealed Winitch's commissions or his termination from Nellie so as to toll the statute of limitations. To the extent plaintiffs contend that Morgan Stanley's failure to disclose such facts warranted tolling the statute of limitations, there is no fiduciary relationship arising from an ordinary broker-client

relationship (*see Matter of Dean Witter Managed Futures Ltd. Partnership Litig.*, 282 AD2d 271 [1st Dept 2001]) so as to give rise to a duty to disclose (*see Eurycleia Partners, LP v Seward & Kissel*, 12 NY3d 553, 562 [2009]). Thus, plaintiffs' argument that Morgan Stanley is equitably estopped from asserting the statute of limitations defense is unavailing (*see Gonik v Israel Discount Bank of N.Y.*, 80 AD3d 437, 438 [1st Dept 2011]).

Nor is the action timely under the two-year discovery rule. Nellie could have discovered facts constituting the fraud, or could have done so with reasonable diligence, in 2004 or at the latest on August 29, 2005 based on her receipt of the confirmation slips and monthly statements (*see Kidder, Peabody & Co. v McArtor*, 223 AD2d 502, 503 [1st Dept 1996]). Even accepting as true the affidavit of plaintiffs' expert that the 611 pages of confirmation slips he reviewed did not fully reflect Winitch's commissions, the confirmations and statements should have reflected the excessive trading activity on the accounts during the relevant period. Plaintiffs' contention that Nellie was inexperienced and unsophisticated is insufficient to toll the statute of limitations. "The test as to when fraud should with reasonable diligence have been discovered is an objective one," and the duty of inquiry arises "where the circumstances are such as to suggest to a person of ordinary intelligence the

probability that he [or she] has been defrauded" (*Gutkin v Siegal*, 85 AD3d 687, 688 [1st Dept 2011] [internal quotation marks omitted]).

In any event, even assuming that Nellie could not have discovered the churning in 2004 and 2005, plaintiffs acknowledge that they discovered such misconduct at the earliest in 2008, when Anita began examining her mother's affairs. Thus, the action commenced in January 2012 would be untimely under the two-year rule (*see TMG-II*, 175 AD2d at 22).

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

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

ENTERED: MARCH 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Andrias, Saxe, JJ.

11932 The People of the State of New York, Respondent, Ind. 5306/98

-against-

Augusto Rojas, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Rena K. Uviller, J.), entered on or about September 22, 2011, which adjudicated defendant a level three sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 20 points under the risk factor for continuing course of sexual misconduct, because the case summary prepared by the Board of Examiners of Sex Offenders provided clear and convincing evidence that defendant committed three or more acts of sexual misconduct over a period of at least two weeks (*see People v Mingo*, 12 NY3d 563, 572-574 [2009]). Defendant's remaining challenge to his point score is unavailing because the court did not actually assess the additional points of which defendant complains; instead, the court only assessed

125 points, which still warrants a level three designation.

The court providently exercised its discretion in declining to grant a downward departure to level two. Defendant does not claim that any physical limitations associated with his age minimize his risk for recidivism, and none of the other factors he cites warrants a downward departure, given the seriousness of his sex offenses against two children (*see e.g. People v Thomas*, 105 AD3d 640 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]).

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

ENTERED: MARCH 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Andrias, Saxe, JJ.

11934N & M-800 Elaine Platt, Plaintiff-Appellant, Index 102092/12

-against-

Alexander Flesher, Defendant-Respondent.

_____

Elaine Platt, New York, appellant pro se.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered July 31, 2013, which, insofar as appealed from, denied plaintiff's motion to transfer this action from Civil Court to Supreme Court, unanimously reversed, on the facts and in the exercise of discretion, with costs, the motion granted, and plaintiff is granted leave to file an amended complaint asserting her new claims and increasing the ad damnum clause from $25,000 to $100,000.

Since plaintiff established by affidavit of merit that her alleged damages were increased beyond Civil Court's jurisdictional maximum as a result of events that transpired

after she had filed her complaint in this matter in Civil Court, her motion to transfer the action to Supreme Court should have been granted (CPLR 325[b]; *see Matter of Miranda v City of New York*, 81 AD2d 792, 792 [1st Dept 1981]; *Williams v Williams*, 23 AD2d 482, 482 [1st Dept 1965]).

M-800 *Elaine Platt v Alexander Flesher*

Motion seeking adjournment denied.

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

ENTERED: MARCH 11, 2014

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, JJ.

8516 The People of the State of New York, Respondent, Ind. 1914/07

-against-

Kamal Thomas,
Defendant-Appellant.

_____

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

Kamal Thomas, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered September 21, 2010, as amended September 28, 2010, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first degree, and sentencing him, as a second felony drug offender, to a term of 14 years, unanimously affirmed.

The court properly denied defendant's mistrial motion, made on the ground that the prosecution violated its duty under *Brady v Maryland* (373 US 83 [1963]) by failing to disclose an allegedly exculpatory document until after both sides had rested. Long before trial, the prosecution had disclosed information regarding the inadvertent placement of a manila envelope connected with another narcotics case in the bag containing the drugs recovered

from defendant in this case. The belatedly disclosed report essentially summarized information concerning the misplacement of the envelope that had already been the subject of extensive trial testimony by the two police chemists involved. Given that the report did not add any new information, any delay in turning it over to defense counsel did not prejudice the defense, notwithstanding counsel's conclusory assertions that his lack of the document adversely affected his trial tactics. Nothing in the document cast any doubt on the accuracy of the test results showing that 19 ounces of cocaine were recovered, and there is no reasonable possibility that the belated disclosure contributed to the verdict (*see People v Vilardi*, 76 NY2d 67, 77 [1990]; *People v Nelson*, 63 AD3d 629, 630 [2009], *lv denied* 13 NY3d 861 [2009]).

Defendant's pro se double jeopardy claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We have considered and rejected defendant's remaining pro se claims.

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

ENTERED: MARCH 11, 2014

CLERK

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

11127 Building Service Local 32B-J Pension Fund, et al., Plaintiffs-Respondents, Index 652266/10

-against-

101 Limited Partnership, Defendant-Appellant.

_____

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for appellant.

Proskauer Rose LLP, New York (Michael T. Mervis of counsel) for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 15, 2013, which granted plaintiffs' motion for partial summary judgment dismissing defendant's counterclaim for delay damages and for an order dissolving the injunction bond posted by plaintiffs, modified, on the law, to deny that part of the motion seeking to dissolve the bond, and to reinstate the bond, and otherwise affirmed, without costs.

Defendant landlord leased a 24-story office building to plaintiffs tenants pursuant to several net leases that expired on December 31, 2011 (collectively, the lease). The lease contained several provisions governing repairs to the building. Section 33.01 required the tenants, at the end of the lease term, to surrender the premises in good condition (the Surrender Clause).

Pursuant to § 12.01(a) and § 15.02, the tenants were required, during the lease term, to take good care of and make repairs to the premises and equipment therein (the Upkeep Clause). The lease further provided that if the tenants defaulted in their ongoing repair obligations, the landlord itself could perform the necessary repairs (§ 21.01[a]), and that the tenants were required to permit the landlord to enter the premises to do so (§ 20.01).

On December 23, 2010, the landlord sent the tenants a notice declaring that they were in default of the Upkeep Clause for failing to make repairs to certain building systems. The notice advised the tenants that if they did not commence the repair work within the 25-day cure period set forth in the lease, the landlord would exercise its right to enter and perform the repairs itself.

On January 13, 2011, the tenants filed a complaint in this action seeking, inter alia, a declaration that they are not in default of the lease and are not responsible for performing the repairs identified in the landlord's default notice. The tenants also moved for a preliminary injunction preventing the landlord from entering the premises to cure the alleged default. The landlord opposed the application and, in the event the injunction were granted, requested a bond to cover the delay damages it

would incur if it had to postpone the repairs until after the lease term ended. In other words, the landlord asked for a bond amount sufficient to cover the rent it would lose during the time it performed the repairs after the tenants vacated. On March 7, 2011, the motion court granted the preliminary injunction upon the condition that the tenants post a bond in the amount of $4,708,242.[1] The tenants subsequently posted the bond.

On June 6, 2011, the landlord answered the tenants' complaint and asserted a counterclaim alleging breach of the Upkeep Clause. The counterclaim sought damages to cover the cost of the repairs, along with delay damages allegedly incurred as a result of the tenants' obtaining the injunction to prevent the landlord from entering the premises. On or before December 31, 2011, the end of the lease term, the tenants vacated the building and surrendered possession to the landlord. In October 2012, the tenants moved for partial summary judgment dismissing the landlord's counterclaim to the extent it sought delay damages and for an order dissolving the bond. By order entered March 15, 2013, the court granted the tenants' motion.

The motion court properly dismissed the landlord's

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[1] Although the motion court referred to the injunction as a *Yellowstone* injunction, the landlord's default notice did not seek to terminate the tenancy (*see First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]).

counterclaim for delay damages. It is well settled that lost rent is not recoverable as damages for breach of a lease covenant requiring a tenant to keep the premises in good repair. An action alleging breach of such a covenant can be brought either before or after the expiration of the lease term (*City of New York v Pennsylvania R.R. Co.*, 37 NY2d 298, 301 [1975]). In *Appleton v Marx* (191 NY 81 [1908]), the Court of Appeals identified two different measures of damages, depending on when the action is commenced. If the action is brought before the lease expires, a landlord can recover "the injury done to the reversion" (*id.* at 83), i.e. "the difference between the value of the premises with the improvement and absent the improvement" (*Tobin v Union News Co.*, 18 AD2d 243, 245 [4th Dept 1963], *affd* 13 NY2d 1155 [1964]). On the other hand, if the action is brought after the expiration of the lease term, "the measure of the damages is the cost of putting the premises into repair" (*Appleton*, 191 NY at 83; *accord Pennsylvania R.R. Co.*, 37 NY2d at 301; *Farrell Lines v City of New York*, 30 NY2d 76, 84 [1972]). In neither circumstance, however, did the Court of Appeals provide that lost rent is included in the measure of damages.

