SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 21, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10870 In re John Polzella, Index 250388/11
Petitioner-Appellant,

-against-

Andrea Evans, etc.,
Respondent-Respondent.

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Steven Banks, The Legal Aid Society, New York (Martin J. LaFalce of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Mark H. Shawhan of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, Bronx County (Howard H. Sherman, J.), entered February 14, 2012, which, to the extent appealed from as limited by the briefs, denied the petition brought pursuant to CPLR Article 78 to annul respondent's determination dated December 29, 2010, finding that petitioner violated the conditions of his parole, revoking his parole and imposing on him an assessment of 24 months of additional imprisonment, and dismissed the proceeding, unanimously reversed, on the law, without costs, the petition

granted, respondent's determination annulled, and petitioner reinstated to parole.

Respondent was required to determine petitioner's mental competency before the parole revocation hearing could proceed since it appears that petitioner is not mentally competent and was incapable of participating in the parole revocation hearing or of assisting his counsel in doing so (*see Matter of Lopez v Evans*, __ NY3d __, 2015 NY Slip Op 2868 [April 07, 2015]) .

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

ENTERED: MAY 21, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13257 Kendu Geralds, Index 156166/13
Plaintiff-Appellant,

-against-

Salvatore F. Damiano, et al.,
Defendants-Respondents.

[And a Third-Party Action]

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Weitzman Law Offices, L.L.C., New York (Raphael Weitzman of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan P. Greenberg of counsel), for respondents.

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Order, Supreme Court, New York County (Geoffrey Wright, J.), entered October 31, 2013, as amended by order (same court and Justice), entered November 8, 2013, which denied plaintiff's motion for summary judgment and a trial preference, affirmed, without costs.

Plaintiff was injured when he was struck by a truck owned by defendant New York City Department of Sanitation and operated by defendant Salvatore Damiano. Plaintiff alleges that he stopped his vehicle on the side of the road at the Arden Avenue/Muldoon Avenue Exit Ramp off West Shore Expressway to inspect a hitch

connecting a trailer he was hauling to the vehicle he was driving. Defendants' vehicle rear-ended the trailer, pushing the trailer into plaintiff and his vehicle.

The record shows that there is conflicting evidence regarding whether plaintiff was stopped on the shoulder or in an active traffic lane, in violation of 34 RCNY § 4-08(e)(1), and whether the hazard lights on the trailer were engaged.[1] Under these circumstances, issues of fact exist regarding plaintiff's comparative negligence and whether his acts also proximately caused the accident. Because of these factual issues, summary judgment in plaintiff's favor is not warranted (*see Maniscalco v New York City Tr. Auth.*, 95 AD3d 510, 511 [1st Dept 2012] [plaintiff's motion for summary judgment denied where record raises a triable issue as to plaintiff's comparative fault]; *Calcano v Rodriguez*, 91 AD3d 468, 468-469 [1st Dept 2012] [same]; *White v Diaz*, 49 AD3d 134, 137-140 [1st Dept 2008] [same]; *Dowling v Consolidated Carriers Corp.*, 103 AD2d 675 [1st Dept 1984], *affd* 65 NY2d 799 [1985] [same]). As this Court noted in *White v Diaz*, issues of proximate cause are typically fact

[1] Contrary to the dissent's position, we find that the conflicting testimony and photographs, which go to whether plaintiff was stopped in the shoulder or in the active driving lane, are best left to be resolved by the trier of fact.

questions to be decided by a jury and are only appropriately decided on summary judgment "'where only one conclusion may be drawn from the established facts'" (49 AD3d at 139, quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). This was the case in *Sheehan v City of New York*, 40 NY2d 496 (1976), where the Court of Appeals concluded, *as a matter of law*, that the *conceded negligence* of a sanitation truck with faulty brakes, which rear-ended a bus, was the sole proximate cause of the plaintiff's injuries, and that the location of the bus merely furnished the condition or occasion for the occurrence of the event, rather than one of its causes. As the Court held, the scenario in *Sheehan* was "singularly appropriate for the exercise of the trial court's screening function since there [wa]s so little factual controversy" (*id.* at 502). That is not the case here.

The motion court properly denied plaintiff's request for a trial preference, since he has not submitted any proof supporting

his claims of destitution and inability to work (*see Roman v Sullivan Paramedicine, Inc.*, 101 AD3d 443 [1st Dept 2012]; *Smith v Horn Constr. Co.*, 12 AD2d 739 [1st Dept 1961]).

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

All concur except Moskowitz, J. who dissents in a memorandum as follows:

MOSKOWITZ, J. (dissenting)

Despite the majority's finding otherwise, the record contains no issues of material fact sufficient to defeat plaintiff's motion for summary judgment. Similarly, there is no conflicting evidence as to whether plaintiff was stopped on the shoulder or in an active traffic lane. Therefore, I respectfully dissent.

As the majority notes, the plaintiff was injured in a rear-end collision that occurred on Staten Island. Plaintiff was stopped on the side of the road near an exit ramp, after exiting an expressway when he exited his vehicle to inspect a hitch connecting his vehicle to a U-Haul trailer when a truck owned by defendant New York City Department of Sanitation (DOS) and operated by defendant Salvatore Damiano exited the highway onto the exit ramp, hitting the back of the trailer and pushing it into plaintiff and his vehicle.

To begin, plaintiff's moving papers amply demonstrate defendant Damiano's negligence, and Damiano has failed to offer a nonnegligent reason for rear-ending the trailer (*see Santos v* Booth, __ AD3d __, 2015 NY Slip Op 02002 [1st Dept March 12, 2015]; *Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]). Indeed, the Safety Unit of defendant DOS found that Damiano had,

in fact, been negligent for failure to carefully use, maintain and operate department equipment.

