SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 25, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

828-
829 W&W Steel, LLC,
Plaintiff-Appellant,

-against-

The Port Authority of New York & New Jersey,
Defendant-Respondent.

Index 650913/13

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Cohen Seglias Pallas Greenhall & Furman PC, New York (Edward Seglias of counsel), for appellant.

DLA Piper LLP, US, New York (Spencer Stiefel of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about August 25, 2014, which granted defendant's motion to dismiss the complaint for lack of subject matter jurisdiction, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about February 23, 2015, which, insofar as appealed from, denied plaintiff's purported motion to renew, unanimously dismissed, without costs, as taken from a nonappealable order.

The National September 11 Memorial and Museum at the World Trade Center Foundation, Inc. (National Memorial) is responsible

for designing, operating, and maintaining the World Trade Center Memorial, the Memorial Museum, and the Museum Pavilion. National Memorial hired Bovis Lend Lease (US) Construction LMB, Inc. (Lend Lease) as its construction manager in connection with the construction of the various 9/11 memorial sites.

National Memorial, through Lend Lease, entered into a contract with plaintiff W&W Steel, LLC, dated October 30, 2009, in which W&W agreed to furnish and install the structural steel for the Museum Pavilion for the amount of $7,289,240.00, subject to additions and deductions for changes and extra work. The contract provided that W&W would commence work on September 1, 2009; construction was to begin on March 16, 2010 and was to be completed, with certain stated exceptions, within 80 consecutive working days.

Months later, in an assignment agreement dated as of October 30, 2009, National Memorial assigned to defendant the Port Authority all of its rights and obligations under the contract; both the Port Authority and W&W Steel signed the assignment agreement in March 2010. The assignment provided that, in the event of a dispute, the parties would resort to the dispute resolution mechanisms set forth in the contract. Article 28 of the contract, in turn, outlined the dispute resolution process, providing that the parties were to try "through their respective

Project level representatives" to reach "an amicable settlement" of any dispute. If the parties were unable to reach a settlement, the dispute was to be submitted to "responsible senior management of each party who [were] not directly involved" with the contract, who were obliged to attempt to resolve the dispute within 60 days. If attempt at resolution also failed, the parties were required to authorize a senior employee designated by National Memorial (or, postassignment, by defendant the Port Authority) to arbitrate a resolution. Moreover, the resolution was subject to "de novo review in a court of competent jurisdiction" after substantial completion of the project. The assignment did not contain any provision, express or otherwise, regarding waiver of sovereign immunity.

W&W alleges that it was directed to perform numerous changes and additions to its scope of work. W&W further alleges that, during the course of the project, the Port Authority actively and unreasonably delayed W&W in the performance and completion of its work, and as a result, W&W's labor force had to remain on site for 195 calendar days longer than bid and planned.

As required by article 19 of the contract, W&W submitted for approval a number of "change orders" reflecting additional charges for uncontracted-for work. W&W alleges that the Port Authority approved change orders totaling $5,014,744 (of which

$2,613,475 remains unpaid) and failed to process another $1,151,227 in pending change order requests, for a total of $3,764,702 in unpaid costs.

W&W claims that it sought to resolve its dispute over the change orders with the Port Authority at the project and senior management levels. W&W then requested on at least three occasions, in February through May 2011, that the Port Authority submit the claims to a designated arbitrator for decision; however, the Port Authority did not do so. Further, on January 11, 2012, W&W submitted a request for an equitable adjustment change order seeking $4,791,146.00 in additional costs not included in the change orders, but the Port Authority did not respond.

On or about March 30, 2012, W&W commenced a suit against the Port Authority and others (index number 651025/12) (the first W&W action), alleging claims for breach of contract, unjust enrichment, and quantum meruit. On November 27, 2012, the IAS court granted the Port Authority's motion to dismiss the first W&W action, rejecting W&W's argument that the various letters it had sent to the Port Authority constituted a notice of claim, and also rejecting W&W's argument that the Port Authority should be estopped from invoking statutory notice requirements as a result of its conduct.