Courts in this State have consistently followed this rule. For example, in *Solow Mgt. Corp. v Hochman* (191 AD2d 250, 250 [1st Dept 1993], *lv dismissed* 82 NY2d 802 [1993]), we rejected

the landlord's claim for lost rent arising out of the tenant's failure to restore the premises to their original condition, concluding that the measure of damages was limited to the reasonable costs of restoring the premises. Likewise, in *Charlebois v Carisbrook Indus., Inc.* (23 AD3d 821 [3d Dept 2005]), where a lease provision required the tenants to maintain the premises and perform preventive maintenance of building systems, the court dismissed the landlords' claim for rent lost while the repairs were being made (*see also Arnot Realty Corp. v New York Tel. Co.*, 245 AD2d 780, 782 [3d Dept 1997]; *Mudge v West End Brewing Co.*, 145 App Div 28, 31 [3d Dept 1911], *affd* 207 NY 696 [1913]; *Orkin's Fashion Stores, Inc. v S.H. Kress & Co.*, 68 NYS 2d 764 [Sup Ct, NY County 1947], citing *Mudge*). We see no reason to depart from this well established principle.

The dissent attempts to distinguish this body of case law by suggesting that New York's rule precluding damages for lost rent does not apply here because the landlord alleges breach of the Upkeep Clause, not the Surrender Clause. The case law, however does not recognize such a distinction, and, in fact, courts have applied the rule to both types of repair covenants (*see Charlebois*, 23 AD3d at 821; *Arnot Realty Corp.*, 245 AD2d at 780; *Orkin's Fashion Stores*, 68 NYS 2d at 764). Contrary to the dissent's view, the landlord is not deprived of a remedy for

breach of the Upkeep Clause, and may seek the appropriate measure of damages provided for by Court of Appeals precedent. The dissent cites no cases that allow for the recovery of lost rent for breach of a repair covenant. Instead, relying on general contract principles, the dissent proposes that we permit such damages because they were foreseeable. However, none of the cases setting forth the proper measure of damages for breach of a repair covenant employed the foreseeability analysis urged by the dissent.

The dissent points out that the lease here contains no express limitation on the landlord's right to recover damages. Although that is true, the lease also does not specifically provide for recovery of consequential damages in the form of lost rent. This Court's recent decision in *New York Univ. v Cliff Tower, LLC* (107 AD3d 649 [1st Dept 2013]) is instructive. In that case, we dismissed a landlord's claim for lost rent based on a breach of a repair covenant, concluding that "[n]othing in the relevant lease provisions provided for additional rent beyond the term of the lease as part of the damages for restoring the premises to the agreed upon condition" (107 AD3d at 649). The same result should occur here. Having failed to include a provision in the lease allowing for recovery of lost rent, the

landlord is barred from obtaining such damages (*see Chemical Bank v Stahl*, 255 AD2d 126 [1st Dept 1998] [denying landlord's lost rent claim where the parties' agreement did not provide for the award of such consequential damages]).

There is no merit to the landlord's argument that it is entitled to recover lost rent under a holdover theory. It is undisputed that the tenants had vacated the premises by the time the lease term ended, and courts have repeatedly rejected attempts to analogize similar facts to holdover tenancies (*see Chemical Bank*, 255 AD2d at 127 [rejecting landlord's attempt to recover lost rental income on the theory that tenant held over its tenancy]; *Arnot Realty Corp.*, 245 AD2d at 782 ["a tenant who has vacated premises but breached covenants to repair cannot be held liable for holdover rent while the repairs are made and the premises unleased"]). The landlord's reliance on *Niagara Frontier Transp. Auth. v Euro-United Corp.* (303 AD2d 920 [4th Dept 2003]) is misplaced. In that case, a holdover tenancy was found because the tenant, upon vacating the premises, left behind "massive pieces of equipment" that prevented the landlord from leasing the premises to a new tenant (303 AD2d at 921, 923). Here, in contrast, the landlord does not allege that the tenants left behind any property that prevented it from reletting the premises.

Contrary to the dissent's view, the landlord cannot recover, as part of its counterclaim, damages it allegedly sustained as a result of the court's issuance of the preliminary injunction. "Absent proof of malice, not asserted here, there is no common-law or statutory right to recover damages sustained as a result of an improperly issued preliminary injunction" (*Thompson v Topsoe*, 237 AD2d 113, 113-114 [1st Dept 1997]). Instead, the undertaking posted in connection with issuance of the injunction provides the sole basis for relief (*see Honeywell, Inc. v Technical Bldg. Servs.*, 103 AD2d 433, 434 [3d Dept 1984]).

We conclude that the motion court prematurely discharged the bond because there has been no determination as to whether the tenants were entitled to the preliminary injunction (*see J.A. Preston Corp. v Fabrication Enters.*, 68 NY2d 397 [1986]; *2339 Empire Mgt., LLC v 2329 Nostrand Realty, LLC*, 71 AD3d 998 [2d Dept 2010]). If the injunction was warranted, then the landlord will not be entitled to any damages arising from its issuance. However, if it is finally determined that the tenants were not entitled to an injunction, the landlord will be entitled to recover, against the undertaking, "all damages and costs which may be sustained by reason of the injunction" (CPLR 6312[b]).

Although lost rent is not an available measure of damages on the landlord's counterclaim, we cannot conclude, on this record,

as a matter of law, that lost rent is not recoverable as damages against the undertaking. We note that the parties, on appeal, did not cite to CPLR 6312(b), and the motion court did not address that provision when it dissolved the bond.[2] The tenants' contention that the bond was properly vacated because the landlord did not lose any rental income as a result of the injunction presents issues of fact inappropriate for summary disposition. In reinstating the bond, we understand, as the tenants argue, that the landlord ultimately may not be able to prove actual damages, but it is not possible for us, at this juncture, to definitively resolve this factual issue.

All concur except Friedman, J.P. and Andrias, J. who concur in part and dissent in part in a memorandum by Andrias, J. as follows:

[2] The parties did reference this statute in earlier briefing before the motion court as to the proper amount of the bond.

ANDRIAS, J. (concurring in part and dissenting in part)

The majority finds that landlord's sole remedy is to seek damages under the bond, if it is finally determined that tenants were not entitled to the preliminary injunction they obtained in this case, and that the motion court correctly dismissed landlord's counterclaim for delay damages. Because I believe that, on the record before us, landlord is entitled to seek delay damages under both the bond and under a breach of contract theory based on tenants' breach of the clause authorizing landlord to enter the premises to perform repair work during the lease term if tenants refused to do so, I concur in part and dissent in part.

In the period of 1989-1991, landlord constructed a new 24-story Class A office tower at 101 Avenue of the Americas, consisting of more than 400,000 square feet of office space. Landlord leased the entire building to tenants on a net lease basis, for an initial 20-year term, with eight renewal options that could potentially extend the lease for approximately 79 years. Tenants elected not to extend the lease beyond December 31, 2011, at which time the lease expired.

Pursuant to § 12.01 of the lease, tenants were required throughout the lease term, inter alia, to replace certain building-wide systems as they became obsolescent (the Upkeep

Clause), so as to maintain the building in first class condition. Pursuant to § 33.01, as of the end of the lease term, tenants were required to return the building to landlord in good repair (the Surrender Clause).

Section 21.01(a) of the lease provided that "[i]f there shall be an Event of Default under this Lease, then Landlord, without waiving or releasing Tenant from any obligation of Tenant contained in this lease, may (but shall be under no obligation to) perform such obligations on Tenant's behalf." Section 20.01 required tenants to permit landlord:

> "to enter the Premises at all reasonable times (but not more frequently than is reasonable under the circumstances), on at least seven days' notice . . . for the purposes of . . . (b) making any Repair . . . which Landlord . . . is permitted to perform pursuant to the terms of this Lease, . . . or (d) during the continuance of an Event of Default, making any Repairs to the Premises and/or performing any work therein, whether necessitated by a Requirement or otherwise."

Section 20.02 provided that "Landlord . . . shall not be liable for inconvenience, annoyance, disturbance, loss of business or other damage of Tenant or any Subtenant by reason of performing such . . . Repair or other work."

In April 2010, landlord informed tenants that they needed to immediately replace certain building systems that were allegedly obsolescent. Tenants refused. On December 15, 2010, tenants commenced this action seeking to recover revenue-sharing proceeds

that the landlord had withheld. On December 23, 2010, landlord sent tenants a notice advising them "that Landlord has determined that you are in default of your obligations under Lease § 12.01 and § 15.02, in that you have failed to properly maintain and make 'Repairs' to the Building in each of the respects noted in Landlord's prior itemizations." The notice specified five categories of repair work and advised tenants that they were required to cure their defaults pursuant to § 24.01(d) by completing, or at a minimum, commencing that work within 25 days, and that "if you fail to timely cure each and all of the above-referenced defaults . . . within the time specified in Lease § 24.01(d), then Landlord intends to exercise its right under Lease § 21.01 (consistent with Landlord's rights under Art. 20) to perform each and all of said Repair work itself, on Tenant's behalf."

On January 18, 2011, tenants moved by order to show cause for a temporary restraining order and injunction preventing landlord from, among other things, "taking any action, including issuing any further notice or entering the Premises and interfering with such parties' right of quiet enjoyment, for alleged purposes of 'curing' any defaults in the Retaliatory Notice, or otherwise interfering with such parties' possession of the Premises." Tenants sought the injunction on the ground that

allowing landlord to perform the repair work during the remaining year of the lease would be highly disruptive to their ongoing occupancy.

Supreme Court issued the temporary restraining order and on February 17, 2011 held a hearing on the preliminary injunction. At the hearing, landlord argued that a bond should be required as a condition of the quasi *Yellowstone* Injunction requested by tenants, to cover, among other things, the "delay damages" it would incur if it had to wait until tenants vacated the building before it commenced the necessary repairs. After tenants' counsel acknowledged that tenants did not want landlord to go in and do the work before the expiration of the lease because it would upset tenants' tenant, the Court commented:

> "I mean, I think it's coming down to this: I either give you a limited Yellowstone that takes care of this issue of eviction, or I give you the broader Yellowstone, but on the condition that the mediation encompasses delay damages and that there's a bond that includes the prospective delay damages. I don't know what amount we're talking about, but it's certainly not going be $18 million, but something of that sort. ¶ You can't have everything . . . ."