By the same token, defendant's opposition papers do not present any genuinely conflicting evidence regarding where plaintiff's vehicle was parked when the accident took place. Both plaintiff and third-party defendant Dawn Kuras (a nonparty to the appeal), who was driving with plaintiff, testified that his vehicle was parked on the shoulder of the road, not on the road itself, when the accident occurred. Similarly, and perhaps even more significantly, a nonparty witness – a handyman and mechanic who had stopped to offer aid to plaintiff just before the accident – stated that plaintiff's vehicle was parked "at the side of the road" on "the shoulder," not on the roadway. Indeed, the photographs of the scene after the accident clearly show that the plaintiff's vehicle and trailer were parked on the area of the road marked as the shoulder, and when plaintiff, Kuras, and the witness each marked photographs of the roadway, their markings showed that plaintiff's vehicle was parked on the shoulder, not in an active driving lane.

The only evidence purporting to create a triable issue of material fact is testimony from defendant Damiano and a DOS supervisor, who both testified that plaintiff's vehicle was

parked on the roadway, not beside it on the shoulder, when the accident occurred. However, these statements contradict the ones that they gave on the same day as the accident. In his original written statement, given soon after the accident, Damiano said that as he was driving onto the exit ramp, plaintiff's vehicle was stopped "to the right of the road." Only later, at his deposition, did he testify that he actually meant to say "the right active lane," claiming that he had stated otherwise on the day of the accident simply because he was nervous. Similarly, the DOS supervisor said in his written statement, made on the same day as the accident, that plaintiff's vehicle was "parked on the side of the road, right side" at the time of the accident. But in another statement written the next day, the DOS supervisor stated that plaintiff's vehicle and trailer were parked in an "active driving lane."

Even on a motion for summary judgment, we need not credit statements that are patently false, or clearly contrary to the record evidence (*see Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). Likewise, we "need not shut our eyes to the patent falsity of a defense" – in this case, the defense of contributory negligence (*see MRI Broadway Rental v U.S. Min. Prods. Co.*, 242 AD2d 440 [1st Dept 1997]). That Damiano and the

DOS supervisor later apparently realized the wisdom of saying that the plaintiff was parked on the roadway rather than on the shoulder, directly contradicting their observations on the day of the accident, does not serve to create a genuine issue of material fact as to plaintiff's negligence. Accordingly, I would grant plaintiff's motion for summary judgment.

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

ENTERED: MAY 21, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14429 Justinian Capital SPC for and on behalf of Blue Heron Segregated Portfolio, Plaintiff-Appellant, Index 600975/10

-against-

WestLB AG, etc., et al., Defendants-Respondents.

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Grant & Eisenhofer P.A., New York (James J. Sabella of counsel), for appellant.

Hughes Hubbard & Reed LLP, New York (Christopher M. Paparella of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 25, 2014, which granted the "renewed motion to dismiss the complaint on the ground of champerty" by defendants WestLB, New York Branch and WestLB Asset Management (US) LLC, unanimously affirmed, without costs.

Defendant WestLB, New York Branch, is the New York branch office of nonparty WestLB AG, a German Bank. Defendant WestLB Asset Management (US) LLC (together with WestLB, New York Branch, WestLB) is a subsidiary of WestLB AG. WestLB was the asset manager of two investment vehicles known as Blue Heron VI and Blue Heron VII. Nonparty Deutsche Pfandbriefbank AG (DPAG), also a German bank, is the original purchaser of certain notes issued

by the Blue Heron entities.

In 2007, the Blue Heron entities collapsed and DPAG determined that it had certain claims against defendants for mismanagement. However, DPAG was reluctant to pursue its claims directly because it depended heavily on the German government for funding, and the German government owned part of WestLB. DPAG feared that if it sued WestLB directly, the German government would withhold funding, thereby "imperil[ing] [DPAG's] very existence."

Plaintiff Justinian Capital SPC is a Cayman Islands company with virtually no assets. On or about April 1, 2010, DPAG, as seller, and plaintiff, as purchaser, entered into a Sale and Purchase Agreement (Purchase Agreement), pursuant to which plaintiff purported to purchase DPAG's right, title and interest in the notes, subject to various limitations detailed therein. The Purchase Agreement recited a purchase price of $1 million, which plaintiff never actually paid. Moreover, DPAG retained many of its rights in the notes, including those related to any litigation or settlement in connection with the notes. Notably, the Purchase Agreement provided that plaintiff would pay approximately 85% of any recovery on the notes to DPAG, and that if it had not yet paid the $1 million purchase price, it would be

deducted from plaintiff's share of the recovery.

When plaintiff attempted to sue on the notes, defendants asserted that plaintiff's purported purchase of the notes was champertous, in violation of Judiciary Law § 489(1). Plaintiff argues that, under Judiciary Law § 489(2), the safe harbor provision precludes the defense of champerty in this case.

Judiciary Law § 489(2) exempts from the general champerty statute the purchase of certain debts and related claims so long as there is an "aggregate purchase price of at least five hundred thousand dollars." Plaintiff argues that actual payment is not required, and that the mere recitation of payment, or a promise to pay, is sufficient. We disagree with plaintiff since this reading would effectively do away with champerty in New York, a doctrine the legislature chose to sustain in 2004, when it voted to adopt the safe harbor provision.

In fact, plaintiff submits the affirmation of former New York State Assembly member, Susan V. John, who sponsored the safe harbor bill. John states that "[t]he Legislature intended to provide clear protection for transactions where a purchaser pays at least $500,000 in a single transaction or a series of transactions for the assignment or transfer of financial instruments and causes of action." She further states that the

"rationale [underpinning the champerty statute] does not apply to sophisticated commercial transactions where the purchaser is paying at least half a million dollars in the aggregate for claims." John's testimony is supported by the safe harbor bill jacket, which provides that "[s]o long as the transfers of bonds and causes of action involved, in the aggregate, the payment of more than $500,000, the transfer (and the bonds and causes of action acquired) would be subject to the safe harbor." The justification presented for safe harbor was that "[b]uyers [are not inclined to] invest large sums of money on claims for the purpose of [then] spending more money on legal fees [opposing champerty defenses]." Accordingly, we conclude that the intent underlying Judiciary Law § 489(2) requires actual payment of at least $500,000.

Plaintiff concedes that it never made the statutory minimum payment and could not obtain financing in order to do so, and the record indicates that at the time the Purchase Agreement was entered into, DPAG understood plaintiff to be a shell company with virtually no assets. Under these circumstances, plaintiff cannot avail itself of the safe harbor.