On February 24, 2011, after the parties submitted additional papers, the Court issued the broader injunction requested by tenants prohibiting landlord from, among other things, entering the building to conduct the repair work while tenants were in

occupancy, and ordered tenants to post a bond in the sum of $4,708,242, which tenants timely posted.

On or about June 6, 2011, landlord served an answer in which it sought, as a separate element of damages on its First Counterclaim, delay damages caused by the injunction, by which tenants blocked landlord from repairing the obsolescent systems during the balance of tenants' lease term, as it sought to do in its Notice. In October 2012, tenants moved for summary judgment dismissing the delay damages claim, arguing that the work was now done at less cost ($4.9 million as opposed to $7.4 million) and in less time (7½ months as opposed to 9 months) than would have been the case if it had been performed while they occupied the building. Tenants also argued that landlord undertook unrelated work during that time period by performing a gut renovation, and could not have rented the premises in any event. Insofar as landlord claimed that it would have been ready to re-let on January 1, 2012, tenants contended that there was nearly a year's hiatus in landlord's efforts to re-let due to a disagreement among internal factions of landlord. Tenants also claimed that, as a matter of law, landlord was not entitled to delay damages under a holdover theory.

Supreme Court granted tenants' motion, stating:

"The court agrees with plaintiffs that the

> rule in New York is well established that the covenant to surrender property in good condition at the end of the lease relates only to the physical condition of repair. The rule of damages applicable to such covenant precludes the idea that loss of rent is included in it. There is no exception to the rule precluding recover of lost rent as delay damages. Plaintiffs were not holdovers because of defendant's repair claims and cannot be liable for holdover rent."

However, CPLR 6312(b) expressly requires an undertaking to be filed to cover potential damages that could result from granting an injunction. "The purpose and function of an undertaking given by a plaintiff . . . is to reimburse the defendant for damages sustained if it is later finally determined that the preliminary injunction was erroneously granted" (*Margolies v Encounter, Inc.*, 42 NY2d 475 [1977).

Here, landlord's delay damages claim is based on tenants' obtaining a broad injunction that prevented landlord from exercising its explicit contractual right to enter the premises to perform work itself, after tenants refused to do so, before the expiration of the lease and tenants' surrender of the premises. The injunction was conditioned on tenants' posting a bond which foresaw that the issuance of the injunction might interfere with landlord's anticipated rental income after tenants surrendered the premises and that the damages incurred in the event it was determined that tenants were not entitled to the

injunction would include delay damages.

Under these circumstances, in the event it is determined that tenants were not entitled to an injunction, landlord is entitled to recover, if proven, all foreseeable damages contemplated by the bond, including delay damages.

Landlord also has a viable breach of contract claim based on tenants preventing it from exercising its contractual right to immediately perform the repairs during the lease term that were required by the Upkeep Clause.

Section 24.01(d) of the lease provides that an event of default shall occur "if Tenant shall fail to observe or perform one or more of the other terms, conditions, covenants or agreements of this Lease or the Operating Agreement and such failure shall continue for a period of 25 days after written notice thereof by Landlord to Tenant specifying such failure . . . ." Section 24.02 provides that "[i]f an Event of Default shall occur, Landlord may elect to proceed by appropriate judicial proceedings, either at law or in equity, to enforce the performance or observance by Tenant of the applicable provisions of this Lease and/or to recover damages for breach thereof."

The lease contains no limitation on landlord's right to recover damages for a default under the Upkeep Clause or from tenants' blocking landlord's contractual right to perform the

systems repair work itself if tenants fail to do so. Thus, landlord is entitled to recover its economic losses, including delay damages, if proven, that were caused by tenants' breach and that the parties had reason to foresee as a likely result of the breach (*see Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 116 [2001] ["Under settled contract principles, however, the landlord . . . is entitled to be placed in as good a position as it would have been had the tenant performed"]; *Ashland Mgt. v Janien*, 82 NY2d 395, 403 [1993]; *Goodstein Constr. Corp. v City of New York*, 80 NY2d 366, 374 [1992]; *Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989]). This is of particular importance to a landlord in a long-term net lease that obligates the tenant to keep building systems up to date so as to maintain its Class A status, and to hold otherwise would essentially read the Upkeep Clause and landlord's right to perform the repairs itself during the lease term out of the lease.

Cases such as *New York Univ. v Cliff Tower, LLC* (107 AD3d 649, 649 [1st Dept 2013]), on which the majority relies, are inapposite since landlord's claim here is based on the Upkeep Clause, not the Surrender Clause, and since delay damages were contemplated when the injunction was issued at tenants' behest to prevent the landlord from exercising its contractual right to self help.

The majority notes that upon vacating the premises, tenants left nothing behind preventing landlord from re-letting the premises to a new tenant. This misses the point. The lease obligated tenant to replace obsolescent systems so as to maintain the building's Class A status, thereby protecting its rental value, and the fact that tenants left nothing behind is not relevant to their breach of the Upkeep Clause and their decision to prevent landlord from performing the repairs during the lease term. Insofar as tenants contend that the evidence in the record undermines landlord's claim that it was prepared to re-let the premises upon the expiration of tenants' lease, or that landlord did not in fact incur any delay damages because the necessary repairs could have been made within the same time period as the gut renovation, these arguments raise issues of fact, which may not be determined on a motion for summary judgment.

Accordingly, I would reverse, and deny the dismissal of defendant's counterclaim for delay damages and reinstate the bond.

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

ENTERED: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11323 Joan Henchy, Index 303509/09
Plaintiff-Appellant,

-against-

VAS Express Corp, et al.,
Defendants-Respondents.

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Dinkes & Schwitzer, P.C., New York (Beth Diamond of counsel), for appellant.

Michael H. Zhu, Esq., PC, New York (Michael H. Zhu of counsel), for respondents.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered May 21, 2012, which granted defendants' motion for summary judgment dismissing the complaint alleging serious injuries under Insurance Law § 5102(d), and denied plaintiff's cross motion to amend her bill of particulars to add new allegations of injuries to the cervical lumbar and lumbar spine, unanimously affirmed, without costs.

On April 6, 2009, then 43-year-old plaintiff was driving her car when an oncoming vehicle owned and driven by defendants spun and hit the left side of her vehicle. Plaintiff commenced this action seeking to recover for serious injuries allegedly suffered in the accident and, as relevant, alleged in her bill of particulars that she sustained a serious injury to her left knee under the "permanent consequential limitation of use,"

"significant limitation of use," and 90/180-day injury categories of Insurance Law § 5102(d).

In support of their motion for summary judgment, defendants established prima facie absence of a causal nexus between the left knee injury and the accident by submitting the affirmed report of their radiologist, who opined that the x-ray film taken the day of the accident showed no acute injuries and that the knee symptoms reflected in the November 2009 MRI film were preexisting degenerative changes consistent with plaintiff's age and increased body habitus (*see Santos v Perez*, 107 AD3d 572, 573 [1st Dept 2013]; *Soho v Konate*, 85 AD3d 522, 522 [1st Dept 2011]). To the extent plaintiff argues that the radiologist's conclusions are speculative because he never met plaintiff, his observations of an increased body habitus are based on his review of the x-ray and MRI films, and is supported by the record.

Defendants also submitted the report of their neurologist who examined plaintiff's cervical and lumbar spine and found full range of motion, absence of spasms, negative clinical test results, absence of neurological disabilities, and opined that she had resolved cervical and lumbar strain/sprain (*see Malupa v Oppong*, 106 AD3d 538, 539 [1st Dept 2013]; *De La Cruz v Hernandez*, 84 AD3d 652, 652 [1st Dept 2011]). That expert's failure to review plaintiff's medical records does not render

his report insufficient, as it described the various tests he performed and found full range of motion and absence of disabilities (*see Abreu v NYLL Mgt. Ltd.*, 107 AD3d 512, 513 [1st Dept 2013]; *Fuentes v Sanchez*, 91 AD3d 418, 419 [1st Dept 2012]; *Clemmer v Drah Cab Corp.*, 74 AD3d 660, 660-661 [1st Dept 2010]).

Plaintiff opposed the motion and cross-moved to amend the bill of particulars, submitting a proposed "Amended and Supplemental Bill of Particulars," seeking, inter alia, to assert injuries to the lumbar spine and cervical spine. The evidence submitted by plaintiff in opposition to the motion failed to raise an issue of fact as to serious injury to the knee, because her records show that she did not receive treatment for the left knee until October 12, 2009, six months after the accident, and the MRI study showing tears was not performed until November 2009, seven months after the accident. Her failure to provide contemporaneous objective evidence of injury to or limitations in the left knee is fatal to her claims concerning the knee (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]; *see also Rosa v Mejia*, 95 AD3d 402, 404 [1st Dept 2012]; *Cabrera v Gilpin*, 72 AD3d 552, 553 [1st Dept 2010]). In light of this, her physician's conclusory opinion on causation does not sufficiently rebut the detailed findings of degenerative changes made by defendants'

radiologist (*see Soho*, 85 AD3d at 523; *Lopez v American United Transp., Inc.*, 66 AD3d 407 [1st Dept 2009]), and plaintiff's physical therapist's conclusions on permanency, significance, and causation are incompetent evidence (*see Tornatore v Haggerty*, 307 AD2d 522, 522-523 [3d Dept 2003]; *Evans v Beebe*, 267 AD2d 828 [3d Dept 1999], *lv denied* 94 NY2d 762 [2000]).

As for the cross motion, leave to amend a bill of particulars following the filing of a note of issue (*see* CPLR 3043[b], 3042[b]) is ordinarily freely given absent surprise or prejudice to the defendants (*Spiegel v Gingrich*, 74 AD3d 425, 426 [1st Dept 2010]; *Katechis v Our Lady of Mercy Med. Ctr.*, 36 AD3d 514, 516 [1st Dept 2007]; *Kassis v Teachers Ins. & Annuity Assn.*, 258 AD2d 271, 272 [1st Dept 1999]; Siegel, NY Prac § 240 at 418 [5th ed 2011]). Where there is an "extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion" (*Kassis*, 258 AD2d at 272 [citation and internal quotation marks omitted]; *see also Alcala v Soundview Health Ctr.*, 77 AD3d 591 [1st Dept 2010]). Further, "where the proposed amendment clearly lacks merit and serves no purpose but to needlessly complicate discovery and trial, such a motion should be denied" (*Katechis v Our Lady of Mercy Med. Ctr.*, 36 AD3d at 516).

Here, while there is no showing of prejudice and the record arguably shows a reasonable excuse for delay, plaintiff failed to demonstrate the merits of the proposed claims. As to the cervical spine, plaintiff acknowledged she ceased feeling pain within a few months after the accident and has provided no objective evidence of injury, and only minor limitations were found by her physician (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]; *Waldman v Dong Kook Chang*, 175 AD2d 204 [2d Dept 1991]). As for the lumbar spine, the only objective evidence of injury is a disc bulge found in an MRI study that was performed over two years after the accident, which is not sufficiently contemporaneous to link such injury to the accident (*see Perl v Meher*, 18 NY3d at 217-218; *Wetzel v Santana*, 89 AD3d 554, 554 [1st Dept 2011]).

Given the insufficient evidence of causation of the knee injury, plaintiff cannot establish her 90/180-day injury claim (*see Barry v Arias*, 94 AD3d 499, 500 [1st Dept 2012]). In any event, defendants established prima facie entitlement to dismissal of the claim by pointing to plaintiff's bill of

particulars and deposition testimony stating that she was confined to bed and home for about three to four weeks after the accident (*Mitrotti v Elia*, 91 AD3d 449 [1st Dept 2012]). Plaintiff did not raise an issue of fact on this point.

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

ENTERED: MARCH 11, 2014

CLERK

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, Gische, JJ.

11809 In re ROM Reinsurance Management Company, Inc., et. al., Petitioners-Appellants, -against- Continental Insurance Company, Inc., as successor to Harbor Insurance Company, Respondent-Respondent. Index 654480/12

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Nicoletti Gonson Spinner, LLP, New York (Benjamin N. Gonson of counsel), for appellants.

White and Williams LLP, New York (Michael S. Olsan of the bar of the Commonwealth of Pennsylvania, admitted pro hac vice, of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered April 22, 2013, which denied the petition to stay arbitration, and granted the cross motion to dismiss the proceeding, unanimously reversed, on the law, with costs, and the matter remanded for a determination as to whether matters described in the petition as relating to Thorpe Insulation and/or J.T. Thorpe asbestos-related claims are time-barred.

The issue before us is whether the timeliness of a demand for arbitration is a matter to be determined by the court or the arbitrator. Based on the parties' agreement and the applicable law, we hold that the timeliness question is to be determined by

the court. It is not disputed that the Federal Arbitration Act (9 USC § 1 *et seq.* [FAA]) is controlling. Under the FAA, the "resolution of a statute of limitations defense is presumptively reserved to the arbitrator, not a court" (*N.J.R. Assoc. v Tausend*, 19 NY3d 597, 601-602 [2012]). "[A]n exception to this rule exists where parties explicitly agree to leave timeliness issues to the court" (*Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 253 [2005]). This is in keeping with the FAA policy by which private arbitration agreements are to be enforced according to their terms (*id.* at 252). Unlike the FAA, New York law "allows a threshold issue of timeliness to be asserted in court" even absent an agreement to do so (*see N.J.R. Assoc.*, 19 NY3d at 602; *see also* CPLR 7502 [b]; 7503 [a]).

The arbitration clause of the agreement before us provides that "the arbitration laws of New York State" shall govern the parties' arbitration. In *Matter of Smith Barney, Harris Upham & Co. v Luckie* (85 NY2d 193 [1995], *cert denied sub nom. Manhard v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 516 US 811 [1995]), the Court held that a choice of law provision which states that New York law shall govern both "the agreement *and its enforcement*" incorporated New York's rule that threshold statute of limitations questions are for the courts (*id.* at 202). In

Diamond Waterproofing, the Court held that an agreement that merely provided that it "shall be governed by the law of [New York]" did not express an intent to have New York law govern enforcement (4 NY3d at 253). The Court reasoned that "[i]n the absence of more critical language concerning enforcement . . . all controversies, including issues of timeliness, are subjects for arbitration" (*id.*).

The question arises as to whether the specific incorporation of "the arbitration laws of New York State" in the instant arbitration clause itself constitutes the needed "more critical language concerning enforcement" within the contemplation of *Diamond Waterproofing*. We hold that it does and, under the agreement, the arbitration laws of New York State include article 75 of the CPLR. We, therefore, reject respondent's argument that the choice of law provision is ambiguous. By way of example, in a case where the FAA controlled the construction of an identical choice of law contractual provision, the court observed: "It is hard to imagine what the parties intended when they agreed that the 'arbitration law of New York State shall govern such arbitration' if they did not intend to have the CPLR apply to petitions to review arbitration awards" (*Harper Ins. Ltd. v Century Indem. Co.*, 819 F Supp 2d 270, 274 [SD NY 2011]). Our conclusion finds support in *Volt Info. Sciences, Inc. v Board of*

Trustees of Leland Stanford Jr. Univ. (489 US 468 [1989]) in which the Court held that where "parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward" (*id.* at 479). Accordingly, the court erred in finding that the agreement does not contain critical language regarding enforcement.

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

ENTERED: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Acosta, Renwick, Freedman, Manzanet-Daniels, JJ.

11850 Braulio Milton Penaranda, Index 100963/10
Plaintiff-Appellant-Respondent, 590179/11

-against-

4933 Realty, LLC,
Defendant-Respondent-Appellant.

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4933 Realty, LLC,
Third-Party Plaintiff
-Respondent-Appellant,

-against-

NY Construction Work Inc., doing
business as K&S Construction,
Third-Party Defendant-Respondent.

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

Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of counsel), for respondent-appellant.

Kral Clerkin Redmond Ryan Perry & Van Etten LLP, Melville (James V. Derenze of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered September 13, 2012, which granted defendant-respondent landlord's motion for summary judgment dismissing plaintiff's complaint and granted third-party defendant tenant's motion to dismiss the third-party complaint against it, unanimously modified, on the law, to the extent of reinstating the Labor Law § 240(1) claim and denying third-party defendant's motion to

dismiss the third-party complaint, and otherwise affirmed, without costs.

Plaintiff was injured while employed by third-party defendant tenant K&S Construction when he was thrown from a Bobcat inside defendant's warehouse. Defendant landlord had contracted with third-party defendant tenant, plaintiff's employer, to construct a concrete curb around the perimeter of the nearby parking lot. Plaintiff was helping to remove plywood, which was allegedly interfering with the construction project, and was positioned on the Bobcat in order to provide balance or serve as a counterweight for the plywood on the Bobcat's front forks. He was thrown off when the two back wheels of the Bobcat lifted up unexpectedly.

The issue here is whether plaintiff was engaged in construction work when removing the plywood so as to afford him the protection of the Labor Law. Cases have held that "construction" includes certain ancillary work that is "necessary and incidental" to or "an integral part of" a construction project (*Johnson v Rapidarda,* 262 AD2d 365 [2d Dept 1999]; *Curley v Gateway Communications, Inc.,* 250 AD2d 888 [3d Dept 1998]). Here, it is unclear whether plaintiff's removal of the plywood was sufficiently related to the construction project. Accordingly, there is a question of fact as to whether plaintiff

was engaged in work that was "necessary and incidental" or an integral part of constructing the curb sufficient to accord Labor Law protection.

Assuming that plaintiff was engaged in such work, we find that falling from the Bobcat is the type of gravity related event contemplated by the Court of Appeals in *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]). In *Potter v Jay E. Potter Lumber Co., Inc.* (71 AD3d 1565 [4th Dept 2010]), the Fourth Department, relying on *Runner*, similarly found that a worker, who like plaintiff here, was positioned as a counterweight for a load on a forklift and was catapulted forward when the forklift became unstable, was entitled to the protection of Labor Law § 240(1). To the extent that our holding in *Modeste v Mega Contr., Inc.* (40 AD3d 255 [2007]), is to the contrary, we depart from it based on the holding in *Runner.*

The provisions of the Industrial Code invoked by plaintiff do not support his Labor Law § 241(6) claim, and, accordingly, that claim was properly dismissed (*see Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004 (NYCRR 23-9.2[b][1] [requirements are merely restatement of common law rule], and *Modeste*, 40 AD3d 255 [2007] [NYCRR 23-9.2[c] [excessive loading prohibitions insufficient to support Labor Law 241(6) claim]).

The third-party complaint for indemnity should not have been

dismissed. It has not been determined whether plaintiff was engaged in performing work under the construction contract and whether defendant landlord had any direct role. Defendant landlord alleges that it is entitled to contractual indemnity pursuant to the construction agreement between it and third-party defendant K&S. We note that defendant landlord did not plead entitlement to indemnity pursuant to the lease.

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

ENTERED: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11935 The People of the State of New York, Ind. 335/09
Respondent,

-against-

Gilbert Diaz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered May 20, 2011, as amended May 24, 2011 and May 31, 2011, convicting defendant, upon his plea of guilty, of four counts of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of 5½ years, unanimously affirmed.

Defendant did not preserve his claim of unreasonable delay in sentencing, and we decline to review it in the interest of justice. Because defendant never raised this issue before the sentencing court, the record is insufficiently developed to permit review of this fact-based claim (*see People v Kinchen*, 60 NY2d 772 [1983]). Furthermore, defendant has not provided the minutes of adjournments that are relevant to this issue (*see People v Olivo*, 52 NY2d 309, 320 [1981]).