The Court of Appeals has stated that "the champerty statute does not apply when the purpose of an assignment is the

collection of a legitimate claim. What the statute prohibits . . . is the purchase of claims with the intent and for the purpose of bringing an action that [the purchaser] may involve parties in costs and annoyance, where such claims would not be prosecuted if not stirred up . . . in [an] effort to secure costs" (*Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1 v Love Funding Corp.*, 13 NY3d 190, 201 [2009] [internal quotation marks and citation omitted]). The purported sale of the notes is champertous since DPAG maintained significant rights in the notes and expected the lion's share of any recovery from defendants (*see Bennett v Supreme Enforcement Corp.*, 275 NY 502 [1937]; *Zindle, Inc. v Friedman's Express, Inc.*, 258 AD 636 [1st Dept 1940]). There is every indication that plaintiff entered into the Purchase Agreement with the intent of pursuing litigation on DPAG's behalf in exchange for a fee; plaintiff's intent was not to enforce the notes on its own behalf (see *Trust for Certificate Holders*, *supra* at 201; *Bluebird Partners v First Fid. Bank*, 94 NY2d 726, 737-739 [2000]). Indeed, plaintiff could not enforce all of the rights under the notes, since, as the motion court noted, "No reasonable finder of fact could conclude that [plaintiff] was making a bona fide purchase of securities." On

the contrary, "[t]he only reasonable way to understand the [Purchase Agreement] is that DPAG was subcontracting out its litigation to [plaintiff] for political reasons." Accordingly, the sale of the notes violated Judiciary Law § 489(1).

Despite plaintiff's argument otherwise, our decision in *71 Clinton St. Apts. LLC v 71 Clinton Inc.* (114 AD3d 583 [1st Dept 2014]) is not at odds with the result in this case. *71 Clinton* addressed a situation in which an assignee sought to protect an independent right of its own – not merely the right to earn a contingent fee – through the litigation. Thus, our decision in *71 Clinton* was based on the fact that the plaintiff, who had bought the debt outright, had been the assignee of a mortgage loan for value "for the purpose of enforcing a legitimate claim" – namely, "to obtain a judgment of foreclosure and sale in a proceeding that was already under way" (*id.* at 585).

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

ENTERED: MAY 21, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, JJ.

14902 Law Offices of Zachary R. Greenhill P.C., et al.,
Plaintiff-Appellants,

-against-

Liberty Insurance Underwriters, Inc., et al.,
Defendants-Respondents.

Index 650414/14

_____

Gallagher, Walker, Bianco & Plastaras, LLP, Mineola (Dominic P. Bianco of counsel), for appellants.

Kaufman, Dolowich & Voluck, New York (Kevin M. Mattessich of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about October 8, 2014, which denied plaintiffs' motion for summary judgment as premature, unanimously affirmed, without costs.

Plaintiffs, an attorney and his law firm, seek a declaration that defendants, which issued a lawyers professional liability insurance policy, were required to provide a defense and pay for all defense costs with respect to counterclaims asserted against Zachary Greenhill (Mr. Greenhill) in an underlying contract action (*Zachary Greenhill and Judy Lee Greenhill v The Dwight School, The Dwight School in China LLC, Stephen H. Spahn and New York Preparatory School, Inc.*, Sup Ct, NY County, index No.

603653/09) (the underlying contract action). Before plaintiffs commenced this action, the underlying contract action settled and the counterclaims were dismissed. Accordingly, in this action, plaintiffs seek to recover defense costs incurred in connection with those counterclaims against them in the underlying action. Plaintiffs assert that they are entitled to such costs because defendants (the insurer) breached their duty to defend and the counterclaims do not fall within any policy exclusion.

Defendants contend that plaintiffs failed to establish any breach of the duty to defend, that plaintiffs' motion is premature, and that they need discovery to determine whether the counterclaims fall within certain policy exclusions which apply to situations where an attorney is sued for legal malpractice, but the attorney has also engaged in certain outside business activities. We agree with defendants.

Mr. Greenhill, his wife, Judy Lee Greenhill (together the Greenhills), and Stephen H. Spahn are founding members of the Dwight School in China, LLC (Dwight China). Mr. Greenhill is an attorney, but his wife is not. It was anticipated that the Dwight School would partner with a top-tier high school in China to establish a Chinese-American joint high school curriculum and dual diploma program and that Dwight China would be the business

entity through which this would be accomplished. Although an operating agreement for Dwight China identifies Spahn as the chairman of the board and Mr. Greenhill as its president and chief executive operating officer, and identifies the Greenhills as having a collective 49% interest (24.5% each) in the company, the operating agreement was never executed by any of the parties to the agreement.

In the underlying contract action, the Greenhills sought to enforce a partially executed consulting agreement they claimed to have with Dwight China. Pursuant to that agreement, they were to receive semiannual consulting fees for the following services: "business development, sales and marketing appropriate to [Dwight China's] business, legal services, contracting for legal services and government filings, contract negotiations, college and university guidance services and close and overall execution of the Company's business plan" The consulting agreement was executed by Spahn on behalf of Dwight China and the Dwight School (Dwight entities), but neither of the Greenhills ever signed it.

In their answer to the second amended complaint in the underlying contract action, the Dwight entities and Spahn denied the enforceability of the consulting contract and alleged that Mr. Greenhill had enlisted the aid of outside counsel to

structure the operating agreement in such a way that it personally benefitted the Greenhills' interests. In addition to asserting a counterclaim against the Greenhills for repudiation of the consulting agreement, the Dwight entities and Spahn asserted a counterclaim against Mr. Greenhill for legal malpractice, alleging that "[Zachary] Greenhill had an attorney-client relationship" with them and that he breached his fiduciary duties to the Dwight entities by having them sign the consulting agreement "without fully informing [them] of his view of the possible consequences of such a signature absent the Greenhills' signature, or advising them to seek independent counsel regarding the alleged Consulting Agreement." The Dwight entities claimed further that Mr. Greenhill had engaged in self-dealing by using the consulting agreement as evidence of the operating agreement that had never been signed.