Defendant did not preserve his claim that his Pennsylvania conviction was not the equivalent of a New York felony, and we decline to review it in the interest of justice. We reject defendant's claim that his second felony drug offender adjudication was a sentencing error appearing on the face of the record, and thus exempt from preservation requirements (*see generally People v Santiago*, 22 NY3d 900, 903 [2013]). While it is undisputed that the Pennsylvania offense would not have qualified as the equivalent of a New York felony if the analysis were confined to a facial comparison of the statutes' elements, the circumstances of the case would have required the court to examine the Pennsylvania accusatory instrument. This is because the foreign statute criminalizes discrete acts, namely possession of different drugs (*see People v West*, 58 AD3d 483, 484 [1st Dept 2009], *lv denied* 12 NY3d 822 [2009]; *compare People v Muniz*, 74 NY2d 464, 468-469 [1989]). Thus, if defendant's Pennsylvania conviction involved heroin or cocaine rather than marijuana, it clearly would have been the equivalent of a conviction under Penal Law § 220.16(1). As a result, the propriety of using the foreign conviction cannot "be determined from the face of the appellate record" (*People v Samms*, 95 NY2d 52, 57 [2000]).

Defendant's ineffective assistance of counsel claim, relating to counsel's failure to challenge defendant's predicate

felony, is unreviewable on direct appeal because it involves matters not reflected in the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11936 Michelle Zayas, Index 306258/10
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for appellant.

Cullen and Dykman LLP, New York (Joseph C. Fegan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered January 4, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was proper in this action where plaintiff fell while attempting to climb over a mound of snow that was piled by the curb in an effort to gain access to her parked car. There was a lack of evidence that defendant's snow removal efforts made the sidewalk more dangerous (*see Quintana v New York City Hous. Auth.*, 91 AD3d 578 [1st Dept 2012]). Nor is there evidence that any alleged negligence on defendant's part was a proximate cause of plaintiff's accident, where plaintiff testified that she elected to leave the cleared path to climb

over the snow mound to get to her car (*compare Dillard v New York City Hous. Auth.*, 112 AD3d 504 [1st Dept 2013]).

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

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

ENTERED: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11937 Diane Silver, Index 114425/09
Plaintiff-Appellant,

-against-

City of New York Department
of Homeless Services,
Defendant-Respondent.

_____

Kreisberg & Maitland, LLP, New York (Jeffery L. Kreisberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered September 24, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established that the denial of plaintiff's request to be reassigned to a certain work location did not constitute a refusal to make a reasonable accommodation for plaintiff's disability (*see* Executive Law § 296; Administrative Code of City of NY § 8-107). There was no position available at the location plaintiff desired, and in any event, "an employer is not obligated to provide the disabled employee with [an]

accommodation that the employee requests or prefers" (*Pimentel v Citibank, N.A.*, 29 AD3d 141, 148 [1s Dept 2006], *lv denied* 7 NY3d 707 [2006] [internal quotation marks omitted]).

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

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

ENTERED: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11938 Sunquest Enterprises, Inc., Index 650035/12
Plaintiff-Appellant,

-against-

Monsour Zar, et al.,
Defendants-Respondents.

_____

Law Offices of Michael A. Haskel, Mineloa (Michael A. Haskel of counsel), for appellant.

Sills Cummis & Gross P.C., New York (Kenneth R. Schachter of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about April 9, 2013, which denied plaintiff's motion for summary judgment on its complaint, unanimously affirmed, without costs.

Plaintiff is correct that, had defendants entered into a contract on behalf of a non-existent entity, for example, the Studio 1 entity that was dissolved by tax proclamation in 1992, they would be personally liable under the contract (*see Imero Fiorentino Assoc. v Green*, 85 AD2d 419, 420-421 [1st Dept 1982]; *Benfield Elec. Supply Corp. v C & L El. Controls, Inc.*, 58 AD3d 423, 423-424 [1st Dept 2009]). However, defendants raised an issue of fact whether they contracted on behalf of a non-existent entity or the currently existing division of their corporation, by presenting documentary evidence showing that the Studio 1 for

which they ordered goods is a division of Shazdeh Fashions, Inc., of which they are officers. This evidence includes documents exchanged with plaintiff during other transactions that pre-date this one as well as documents that post-date this transaction.

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

ENTERED: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11939 In re Oksoon K.,
Petitioner-Respondent,

-against-

Young K., etc.,
Respondent-Appellant.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Young K., appellant pro se.

Law office of Cabelle & Calderon, Jamaica (Lewis S. Calderon of counsel), for respondent.

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Order of protection, Family Court, Bronx County (David B. Cohen, J.), entered on or about September 6, 2012, and in force until September 8, 2014, which, upon a fact-finding determination that respondent committed the family offenses of aggravated harassment in the second degree and stalking, directed him to stay away from petitioner and not communicate with her, unanimously modified, on the law, to vacate the finding of aggravated harassment in the second degree, and otherwise affirmed, without costs.

A fair preponderance of the evidence does not support the Family Court's determination that respondent's actions on October 28, 2011 constituted the family offense of aggravated harassment in the second degree (*see* Family Court Act §§ 812 [1]; 832 and

Penal Law § 240.30).

We agree, however, with the Family Court that the hearing testimony proved by a fair preponderance of the credible evidence that on the day of the incident, respondent's actions constituted the family offense of stalking in the fourth degree (Penal Law § 120.45) because his behavior was designed to hound, frighten, intimidate and threaten petitioner (*see People v Stuart*, 100 NY2d 412, 428 [2003]). We also agree that the issuance of a two-year order of protection in petitioner's favor with the reasonable condition that he "stay away" from her home and employment was proper because it will likely be helpful in eradicating the root of the family disturbance (*see Matter of Miriam M. v Warren M.*, 51 AD3d 581, 582 [1st Dept 2008]; *and see Matter of F.B. v W.B.*, 248 AD2d 119 [1st Dept 1998]).

Respondent's assertion that Family Court Act § 1051(b) is applicable here is misplaced, because that statute only applies to petitions filed pursuant to article 10 of the Family Court Act, whereas the instant petition was filed pursuant to article 8. The Family Court providently exercised its discretion in granting petitioner's oral application made at the close of her case to conform the pleadings to the proof pursuant to CPLR 3025 because respondent had a full and fair opportunity to contest her testimony at the fact-finding hearing (*see Troiano v Troiano*, 87

AD2d 588, 589 [2d Dept 1982]). Moreover, there is no indication in the record that respondent was hindered in the preparation of his case or was prevented from taking any measure in support of his position (*see Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]).

Contrary to respondent's contention, the Family Court did not violate his due process right to a fair trial by suggesting to petitioner's counsel that she should make the motion to conform the pleadings to the proof, because it had the authority to deem the petition amended to conform to the evidence presented at the fact-finding hearing sua sponte (*see O'Neill v New York Univ.*, 97 AD3d 199, 209 [1st Dept 2012]). Finally, review of the transcripts of the fact-finding hearing demonstrate that the court did not harbor a bias against respondent (*see Matter of Kelvin D.*, 40 NY2d 895, 897 [1976]).

We have considered the other claims and find them to be without merit.

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

ENTERED: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11940 The People of the State of New York, Ind. 3692/09
Respondent,

-against-

Jorge Abrams,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven Barrett, J.), rendered on or about October 14, 2011,

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

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

ENTERED: MARCH 11, 2014

CLERK

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

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11942 Lion's Property Development Group LLC, Plaintiff-Appellant, Index 651016/11

-against-

New York City Regional Center, LLC, et al., Defendants-Respondents.

Hinckley & Heisenberg LLP, New York (George Hinckley of counsel), for appellant.

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 19, 2013, which denied plaintiff's motion for summary judgment on its cause of action for breach of contract, and granted defendants' motion for summary judgment dismissing the complaint as against defendant Hoche Partners Capital LLC and so much of the motion as sought to dismiss the causes of action for breach of contract, tortious interference with contract with the licensed Chinese immigration companies (LCICs) other than Henry Global Consulting Group, tortious interference with prospective business advantage, breach of confidence, trade defamation, and unjust enrichment as against the remaining defendants, unanimously affirmed, with costs.

The causes of action relating to plaintiff's claims that it

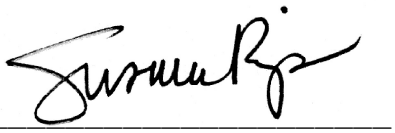
was due commissions for certain referrals it made to defendant New York City Regional Center, LLC (NYCRC) should be dismissed because, under the parties' agreement, plaintiff was to be compensated for referrals of potential investors, not representatives of potential investors, namely, the LCICs. Plaintiff was not due a commission for the referral of the individual investors, since they were referred to NYCRC not by plaintiff but by the LCICs accepted by NYCRC.

Plaintiff's related claims, including the claim that defendants tortiously interfered with contracts between plaintiff and three of the LCICs, should be dismissed because the record demonstrates that plaintiff did not have enforceable agreements with those LCICs. The record shows that defendants' alleged interference with plaintiff's prospective business advantage was neither wrongful nor motivated solely by malice, as opposed to

normal economic interest (*see Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]). In opposition to defendants' motion, plaintiff failed to raise triable issues as to its unjust enrichment claim and its claims against Hoche.

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

ENTERED: MARCH 11, 2014



CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11943 The People of the State of New York, Ind. 1784/08
Respondent,

-against-

Michael Williams,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven Barrett, J.), rendered on or about April 2, 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: MARCH 11, 2014

CLERK

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

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11944 Melissa L. Irizarry, Index 302260/11
Plaintiff,

-against-

Antoinette Daly, et al.,
Defendants-Appellants,

NYLL Management, Ltd., et al.,
Defendants-Respondents.

_____

Adams Hanson Rego Carlin Kaplan & Fishbein, Yonkers (Jeffrey A. Domoto of counsel), for appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Majorie E. Bornes Of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered June 4, 2013, which, to the extent appealed from, denied defendants Antoinette Daly and Anthony Daly's motion for summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, without costs.

Plaintiff was a back-seat passenger in a car driven by defendant Anthony Daly, a teenager who was driving his mother's car, when Anthony made a left turn across two lanes of oncoming traffic, and was hit by a livery cab coming from the opposite direction. Plaintiff did not recall seeing a green left-turn arrow before Anthony made the turn, and heard screeching brakes from the livery cab before the accident. Anthony acknowledged

that he "didn't really know what to do" when he saw the livery cab driving toward his car, and did not recall doing anything to avoid the accident.

Defendants failed to establish that the driver of the livery cab was solely at fault for the accident, which would have eliminated issues of fact as to Anthony's negligence. They failed to establish either that Anthony acted lawfully and with reasonable care in making the left turn while a vehicle was approaching in oncoming traffic (*see Cadeau v Gregorio*, 104 AD3d 464 [1st Dept 2013]) or that he used reasonable care to avoid a collision with the oncoming vehicle (*see Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295, 298 [1st Dept 2008]). For the same reasons, defendants failed to establish the applicability of the emergency doctrine (*see Markowitz v Lewis*, 40 AD3d 371 [1st Dept 2007]).

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

ENTERED: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11945 CPS 1 Realty LP, Index 601893/09
Plaintiff-Respondent,

-against-

Michael Brennan, et al.,
Defendants-Appellants.

_____

Foreht Associates, LLP, New York (Stephen R. Foreht of counsel), for appellants.

Westermann Sheehy Keenan Samaan & Aydelott, LLP, Uniondale (Stephen J. Gillespie of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 22, 2012, which denied defendants' motion for summary judgment dismissing the claims for delay damages, and granted plaintiff's motion for summary judgment determining, pursuant to an arbitration award, that defendants are responsible for 15% of the subject delays, unanimously affirmed, with costs.

The motion court correctly declined to determine the scope of the arbitration award apportioning responsibility for the subject delays, specifically, whether the arbitrators regarded

the delays as concurrent or consecutive (*see Rembrandt Indus. v Hodges Intl.*, 38 NY2d 502 [1976]), on the ground that that issue was determined by a court of coordinate jurisdiction in confirming the award.

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

ENTERED: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11947- 11947A — The People of the State of New York, Respondent, — Ind. 4456/11, 5616/11

-against-

Anthony Jones,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Charles H. Solomon, J.), rendered March 13, 2012, convicting defendant, upon his pleas of guilty, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree and sentencing him to concurrent terms of six months, unanimously affirmed.

Since defendant was sentenced to a term of incarceration of longer than 60 days (*see* Penal Law § 60.35[8]), he was required to seek relief from his mandatory surcharge payments by way of a CPL 420.10(5) motion for resentencing. Defendant's claims that he was entitled to a financial hardship hearing pursuant to CPL 420.40, and that the hearing should have been held at the time of his sentencing, are not supported by the applicable statutes. Rather, any application for relief from his surcharges is to be

entertained in postsentence proceedings (*see People v Bradley*, 249 AD2d 103 [1st Dept 1998], *lv denied* 92 NY2d 923 [1998]; *People v Wheeler*, 244 AD2d 277 [1st Dept 1997]).

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

ENTERED: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11948 Koya Abe, Index 152312/12
Plaintiff-Appellant,

-against-

Michael J. Cohen,
Defendant-Respondent,

Does 1-20,
Defendants.

_____

Jennifer L. Unruh, Astoria, for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Brian S. Kaplan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered November 28, 2012, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint as against defendant Michael J. Cohen pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs.

The bulk of plaintiff's 127-paragraph complaint consists of generic allegations of wrongdoing by unnamed "defendants," presumably including Cohen. These generic allegations fail to state a cause of action of retaliation by Cohen (*see Askin v Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]; *Ortiz v City of New York*, 105 AD3d 674, 674 [1st Dept 2013]).

The complaint does contain one concrete factual allegation of direct action by Cohen, alleging that he created a document for the purpose of concealing retaliatory actions taken by his wife, Nancy Barton (plaintiff's supervisor and a party defendant in a related action) against plaintiff in 2007. As amplified and clarified in the papers submitted by plaintiff in opposition to defendants' dismissal motion, however, the "creation" action of which plaintiff complains consisted of copying the text of an e-mail exchange between Barton and plaintiff, stripping out the date and recipients, pasting it into a Microsoft Word document, and attaching it to an email from Barton to Ken Castronuovo, a New York University administrator (who is also a party defendant in a related action by plaintiff).

Absent some concrete allegation of harm, the simple act of forwarding an email cannot constitute a disadvantageous action sufficient to support a claim of retaliation (*see Bogart v City of New York*, 2002 WL 1561065, *2, 2002 US Dist LEXIS 12756, *4-5 [SD NY 2002]). Although plaintiff alleges that, in copying his email, Cohen somehow "changed the content," he does not allege how the content was changed, other than removal of the date and recipients from the original email header. Plaintiff alleges that the removal of the date and recipients somehow served to conceal prior acts of discrimination by Barton, but, again, does

not explain how this could be. Under these circumstances, plaintiff's allegation that Cohen created a document does not allege that Cohen engaged in any disadvantageous action sufficient to support a claim of retaliation (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]).

Plaintiff also contends that Cohen aided and abetted Barton in creating the above document. As discussed above, however, the creation of this document was not a disadvantageous action sufficient to support a claim of retaliation. Cohen cannot be held liable for aiding and abetting an act which itself is not actionable (*see Kelly G. v Board of Educ. of City of Yonkers*, 99 AD3d 756, 758-759 [2d Dept 2012]; *Miloscia v B.R. Guest Holdings LLC*, 33 Misc 3d 466, 479 [Sup Ct NY County 2011], *affd in part, mod on other grounds in part* 94 AD3d 563 [1st Dept 2012]).

Plaintiff also contends that Cohen aided and abetted unnamed defendants in creating a hostile work environment. Even crediting plaintiff's allegations that defendants engaged in such acts as "excluding [him] from communications" and "from events and privileges," those allegations are not sufficient to state a claim for hostile work environment (*see e.g. Salerno v Town of Bedford*, 2008 WL 5101185, *8, 2008 US Dist LEXIS 99373, *23 [SD NY 2008]; *see also Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 307 [2004] ["shouting" and "[b]eing yelled at" "do not rise

to the level of adverse employment actions" [internal punctuation omitted]).

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: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11949 The People of the State of New York, Respondent, Ind. 2218/09

-against-

David Holland, Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Jessica L. Supernaw and Margaret E. Knight of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered March 2, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender previously convicted of a violent felony, to a term of eight years, unanimously reversed, on the law, and the matter remanded for a new trial.

Defendant's ineffective assistance of counsel claim may be reviewed on direct appeal since this Court is able to determine from the record that there was no conceivable strategic purpose for counsel's conduct (*see People v Jones*, 101 AD3d 1482 [3rd Dept 2012], *lv denied* 21 NY3d 1017 [2013]). The record reveals that defense counsel's trial strategy rested on a theory that

defendant could not be found guilty of the charged sale unless he directly sold narcotics to the undercover officer, rather than an intermediary. However, the identity of the person to whom defendant sold the narcotics is not a material element of the crime charged (*see People v Brown*, 196 AD2d 428, 430-431 [1st Dept 1993], *lv denied* 82 NY2d 804 [1993]).

Counsel demonstrated a lack of familiarity with the applicable criminal law, which prejudiced defendant (*see People v Droz*, 39 NY2d 457 [1976]). By arguing to the court and jury that defendant could not be found guilty of the crime charged if he sold the narcotics to an intermediary instead of to the undercover police officer directly, in essence counsel admitted to the jury that defendant did in fact sell narcotics (*see People v Logan*, 263 AD2d 397 [1st Dept 1999]).

Nor can it be said that counsel's argument was aimed to appeal to the jury for sympathy or nullification, since counsel argued those same irrelevant facts to the court outside the

jury's presence, which demonstrated his "lack of understanding of the Penal Law" (*People v Gordian*, 99 AD3d 538, 539 [1st Dept 2012], *lv denied* 20 NY3d 1061 [2013]).

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

ENTERED: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11950 Thomas Godbolt, Index 109611/09
Plaintiff-Appellant,

-against-

Verizon New York Inc.,
Defendant-Respondent.

- - - - -

Community Service Society of New York,
The Bronx Defenders, The Fortune
Society, Inc., Legal Action Center,
The Legal Aid Society, Legal Services NYC,
MFY Legal Services, Inc., National
Employment Lawyers Association/NY,
The Osborne Association and Youth Represent,
Amici Curiae.

_____

Alterman & Boop LLP, New York (Arlene F. Boop of counsel), for appellant.

Seyfarth Shaw LLP, New York (Robert S. Whitman of counsel), for respondent.

Community Service Society, New York (Paul Keefe of counsel), for amici curiae.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 23, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that he was terminated from his employment on the basis of his race and his past criminal convictions, in violation of the State and City Human Rights Laws (Executive Law § 296 *et seq.*; Administrative Code of City of NY § 8-107[1][a],

[7]) and Correction Law § 752.

Defendant explained that it terminated plaintiff because he failed to disclose his prior criminal convictions on his employment applications, which plaintiff admitted, and demonstrated that every one of its employees who were found to have falsified an employment application was terminated (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]).

Plaintiff failed to raise an issue of fact. He presented no evidence that defendant's proffered reason for his termination was pretextual and identified no evidence that he was treated differently from similarly situated employees because of his race or criminal history. There is no evidence to support his claim that the investigator exceeded his investigative authority or that his investigation was animated by racial bias. The fact that the investigation, which initially was focused on claims of intoxication at work, found evidence of unrelated criminal convictions did not render the investigation unreasonable or improper.

Even under the mixed-motive analysis applicable to City Human Rights Law claims, plaintiff's claim fails, because there is no evidence from which a reasonable factfinder could infer

that race or criminal history played any role in defendant's decision to terminate him (*see Bennett*, 92 AD3d at 40-41).

Plaintiff relies on one remark made in an email exchange that took place weeks after the decision to terminate him was made and that concerned the resolution of his union's grievance following the termination. In the email, one of defendant's employees responsible for making the decision to terminate plaintiff declined to reconsider the penalty because of the nature of plaintiff's convictions and his concern about the liability that defendant would assume if plaintiff committed a similar crime while on company time. However, "[s]tray remarks such as [this], even if made by a decision maker, do not, without more, constitute evidence of discrimination" (*Melman v Montefiore Med. Ct.*, 98 AD3d 107, 125 [1st Dept 2012]). Indeed, plaintiff did not demonstrate a nexus between the employee's remark and the decision to terminate him (*see e.g. Mete v New York State Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 294 [1st Dept 2005]).