In a third counterclaim against Mr. Greenhill's law firm, the Dwight entities sought to recoup the "legal and consulting fees" they had paid, because Mr. Greenhill allegedly had given them the impression that he was their attorney, but actually defrauded them.

Initially, defendants denied coverage for the counterclaims based upon the following exclusions:

"3. Certain Services and Capacities. This policy does not apply to any claim arising out of your services and/or capacity as:

"a. an officer, director, partner, trustee, manager operator, or employee of an organization other than that of the name insured . . . (bold omitted) (the Capacity Exclusion).

"6. Equity Interests. If a person insured under this policy owns, along with his or her spouse, ten percent (10%) or more of the issued and outstanding shares, units or other portions of the capital of an organization, and that person simultaneously provides professional legal services with respect to such an organization, this policy will provide no coverage to that person for any claims that result therefrom.

"If the collective equity interest of:

a. all persons and entities insured under this policy;
b. spouses of persons insured under this policy; and
c. the named insured

is thirty-five percent (35%) or more of the issued and outstanding shares, units or other portions of the capital of an organization, and any person simultaneously provides professional legal services with respect to such an organization, this policy will provide no coverage to any person insured or to the named insured for any claims that result therefrom" (boldface omitted) (the Equity Interests Exclusion).

In subsequent correspondence dated January 4, 2013, however, defendants notified plaintiffs that they had

reconsidered their position and agreed to defend plaintiffs, but with a full reservation of rights. Defendants stated that they intended to further investigate Mr. Greenhill's status as a Dwight China executive to determine whether "he was wearing two hats – one as a solo practitioner and the other as negotiator and executive for Dwight China."

We reject plaintiffs' argument that defendants repudiated or breached the policy by agreeing to defend them subject to a full reservation of rights. We also agree with Supreme Court that plaintiffs' motion for summary judgment is premature, because no discovery has been conducted as to whether the allegations in the counterclaims fall within either or both exclusions to coverage.

The malpractice counterclaim against Mr. Greenhill is of a hybrid nature and arises in the context of a case commenced by the Greenhills to enforce the payment of consulting fees for their services as a college guidance team. Although Mr. Greenhill is a practicing attorney and the Dwight entities acknowledge they paid him for his legal services, he sought to enforce a consulting agreement for services closely related to an operating agreement that identified him and his wife as having an

ownership interest. Many of the other services in the consulting agreement are of a nonlegal nature and directly correlate to the Chinese-American educational program that was envisioned. This is precisely the situation that the Capacity Exclusion and Equity Interests Exclusion seem to encompass and presents circumstances very similar to those decided by the Court of Appeals in *K2 Inv. Group, LLC v American Guar. & Liab. Ins. Co.* (22 NY3d 578 [2014]) (*K2*), and more recently by this court in the case of *Lee & Amtzis, LLP v American Guar. & Liab. Ins. Co.* (__AD3d__, 2015 NY Slip Op 02919 [1st Dept 2015]) (*Lee & Amtzis*).

It is well-settled law that a insurer's duty to defend its insured is determined by analyzing the allegations of the subject pleading and the terms of the policy (*see Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985]). Defendants, despite their initial refusal, agreed to provide plaintiffs with a defense, but plaintiffs rejected their tender because of the reservation of rights. Although plaintiffs liken the reservation of rights to an outright refusal to defend them and, therefore, a repudiation or breach of the policy, that is an inaccurate statement of law. The issuance of a reservation of

rights allows the insurer the flexibility of fulfilling its obligation to provide its insured with a defense, while continuing to investigate the claim further. In fact, an insurance company's failure to reserve the right to disclaim coverage may later result in the insurer being equitably estopped from doing so (*Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 36 [1st Dept 2006]). Thus, although plaintiffs are correct that the counterclaims, broadly construed, triggered defendants' duty to provide them with a defense, defendants did not breach that duty by agreeing to do so, but with a reservation of rights to, among other things, later recoup their defense costs upon a determination of non-coverage (*see BX Third Ave. Partners, LLC v Fidelity Natl. Tit. Ins. Co.*, 112 AD3d 430, 431 [1st Dept 2013]).

Mr. Greenhill, much like the attorneys in *K2* and *Lee & Amtzis*, obtained a lawyer's professional liability policy that specifically excludes coverage in where the attorney is serving two masters: his client and himself. Plaintiffs seek to distinguish *K2* solely on the basis that it involved the issue of whether the insurer had to indemnify its insured as opposed to

providing a defense. If, however, coverage is excluded because of the hybrid nature of the legal representation, defense costs are also excluded (*see Lee & Amtzis*, 2015 NY Slip Opn 02919 *3). While the counterclaims are, in part, rooted in the legal services Mr. Greenhill provided, allegedly failed to provide, failed to provide, overall the counterclaims consist of intertwined allegations about Mr. Greenhill's legal services to The Dwight School and Dwight China, the latter of which he appears to have had a financial interest in. Therefore, defendants have raised issues of fact whether Mr. Greenhill's activities on behalf of the Dwight entities were of a hybrid nature, because of the allegations of self-dealing, the Greenhills' alleged 49% ownership interest in Dwight China, and the Greenhills' efforts in enforcing the consulting agreement, which personally benefitted them financially. At a minimum, discovery is necessary on the issue of Mr. Greenhill's ownership interests and whether such interests come within the Equity Interests Exclusion.

Because plaintiffs have not established as a matter of law that defendants breached the policy or that the counterclaims do

not fall within the policy exclusions and defendants seek discovery, the issue of whether plaintiffs are entitled to recover their defense costs from defendants is premature.

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

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

ENTERED: MAY 21, 2015

CLERK

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

15174 The People of the State of New York, Ind. 1778/11
Respondent,

-against-

Alex Haywood,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Maxwell L. Wiley, J.), rendered November 2, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third and fourth degrees, and sentencing him to an aggregate term of 2½ years, unanimously affirmed.