We decline to hold, as urged by plaintiff and amici, that the stray remarks doctrine may not be relied on in determining claims brought pursuant to the City Human Rights Law, even as we recognize the law's "uniquely broad and remedial purposes" (*Bennett*, 92 AD3d at 34 [internal quotation marks omitted]). The

doctrine is not inconsistent with the intentions of the law, since statements "constitute evidence of discriminatory motivation when a plaintiff demonstrates that a nexus exists between the allegedly discriminatory statements and a defendant's decision to discharge the plaintiff" (*Schreiber v Worldco, LLC*, 324 F Supp 2d 512, 518 [SD NY 2004]; *see Tomassi v Insignia Fin. Group, Inc.*, 478 F3d 111, 115-116 [2nd Cir 2007]).

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: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11951N Adnan Abu Ayyash, Index 151471/12
Plaintiff-Petitioner-Appellant,

-against-

Rana Abdul Rahim Koleilat,
Defendant.
- - - - -
Banco Bradesco, S.A., et al.,
Nonparty Respondents,

Banco Do Brasil, S.A., et al.,
Nonparty Respondents-Respondents.
- - - - -
Institute of International Bankers,
The Clearing House Association L.L.C.,
European Banking Federation, and New York
Bankers Association,
Amici Curiae.

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Law Offices of Steven A. Cash, PLLC, New York (Steven A. Cash of counsel), for appellant.

Aaron W. Tandy, New York, for Banco Do Brasil, S.A., respondent.

Shearman & Sterling, LLP, Washington, D.C. (Heather L. Kafele of the bar of the State of Maryland and District of Columbia admitted pro hac vice of counsel), for Banco Santander, S.A., and Itaú Unibanco, S.A., respondents.

Bressler, Amery & Ross, P.C., New York (Andrew W. Sidman of counsel), for UBS A.G., respondent.

Cleary Gottlieb Steen & Hamilton LLP, New York (Carmine D. Boccuzzi of counsel), for Credit Agricole Corporate and Investment Bank and HSBC Bank USA, N.A., respondents.

Cravath, Swaine & Moore LLP, New York (Julie A. North of counsel), for Credit Suisse (USA), Inc., respondent.

White & Case LLP, New York (Dwight A. Healy of counsel), for amici curiae.

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered October 22, 2012, which denied plaintiff's motion to compel nonparty respondents to comply with information subpoenas, subpoenas duces tecum, and restraining notices issued against any of defendant's accounts located in any of the banks' branches, unanimously affirmed, without costs.

Plaintiff served the subpoenas and restraining notices on respondents, New York branches of financial institutions, in an attempt to enforce a judgment issued by a court in Lebanon awarding him damages against defendant. Plaintiff seeks to compel respondents to comply fully with the subpoenas and restraining notices, which purport to apply to all of respondents' branches worldwide. The motion court properly denied plaintiff's motion. The court providently exercised its discretion, pursuant to CPLR 5240, in denying the enforcement procedures sought by plaintiff since they would likely cause great annoyance and expense to respondents or their employees or agents.

In addition, the denial of plaintiff's motion is warranted based on principles of international comity since the underlying dispute did not originate in the United States, the Hague

Convention on the Taking of Evidence Abroad in Civil and Commercial Matters provides an alternative recourse, and ordering compliance raises the risk of undermining important interests of other nations by potentially conflicting with their privacy laws or regulations (*see Matter of Agusta*, 171 AD2d 595 [1st Dept 1991]; *Orlich v Helm Bros.*, 160 AD2d 135, 143-144 [1st Dept 1990]).

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

ENTERED: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11952N Aireen Romero, Index 150307/12
Plaintiff-Appellant,

-against-

Alezeb Deli Grocery Inc., et al
Defendants,

2024 Second Avenue LLC,
Defendant-Respondent.

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Lerner, Arnold & Winston, LLP, Garden City (John V. Decolator of counsel), for appellant.

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

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 25, 2013, which granted defendant 2024 Second Avenue LLC's motion to vacate the default judgment entered against it, unanimously affirmed, without costs.

The motion court exercised its discretion in a provident manner in granting defendant's motion. The unexplained delay of defendant's insurance broker in forwarding the summons and complaint to defendant's insurance carrier constituted a reasonable excuse for defendant's failure to appear (*see Castillo v Garzon-Ruiz*, 290 AD2d 288, 290 [1st Dept 2002]). Moreover, the record shows that the insurance broker did not respond to telephone calls from plaintiff's counsel regarding the status of

the claim, and there is no indication that defendant's failure in answering the complaint was willful, or that plaintiff was prejudiced by the delay (*see Lee v 215 W. 88 St. Holdings, LLC*, 106 AD3d 460, 461, [1st Dept 2013]; *Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 413-414 [1st Dept 2011]).

Defendant also established potentially meritorious defenses in this action. The record demonstrates that defendant did not create the icy condition, and there was no conclusive evidence, at this juncture, that it had notice of the condition.

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

ENTERED: MARCH 11, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10965- 10965A CashZone Check Cashing Corp, et al., Plaintiffs-Appellants, Index 653245/11

-against-

Vigilant Insurance Company, et al., Defendants-Respondents.

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Herrick, Feinstein LLP, New York (Alan R. Lyons of counsel), for appellants.

Rosner, Nocera & Ragone, LLP, New York (Joseph Goljan of counsel), for respondents.

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Orders Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 21, 2013 and March 25, 2013, reversed, on the law, with costs, defendant Vigilant's motion denied, and plaintiffs' motion granted, and it is declared that Vigilant is obligated to provide coverage to plaintiffs pursuant to the bond.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Rosalyn H. Richter
Paul G. Feinman, JJ.

10965-
10965A
Index 653245/11

_____x

CashZone Check Cashing Corp., et al.,
Plaintiffs-Appellants,

-against-

Vigilant Insurance Company, et al.,
Defendants-Respondents.

_____x

Plaintiffs appeal from orders of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 21, 2013 and March 25, 2013, which, to the extent appealed from, denied their motion for summary judgment declaring that defendant Vigilant Insurance Company is obligated to provide coverage pursuant to the "In Transit" provision of the insurance bond, and granted Vigilant's motion for summary judgment dismissing the complaint as against it.

Herrick, Feinstein LLP, New York (Alan R. Lyons of counsel), for appellants.

Rosner, Nocera & Ragone, LLP, New York (Joseph Goljan, John A. Nocera and John P. Foudy of counsel), for respondents.

SAXE, J.

Plaintiffs seek coverage under the "In Transit" clause of an insurance bond they purchased from defendant Vigilant Insurance Company, for losses they sustained due to an embezzlement scheme perpetrated by the principals of nonparty Mount Vernon Money Center (MVMC), an armored car company. The larcenies were perpetrated while plaintiffs' cash was being processed at MVMC's vault, en route between the Federal Reserve bank and plaintiffs' check-cashing businesses and ATMs. The insurer disclaimed coverage, and in this declaratory judgment action, both sides moved for summary judgment. The motion court held that the bond in question does not cover the circumstances of this theft; we reverse and declare that the insurer has an obligation to provide coverage to plaintiffs under the bond.

The essential facts are undisputed. Plaintiff Metropolitan National Bank (Metropolitan) is a federally chartered national bank; it owns co-plaintiff CashZone Check Cashing Corporation (CashZone), a check cashing agency. On or about January 6, 2006, CashZone entered into an "Armored Car Service Agreement" with MVMC, under which MVMC would retrieve currency on CashZone's behalf from the Federal Reserve Bank of New York, Monday through Friday, and take the money to the MVMC vault, where it would be sorted, counted, and bundled for delivery to plaintiffs'

financial centers; cash for plaintiffs' ATMs would be loaded into ATM cassettes. At plaintiffs' ATM locations, MVMC would replace the ATM cassettes that had been in the machines with replenished ATM cassettes. MVMC agreed to maintain custody of CashZone's funds at all times from its pickup from the Federal Reserve Bank to its delivery to CashZone's facilities and not to commingle funds with its own funds or with other customers' funds. CashZone's predecessor-in-interest, G&R Check Cashing Corporation, also had an "ATM Management Service Agreement" with MVMC effective January 6, 2003, under which MVMC would provide scheduled cash replenishment services for G&R's ATMs.

MVMC owned and operated several cash vaults within which it processed the cash collected from the Federal Reserve Bank in preparation for its ultimate delivery, along with the residual cash remaining in the retrieved ATM cassettes. On a weekly basis, MVMC held tens of millions of dollars for its customers for a certain period of time.

The embezzlement scheme that resulted in plaintiffs' losses was devised by Robert Egan, the president and sole shareholder of MVMC, with the assistance of Bernard McGarry, MVMC's chief operating officer. Egan and McGarry arranged to use their customers' funds to finance MVMC's business operations, commingling customer funds to help conceal their misappropriation

of the stolen funds, a practice referred to by plaintiffs and by the prosecutor in the criminal prosecution of Egan and McGarry as "playing the float" (*see United States v Egan*, 811 F Supp 2d 829, 833 [SD NY 2011]).

Egan was first charged with bank fraud in a criminal complaint on February 8, 2010, and he and McGarry were indicted in March 2010. Both men ultimately pleaded guilty to bank fraud and conspiracy. CashZone and Metropolitan, upon learning of Egan's arrest, calculated their losses to be approximately $446,564.12. In April 2010, plaintiffs tendered proof of that loss with their claim to the insurer, seeking payment under the "In Transit" clause of the insurance bond the insurer had issued.

The insurance bond under which plaintiffs make their claim was effective from April 22, 2009 to April 22, 2010. The provision of the bond that plaintiffs claim covers this situation is Clause 3, the "In Transit" clause. It provided that the insurer would pay Metropolitan for:

> "3. Loss of Property resulting directly from common law or statutory larceny, misplacement, mysterious unexplainable disappearance, damage or destruction, while the Property is in transit anywhere:
>
> > "A. in an armored motor vehicle, including loading and unloading thereof,
> >
> > "B. in the custody of a natural person acting as a messenger of the ASSURED, or

> "C. in the custody of a Transportation Company and being transported in a conveyance other than an armored motor vehicle, provided, however, that covered Property transported in such manner is limited to [records, securities and negotiable instruments].
>
> "Coverage under this INSURING CLAUSE begins immediately on the receipt of such Property by the natural person or Transportation Company and ends immediately on delivery to the premises of the addressee or to any representative of the addressee located anywhere."

The insurer denied coverage of plaintiffs' loss, reasoning that at the time of the loss, the property at issue had not been "in transit" as that term is defined by the bond, but, rather, had been within the vault of MVMC. Plaintiffs then commenced this action for a declaration that their loss of $446,564.12 was covered under the "In Transit" clause of the insurance bond and damages for breach of contract. Plaintiff moved for partial summary judgment seeking recovery under the bond; insofar as is relevant to this appeal, the insurer moved for summary judgment dismissing the complaint and a declaration that it was not obligated to provide coverage under the bond.

The motion court denied plaintiffs' motion and granted the insurer's motion, declaring that the insurer was not obligated to provide coverage under the "In Transit" clause of the bond. It reasoned that paragraph 3(A) of the "In Transit" clause did not cover the larceny at issue here, since the money was not stolen while it was in an armored vehicle or while the vehicle was being

loaded or unloaded, or during an incidental stop, but, rather, during a substantive interruption of the transit process, while the money was inside MVMC's premises for sorting and processing. Coverage for "In Transit" losses began, the court held, when MVMC picked up the money at the Federal Reserve Bank, and ended when MVMC delivered the currency to the MVMC vault for sorting and processing prior to delivery to ATMs; transit then resumed when the cash was taken from the MVMC vault and placed in an armored vehicle, and ended when delivery to plaintiffs' facility was complete. Whether the stopover at the vault was completed on the same day as the pickup from the Federal Reserve Bank, or lasted overnight, the court said, it was more than an "incidental" interruption of transit.

For the reasons that follow, we hold that the "In Transit" clause of the bond covers plaintiffs' loss.

The insurer relies on the unreported case of *Actors Fed. Credit Union v CUMIS Ins. Soc., Inc.* (US Dist Ct, SD NY, 11 Civ 2129, Nathan, J., Sept. 17, 2012) for the proposition that the "in transit" language unambiguously limits coverage to the period during which the funds are either in an armored vehicle or being loaded onto or unloaded from that vehicle. It also cites *Palm Desert Natl. Bank v Federal Ins. Co.* (473 F Supp 2d 1044 [CD Cal 2007], *affd* 300 Fed Appx 554, 2008 WL 4927354 [9th Cir 2008]), as

well as cases from other jurisdictions, for the proposition that "in transit" coverage extends to thefts outside of the armored car itself *only* when they occur during incidental stops in transit, such as for meals, gas, or during overnight stops (*see Tivoli Corp. v Jewelers Mut. Ins. Co.*, 932 SW2d 704 [Tex App 1996]; *Ore & Chem. Corp. v Eagle Star Ins. Co.*, 489 F2d 455 [2d Cir 1973]; *United Bank of Pueblo v Hartford Acc. & Indem. Co.*, 529 F2d 490 [10th Cir 1976]).

However, our analysis requires us to determine, and apply, the controlling case law of this State; rulings by courts of other jurisdictions, even where they apply New York law, are not controlling on this Court (*see* 28 NY Jur 2d, Courts and Judges § 230). The question presented, namely, the proper construction of the term "in transit" in the context of transportation insurance coverage, is a settled point of law in New York.

An "In Transit" provision was discussed and interpreted in the controlling case of *Underwood v Globe Indem. Co.* (245 NY 111 [1927]). In *Underwood*, a bond salesman who was attempting to arrange a bond sale to a potential buyer brought the bonds from Pine Street, in lower Manhattan, to West End Avenue near 88th Street, where the buyer gave him a worthless check that had been forged to appear certified, in exchange for the bonds. When the buyer absconded with the bonds, the seller made a claim under a

policy for the theft of the bonds while "in transit." The Court concluded that the transit of the bonds was never completed, because the completion of transit would have involved a lawful transfer of title, whereas the bonds had been taken "by a trick and false device," without a valid transfer of title (*id.* at 115). The Court reasoned that "[t]o hold that transit means actual movement, and not a period of rest, is too narrow a construction to give to this undertaking, and is contrary to its full meaning and scope" (*id.*).

The *Underwood* analysis was at the heart of the determination in *Franklin v Washington Gen. Ins. Corp.* (62 Misc 2d 965 [Sup Ct, NY County 1970], *affd* 36 AD2d 688 [1st Dept 1971]), a determination affirmed by this Court, holding that the test for whether something is "in transit" is "whether the goods, even though temporarily at rest, were still on their way, with the stoppage being merely incidental to the main purpose of delivery" (at 966-967).

As one New York practice treatise explains, under New York law:

> "Once the transportation of the goods has started, the property remains protected under the policy during the ordinary delays in transshipments incident to such movements. In consonance with the foregoing statement, the term 'in transit' in a policy insuring a broker against theft while property is in transit means while the property is in the possession of a messenger making delivery to a

> customer, and is not confined to periods of actual movement, but includes periods of rest during the progress of the continuous undertaking.
>
> "Whether an interruption in actual transit is sufficient to remove the goods from coverage depends on the extent and purpose of the interruption and the context of the risk contemplated. The temporary interruption for purposes related to the carriage itself does not remove the property from transportation. The true test is whether the goods, even though temporarily at rest, were still on their way with the stoppage being merely incidental to the main purpose of the delivery" (Anne M. Payne & Joseph Wilson, New York Insurance Law § 19:35, at 680 [31 West's NY Prac Series, 2013-2014 ed]).

Applying these principles of New York law to the instant case, the "In Transit" provision of the bond must be understood to cover the loss here. MVMC was responsible for picking up the cash from the Federal Reserve Bank and delivering it to CashZone locations. As in *Underwood*, the transit process was never completed for the portion of the funds that, through the "trick and false device" of failing to segregate the funds as required, MVMC instead commingled them in order to facilitate and conceal its larceny. The transit for those funds was never completed.

We reject the argument pressed by the insurer, that the "In Transit" clause provided for coverage in the armored car scenario only when the money was inside of, or being loaded onto or unloaded from, an "armored vehicle." In our view, MVMC's act of collecting money from the Federal Reserve Bank and transporting it to an MVMC vault, in order to place it in the form necessary

for its transportation and delivery to the CashZone locations, was one continuous shipment process. The stop at MVMC's vault was expressly understood by all concerned as a necessary component of the act of delivery of cash by armored car from the Federal Reserve Bank to plaintiffs' locations. As long as the cash remained in the possession of the armored car service making the delivery, and the stop was in service to that delivery, we consider the property to have been "in transit" until the contemplated delivery was completed.

The insurer's reliance on *Palm Desert National Bank* (473 F Supp2d at 1044) is misplaced. Notably, the California district court in that case expressly declined to adopt New York state's broad definition of "in transit" (*id.* at 1049), and instead based its ruling on California precedent employing a narrower test, i.e., determining whether the stoppage was for purposes of conducting "further work" (*see id.* at 1048, citing *Aetna Cas. & Sur. Co. v Burbank Generators, Inc.*, 121 Cal App 3d 813, 816 [1981]).

The insurer's reliance on the unreported opinion of the District Court for the Southern District of New York in *Actors Federal Credit Union* (*supra*) is also unavailing. In that case, the insuring clause stated that the insurer would provide coverage while the money was "physically *in transit*" in the

custody of an armored vehicle, with transit "begin[ning] immediately upon receipt of the 'covered property' by ... such armored vehicle company, and end[ing] immediately upon delivery at the destination." The court, taking note of the New York rule, did not conclude that the transit process ceased as a matter of law during a stopover at MVMC's vault; rather, it denied summary judgment, finding questions of fact concerning, inter alia, whether the In Transit provision's coverage terminated during that stopover (*id.*).

While the concept of an "incidental" stop in delivery is included in the defining characteristics of "in transit" under New York law (*see Franklin v Washington Gen. Ins.*, 62 Misc 2d at 966; *Ben Pulitzer Creations v Phoenix Ins. Co.*, 47 Misc 2d 801, 803 [Civ Ct, NY County 1965]), we decline to adopt the proposed semantic distinction between "substantive" and "incidental" interruptions so as to require a different result for the stop at issue here. The interruption in the transit process for cash sorting and processing may be somewhat different from an interruption enabling the carrier's employees to eat or rest. Yet, it was part of, or "incidental to," the understood, contracted-for process by which the armored car carrier would do its job, namely, taking the cash from the site of pickup and delivering it for use at plaintiff's business locations. Because

the contemplated delivery process necessarily included the sorting and processing of the money, we consider the entire process to be included in the "transit" of the cash.

Along the same lines, we reject the insurer's suggestion that we treat the transfer of the cash from the armored vehicle into MVMC's vault as constituting the delivery of the cash from MVMC (acting as a transportation company) to MVMC (acting as the representative of CashZone). Rather, we view MVMC as serving as the transportation company throughout, making one necessary stop as part of the contemplated delivery process for the property being transported.

Finally, to the extent the insurer protests that the bond did not cover theft *by* the transportation company, but only theft *from* the transportation company, no such distinction is justified by the language of the bond.

Accordingly, the orders of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 21, 2013 and March 25, 2013, which, to the extent appealed from, denied plaintiffs' motion for summary judgment declaring that defendant Vigilant Insurance Company is obligated to provide coverage pursuant to the "In Transit" provision of the insurance bond, and granted Vigilant's motion for summary judgment dismissing the complaint

as against it, should be reversed, on the law, with costs, Vigilant's motion denied, and plaintiffs' motion granted, and it is declared that Vigilant is obligated to provide coverage to plaintiffs pursuant to the bond.

All concur.

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

ENTERED: MARCH 11, 2014

CLERK