Defendant did not preserve his challenge to references at trial to his allegedly prejudicial nickname, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. Defendant was not deprived of a fair trial, and any error was harmless because there was

overwhelming evidence of defendant's guilt (*see People v Santiago*, 255 AD2d 63, 66 [1st Dept 1999], *lv denied* 94 NY2d 829 [1999]). Although defendant argues that his trial counsel rendered ineffective assistance by failing to object to mention of the nickname, we find that, to the extent the existing record permits review, 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]).

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

ENTERED: MAY 21, 2015

CLERK

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

15175 CF Notes, LLC, Index 159670/13
Plaintiff-Respondent,

-against-

Irvin Goldman,
Defendant-Appellant.

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Spears & Imes LLP, New York (Joanna C. Hendon of counsel), for appellant.

Michael S. Popok, New York, for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered November 5, 2014, which denied defendant's motion to dismiss the complaint as time-barred, unanimously affirmed, with costs.

In this action to recover on a promissory note made by defendant in favor of plaintiff CF Notes, LLC, an affiliate of defendant's then-employer, Cantor Fitzgerald & Co., the first paragraph of the note provides that defendant unconditionally promises to pay the monies loaned to him "on such date as Payee may demand." The second paragraph, however, identifies certain contingencies, including defendant "ceas[ing] to be employed by" Cantor Fitzgerald, that would render the note automatically due and payable "without notice or demand." The motion court

properly harmonized these conflicting provisions "so as not to leave any provision without force and effect" (*Isaacs v Westchester Wood Works*, 278 AD2d 184, 185 [1st Dept 2000]) in finding that the note is a "demand note" that converted to a contingent note upon the happening of one of the enumerated events listed in the second paragraph. Thus, as the motion court determined, defendant's note was payable upon his resignation from Cantor Fitzgerald on October 22, 2007, and it was on this date that the statute of limitations began to run (*see DDS Partners v Celenza*, 6 AD3d 347, 348 [1st Dept 2004]; *Pine v Okoniewski*, 256 AD 519, 521 [4th Dept 1939]). Accordingly, the complaint was timely filed on October 21, 2013 - one day prior to the expiration of the six year statute of limitations (*see* CPLR 213[2]).

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

ENTERED: MAY 21, 2015

CLERK

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

15176 In re Valentino R., and Another,

Dependent Children Under the
Age of Eighteen Years, etc.

Dina R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondent.

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

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about February 11, 2014, which, after a fact-finding hearing, inter alia, found that respondent mother neglected the subject children, unanimously affirmed, without costs.

A preponderance of the evidence demonstrated that the mother neglected the subject children by failing to protect them from the father's domestic violence against her (*see* Family Court Act § 1012[f][i][B]; *see also Matter of Niyah E. [Edwin E.]*, 71 AD3d 532 [1st Dept 2010]). Police testimony showed that the father

threatened the family with a knife and a cleaver and that the mother ran into the bathroom with the children to escape the assault. The officer observed damage to the walls and bathroom door from the cleaver and saw sheetrock dust on the knives. The progress notes demonstrated that one of the children expressed a fear of the father, which was sufficient to show that his emotional health was placed at risk by the mother's failure to act to enforce the orders of protection on behalf of her and the children (*see Matter of Madison M. [Nathan M.],* 123 AD3d 616, 617 [1st Dept 2014]). There exists no basis to disturb the court's credibility determinations, including its rejection of the mother's claim that she believed the orders of protection had expired (*see Matter of Irene O.,* 38 NY2d 776, 777 [1975]).

The record does not reflect that the mother requested an adjournment to permit her counsel to prepare, and she specifically denied that she wished to proceed pro se. The mother's claim that the court relied on evidence not set forth in the amended petition was not preserved, and in any event, the

evidence presented was necessary to determine whether the mother's judgment in permitting the father to live in the apartment, given his history of domestic violence, was reasonable.

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

ENTERED: MAY 21, 2015

CLERK

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

15177-
15178 Arnaud C. Achache, et al.,
Plaintiffs-Appellants,

-against-

Daniel Och, et al.,
Defendants-Respondents.

Index 650737/12

Garvey Schubert Barer, New York (Andrew J. Goodman of counsel), for appellants.

Debevoise & Plimpton LLP, New York (Edwin G. Schallert of counsel), for respondents.

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 14, 2014, dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered March 13, 2014, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7), unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court correctly found that, by waiting too long to file the instant action, plaintiffs waived their argument that they signed the subject release under duress (*see e.g. Leader v Dinkler Mgt. Corp.*, 26 AD2d 683 [2d Dept 1966], *affd* 20 NY2d 393 [1967]). Plaintiffs might have been excused from suing for the

first two years due to their fear of the look-back period (*see Austin Instrument v Loral Corp.*, 29 NY2d 124, 133 [1971]; *Sosnoff v Carter*, 165 AD2d 486, 492 [1st Dept 1991]). However, they delayed an additional 10 months beyond those two years (*see Leader*, 26 AD2d at 683 [six-month delay waived claim of duress]).

Assuming arguendo that triable issues exist as to unconscionability and overreaching (*see* CPLR 3211[c]), plaintiffs' ratification of the release bars them from challenging it on those grounds (*see Allen v Riese Org., Inc.*, 106 AD3d 514, 517 [1st Dept 2013]). Plaintiffs' claim that they received no benefits at all from the separation agreement and release is belied by the record.

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

ENTERED: MAY 21, 2015

CLERK

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

15179-
15180 In re Take Two Outdoor Media LLC,
Petitioner-Appellant,

-against-

Board of Standards and Appeals
of the City of New York,
Respondent-Respondent.

Index 100293/13
100294/13

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Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Richard G. Leland of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondent.

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Judgments, Supreme Court, New York County (Carol E. Huff, J.), entered October 30, 2013 and November 7, 2013, denying the petitions seeking annulment of resolutions by respondent Board of Standards and Appeals of the City of New York dated January 8, 2013, which had affirmed the New York City Department of Buildings' (DOB) determinations rejecting petitioner's applications to register advertising signs, and dismissing the proceedings brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's denials, pursuant to New York City Zoning Resolution § 42-55, of petitioner's applications for registration of advertising signs on the roof and wall of buildings in

proximity to the exit roadway of the Holland Tunnel were not contrary to law, arbitrary and capricious, or an abuse of discretion (*see* CPLR 7803[3]). Respondent properly determined that the exit roadway is an "approach" within the meaning of 1 RCNY 49-01 and therefore is an "arterial highway" within the meaning of section 42-55 of the Zoning Resolution. Respondent properly relied on the definition of "approach" set forth in 1 RCNY 49-01 (Rule 49), which is consistent with the plain language of the Zoning Resolution. Further, respondent properly rejected petitioner's contention that the exit roadway is not an approach within the plain meaning of Rule 49.

Although the DOB had previously approved the signs, its subsequent determinations rejecting the signs adequately explained its reasons for "alter[ing] its prior stated course" (*Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 520 [1985]).

The court correctly rejected petitioner's argument that respondent's determinations violated its commercial free speech

rights (*see Clear Channel Outdoor, Inc. v City of New York*, 594 F3d 94 [2d Cir 2010], *cert denied* _ US _, 131 S Ct 414 [2010]).

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

ENTERED: MAY 21, 2015

CLERK

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

15183 Danis Santana, Index 104874/10
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

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

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

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered March 5, 2014, which granted defendant New York City Housing Authority's (NYCHA) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The award of summary judgment to NYCHA was proper based on the storm in progress doctrine. The parties' expert meteorologists both opined that the icy condition of the ramp on which plaintiff fell was the result of overnight snow that did not end until 6:03 a.m., about 82 minutes before the accident occurred at 7:25 a.m. on January 2, 2010, when a holiday schedule was in effect. Under the circumstances, as a matter of law, a reasonable amount of time had not elapsed between the end of the snowfall and the accident to charge NYCHA with notice of the icy

condition and a duty to remedy the condition (*see Clement v New York City Tr. Auth.*, 122 AD3d 448 [1st Dept 2014]; *Espinell v Dickson*, 57 AD3d 252, 253-254 [1st Dept 2008]; *Urena v New York City Tr. Auth.*, 248 AD2d 377, 377-378 [2d Dept 1998]).

Plaintiff's contention that NYCHA's employees caused and created the alleged defect by clearing the snow without sanding and salting the icy surface prior to the accident is speculative, and contrary to the meteorologists' opinions that the icy condition formed overnight.

The affidavit of plaintiff's expert professional engineer regarding the condition of the ramp lacks probative value, because he never stated that he inspected the ramp, and had no basis for opining that it had remained in the same condition since a prior accident (*see Snauffer v 1177 Ave. of the Ams. LP*, 78 AD3d 583 [1st Dept 2010]; *Figueroa v Haven Plaza Hous. Dev. Fund Co.*, 247 AD2d 210 [1st Dept 1998]). Moreover, his contention that a crack in the ramp played a role in the accident

is speculative because it contradicts plaintiff's testimony that it was the icy condition of the ramp that caused the accident (*see Owens v Cooper Sq. Realty*, 91 AD3d 515 [1st Dept 2012]).

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

ENTERED: MAY 21, 2015

CLERK

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

15184 In re The Mechanical Contractors Association of New York, Inc., et al., Petitioners-Appellants, Index 100993/13

-against-

New York City Department of Buildings, et al., Respondents-Respondents,

Atlantic Yards B2 Owner, LLC, et al., Intervenors-Respondents-Respondents.

_____

Alston & Bird LLP, New York (Brett D. Jaffe of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Karen M. Griffin of counsel), for municipal respondents.

Proskauer Rose LLP, New York (Bradley I. Ruskin of counsel), for Atlantic Yards B2 Owner, LLC and FC+Skanska Modular, LLC, respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 20, 2013, which denied the petition seeking to annul respondent agency's April 9, 2013 determination that the Administrative Code of the City of New York's requirements that certain plumbing and fire suppression work be performed only by, or under the direct and continuing supervision of, a licensed master plumber and licensed master fire suppression piping contractor, respectively, do not apply to off-site, factory-based

assembly of modular construction units, unanimously affirmed, without costs.

The Department of Building's determination that "modular . . . assembly performed at a location other than the jobsite is not plumbing or fire suppression work as . . . defined in the Administrative Code and that those terms do not apply to work done offsite prior to its incorporation into a building or jobsite," is rationally based, is not arbitrary and capricious, and is entitled to deference (*see Matter of Feigenbaum v Silva*, 274 AD2d 132, 136-137 [1st Dept 2000]; *see also Matter of Excellus Health Plan v Serio*, 2 NY3d 166, 171 [2004]; *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]). A modular construction unit is not of the same kind or class as the non-inclusive list of examples of a "structure" provided for in

Administrative Code §28-101.5 (*see e.g. 242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 103-104 [1st Dept 2006]).

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

ENTERED: MAY 21, 2015

CLERK

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

15185N Nancy Wallach, Index 109547/09
Plaintiff-Appellant,

-against-

R&J Construction Corp.,
Defendant-Respondent.

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Ephrem J. Wertenteil, New York, for appellant.

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered on or about July 9, 2012, which denied plaintiff's motion to amend the summons and complaint to add Dermot Clinton Green (Dermot) as a party defendant under the relation back doctrine (CPLR 203[c]), unanimously affirmed, without costs.

Plaintiff failed to demonstrate that proposed defendant Dermot was united in interest with defendant, R&J Construction Corp. Dermot and R&J have different defenses to plaintiff's claims (*see Raymond v Melohn Props., Inc.*, 47 AD3d 504, 505 [1st Dept 2008]). For example, R&J's potential defenses that it was not a statutory agent for purposes of Labor Law § 241(6) and that it did not control the work that caused plaintiff's injuries are not defenses that Dermot could raise.

Nor does Dermot's "Wrap-Up" policy render it an indemnitor of R&J and, thus, vicariously liable to R&J. The wrap-up policy was not an indemnification agreement between Dermot and R&J; it was an insurance policy under which both Dermot and R&J were insured.

Given the undisputed facts that the ownership of the property in question is a matter of public record, that plaintiff's counsel had been apprised, by a letter dated July 2008, of the property owner's identity, and R&J had denied ownership in its answer, we reject plaintiff's contention that her failure to name Dermot as a defendant was a mistake (*see e.g. Goldberg v Boatmax://, Inc.*, 41 AD3d 255 [1st Dept 2007]).

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

ENTERED: MAY 21, 2015

CLERK

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

15186 Harold Levinson Associates, Inc., Index 150969/13
Plaintiff-Appellant,

-against-

Christopher Wong, et al.,
Defendants,

Robin Wong, et al.,
Defendants-Respondents.

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Baker Botts L.L.P., New York (Joseph Perry of counsel), for appellant.

Wickham, Bressler & Geasa, P.C., Mattituck (Eric J. Bressler of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 7, 2014, which granted the motion of defendants Robin Wong and Jade Kee Wholesale LLC to quash plaintiff's third-party subpoena, unanimously reversed, on the law, with costs,and the motion denied.

Defendants failed to establish that the records sought were "utterly irrelevant" to the instant action (*Matter of Kapon v Koch*, 23 NY3d 32, 34 [2014]), and they had sufficient notice of "the circumstances or reasons" underlying the subpoena request (CPLR 3101[a][4]; *see Nacos v Nacos*, 124 AD3d 462, 463 [1st Dept 2015]). Contrary to defendants' contention, the motion court's

prior denial of plaintiff's motion to compel discovery as overbroad does not require granting the motion to quash, as the discovery sought in the subpoena at issue was narrower than the material previously sought.

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

ENTERED: MAY 21, 2015

CLERK

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

15187 Lillian Rivera, Index 100299/10
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent,

New York City Housing Authority,
Defendant.

_____

Coiro, Wardi, Chinitz & Silverstein, Bronx (Michael A. Chinitz of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered April 3, 2014, which, to the extent appealed from as limited by the briefs, granted defendant City of New York's motion to strike the complaint, unanimously affirmed, without costs.

Plaintiff's noncompliance with six court orders issued in a two-year period directing her to appear for a deposition culminated in an order directing her to appear for a deposition and stating that failure to appear would result in the striking of the complaint (*see* CPLR 3126). Plaintiff claims that it was actually defendant's counsel who was not prepared to proceed on

the final date scheduled for her deposition, but offered no documentation to support this claim other than plaintiff's counsel's secretary's affidavit, which was not sufficient under the circumstances here, including the history of her failing to appear for at least seven previously scheduled depositions. Thus, she failed to demonstrate a reasonable excuse for her failure to appear so as to relieve herself of the sanction imposed by the conditional order (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004]).

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

ENTERED: MAY 21, 2015

CLERK

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

15188 The People of the State of New York, Ind. 4361/03
Respondent,

-against-

Mike Davis,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Katherine A. Gregory of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered on or about September 8, 2014, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated the denial of the motion in light of defendant's extensive criminal history and "chronic

inability to control his behavior while at liberty" (*People v Correa*, 83 AD3d 555, 556 [1st Dept 2011], *lv denied* 17 NY3d 805 [2011]).

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

ENTERED: MAY 21, 2015

CLERK

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

15189 Mal Braverman, Index 158299/13
Plaintiff-Appellant-Respondent,

-against-

Yelp, Inc.,
Defendant-Respondent-Appellant.

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Law Offices of Andrew C. Risoli, Eastchester (Andrew C. Risoli of counsel), for appellant-respondent.

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Andrew I. Mandelbaum of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 25, 2014, which granted defendant's motion to dismiss the complaint, but declined to award costs, sanctions and attorney's fees, unanimously affirmed, with costs.

The court properly dismissed plaintiff's defamation claims based on the doctrine of collateral estoppel since plaintiff had a full and fair opportunity to litigate this claim in a prior action (*see Misek-Falkoff v American Lawyer Media*, 300 AD2d 215, 216 [1st Dept 2002], *lv denied* 100 NY2d 508 [2003]). With respect to the additional causes of action, plaintiff failed to sufficiently state the claims for breach of contract and violations of General Business Law §§ 349(a) and 350.

To the extent plaintiff's allegations support a claim for

fraudulent inducement, they must be brought in a different forum in accordance with the forum selection clause contained in the advertising agreement entered into by the parties. Plaintiff failed to meet his burden of showing that the forum selection clause should not be enforced (*see Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]).

The motion court providently exercised its discretion in declining to award defendant costs and attorney's fees. Defendant failed to show that plaintiff's conduct in commencing this action was frivolous (*see* 22 NYCRR 130.1.1; *Grozea v Lagoutoval*, 67 AD3d 611 [1st Dept 2009]).

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

ENTERED: MAY 21, 2015

CLERK

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

15191 The People of the State of New York, Dkt. 64190/11
Respondent,

-against-

Willis Thompson,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert Sackett, J.), rendered on or about September 25, 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: MAY 21, 2015

CLERK

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

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

15194-
15195 The People of the State of New York,
Respondent,

-against-

Melvin Williams,
Defendant-Appellant.

Ind. 831/83

_____

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Denis J. Boyle, J.), entered on or about January 14, 2013, which, upon reargument, adhered to a prior order denying defendant's CPL 440.30(1-a) motion for DNA testing, unanimously affirmed.

The People presented detailed affidavits by personnel from the District Attorney's Office, the Office of the Chief Medical Examiner and the Police Department setting forth their diligent but unsuccessful efforts to locate evidence from defendant's 1984 trial, on which defendant sought to have DNA testing performed. This satisfied the People's burden to show that the evidence could no longer be located and was thus no longer available for testing (*see People v Pitts*, 4 NY3d 303, 311-312 [2005]; *People v*

Garcia, 65 AD3d 932 [1st Dept 2009], *lv denied* 13 NY3d 907 [2009]). Given these circumstances, we see no reason to remand for an evidentiary hearing or for any other purpose. Defendant does not adequately explain how a hearing would result in discovery of the evidence he seeks.

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

ENTERED: MAY 21, 2015

CLERK

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

15197N In re Allstate Insurance Company, Index 260548/11
Petitioner-Respondent,

-against-

Uninsured Motorist Arbitration
demanded by Cristobal Peralta, et al.,
Respondents,

State Farm Fire & Casualty
Company, et al.,
Additional Respondents-Appellants.

_____

Picciano & Scahill, P.C., Westbury (Albert J. Galatan of counsel), for appellants.

Law Offices of John Trop, Yonkers (David Holmes of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered February 27, 2014, which granted petitioner Allstate Insurance Company's application to permanently stay an uninsured motorist arbitration, unanimously affirmed, without costs.

The evidence at the hearing did not overcome the presumption of permissive use. Appellants presented evidence that Taveras's car keys were stolen hours before the accident and that the theft was reported to the police. However, there was no evidence that the car itself was ever stolen or reported stolen. Under these

circumstances, the court could reject appellants' contention that the car must have been driven by an unknown thief at the time of the accident, and no basis exists to disturb the findings of the hearing court (*see State Farm Mut. Auto Ins. Co. v Taveras*, 71 AD3d 606 [1st Dept 2010]; *Matter of State Farm Mut. Auto Ins. Co. v Fernandez*, 23 AD3d 480 [2d Dept 2005]).

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

ENTERED: MAY 21, 2015

CLERK

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

15198N In re ROM Reinsurance Management Company, Inc., et al., Petitioners-Appellants, Index 654480/12

-against-

Continental Insurance Company, Inc., (as successor to Harbor Insurance Company) Respondent-Respondent.

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

White and Williams LLP, New York (Sarah R. Connelly of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered January 22, 2015, denying the petition to stay arbitration on statute of limitations grounds, and dismissing the proceeding brought pursuant to CPLR article 75, unanimously affirmed, with costs.

Petitioners participated in the arbitrator selection process, even though they were undoubtedly aware of their statute of limitations claim. Under these circumstances, the court correctly determined that petitioners participated in the arbitration and therefore are precluded from seeking a stay on statute of limitations grounds pursuant to CPLR 7503(b) (*see Matter of Allstate Ins. Co. v Khait*, 227 AD2d 551 [2d Dept 1996];

compare Cybex Intl. v Fuqua Enters., 246 AD2d 316, 316-317 [1998] [the petitioner did not waive its right to seek a stay of arbitration by participating in arbitral discovery and the selection of an arbitrator before it had received detailed specification of the respondent's claims]). Although petitioners have waived their ability to have the courts determine the statute of limitations issue, the issue may be determined by the arbitrators.

We have considered petitioners' remaining arguments, including that this Court had previously determined the participation issue (*see* 115 AD3d 480 [1st Dept 2014]), and find them unavailing.

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

ENTERED: MAY 21, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15284 In re Clara Josefina Russo, Index 402268/12
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

- - - - -

New York City Council Member
Ritchie Torres,
Amicus Curiae.

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David I. Farber, New York (Andrew M. Lupin of counsel), for appellant.

Emily Jane Goodman, New York, for respondent.

Adriene Holder, The Legal Aid Society, New York (Lucy Newman of counsel), for amicus curiae.

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Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered June 19, 2014, annulling respondent's determination, dated July 18, 2012, which denied petitioner's remaining family member claim to succession rights to an apartment formerly leased to her husband, and remanding the matter for a new hearing before a different hearing officer, unanimously affirmed, without costs.

As the article 78 court found, petitioner was deprived of a fair hearing, in violation of her right to due process (*see Mathews v Eldridge*, 424 US 319, 333 [1976]). Recognizing

petitioner's mental disability, respondent (NYCHA) appropriately, and in accordance with court-approved procedures, referred petitioner for a competency evaluation and assigned her a guardian ad litem (GAL) from the New York State Office of Court Administration's list of approved GALs (*see Blatch v Hernandez*, 2008 WL 4826178, 2008 US Dist LEXIS 92984 [SD NY 2008]). However, a review of the administrative record reveals that the assigned GAL was not a "suitable representative" (see *Blatch v Hernandez*, 360 F Supp 2d 595, 621 [SD NY 2005]).

Among other things, the GAL did not appear to understand the issues framed by NYCHA, testified in petitioner's stead despite his lack of personal knowledge of relevant facts and petitioner's presence at the hearing, failed to offer evidentiary support on key factual issues, and admitted his ignorance as to when petitioner moved into the subject apartment – a fact needed to determine whether petitioner met the one-year requirement for remaining family member status (*see* NYCHA Management Manual, Chapter IV, Section XII). Under these circumstances, the hearing officer's failure to develop the record during the brief hearing, and to make inquiry of the pro se petitioner, who exhibited confusion, deprived petitioner of a full and meaningful opportunity to be heard (*see Matter of Detres v New York City*

Hous. Auth., 65 AD3d 442 [1st Dept 2009]; *Earl v Turner*, 303 AD2d 282 [1st Dept 2003], *lv denied* 100 NY2d 506 [2003]).

Although the letter to the GAL from a health center at which petitioner was a patient was dehors the record, the court properly considered it since, in establishing a critical date, it "substantiate[d] [petitioner's] claims of prejudice attributable to the cited due process violations" (*Matter of Feliz v Wing*, 285 AD2d 426, 427 [1st Dept 2001], *lv dismissed* 97 NY2d 693 [2002]). On this administrative record it cannot be determined whether there are circumstances that may relieve petitioner of the requirement of written consent to her occupancy (*see Matter of Echeverria v New York City Hous. Auth.*, 85 AD3d 580 [1st Dept 2011]*; Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289, 291 [1st Dept 2004]).

NYCHA's counsel's criticisms of the court do not violate the Rules of Professional Conduct or warrant the imposition of sanctions (*cf. Matter of Holtzman*, 78 NY2d 184 [1991]

[accusations of judicial misconduct not supported by evidence], *cert denied* 502 US 1009 [1991]; *Matter of Golub*, 190 AD2d 110, 111 [1st Dept 1993] ["intemperate outburst" to press about judge after adverse ruling]).

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

ENTERED: MAY 21, 2015

CLERK