On November 30, 2012, W&W served the Port Authority with a notice of claim, detailing a claim for approximately $8.6 million. On December 14, 2012, W&W re-served the Port Authority with a revised notice of claim. Both versions of the notice of claim stated that construction was "delayed until June 4, 2010, and substantial completion was not achieved until April 4, 2011."

On February 19, 2013, W&W moved to amend the complaint in the first W&W action to reassert claims against the Port Authority. The Port Authority opposed, arguing that the notice of claim was improper because W&W had not served it before commencing the action. The Port Authority also argued that W&W's claims were barred by the one-year limitations period set forth in § 7107 of the New York Unconsolidated Laws.

On March 14, 2013, before the court had decided W&W's motion to amend in the first W&W action, W&W filed a summons with notice in this action (index number 650913/13). On or about April 10, 2013, the parties entered a stipulation in the first W&W action withdrawing W&W's motion to amend its pleading.

On May 29, 2013 – more than 60 days after serving its notice of claim – W&W filed the verified complaint in this action. As in the first W&W action, W&W brought claims against the Port Authority for breach of contract, unjust enrichment, and quantum meruit, and added a claim for violation of Finance Law § 139-f.

W&W sought damages in the amount of $8,555,848.00.

The Port Authority moved under CPLR 3211(a)(2) to dismiss this action for lack of subject matter jurisdiction. The Port Authority argued that W&W's claims accrued "sometime in 2011," as W&W's work was substantially completed on April 4, 2011 and it began complaining about costs and delays even before that; accordingly, the Port Authority argued, no part of W&W's claims accrued within one year before the action was commenced in March 2013. Thus, the Port Authority maintained, W&W failed to comply with the condition precedent to suit contained in Unconsolidated Laws § 7107.

The IAS court granted the Port Authority's motion. Citing *Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.* (93 NY2d 375 [1999]), the IAS court held that "[t]he requirement to bring an action [against the Port Authority] within one year . . . [is] a condition precedent to suit, which cannot be tolled." The court rejected W&W's argument that its cause of action "did not accrue until the Port Authority breached the contract by refusing to issue payments for change orders or to accept W&W's Request for Equitable Adjustment," finding that W&W's argument was "belied by the complaints it filed in this action and the [first W&W] [a]ction," which W&W had filed more than a year earlier. The court also rejected W&W's estoppel argument on the grounds that

it was raised and rejected in the first W&W action, and that W&W could not argue that it was prevented from timely commencing litigation when it had timely commenced the first W&W action.

By notice dated September 22, 2014, W&W moved under CPLR 2221 to reargue or renew, advancing three arguments. First, W&W argued that the court had misapprehended facts establishing that W&W's cause of action accrued on or after September 17, 2012. Second, W&W argued that the court had misapprehended the factual importance of the assignment. Third and finally, W&W argued that the court had misapprehended the facts and arguments in favor of W&W's estoppel claim. W&W framed only the third of these arguments (regarding assignment) as an argument to "reargue or renew"; the remaining branches of the motion were for leave to reargue.

The IAS court denied W&W's motion to renew or reargue. With respect to W&W's assignment argument, which W&W also advances on appeal, the court found that the argument was not raised earlier and could therefore not be advanced in the first instance on a motion to reargue. At any rate, the court found, "W&W cites no cases that support the notion that the Port Authority can implicitly waive sovereign immunity by accepting an assignment that does not contain express language waiving the immunity."

The only argument that the court (as opposed to W&W)

characterized as an argument to "renew" related to the time of accrual of W&W's cause of action. The court rejected that part of the motion because W&W had not identified any material fact overlooked in rendering the prior decision, but argued only that W&W had "mistakenly and wrongfully" believed that the Port Authority had already conclusively denied payment at the time it filed the original action.

Initially, we note that in § 7107 of the Unconsolidated Laws, the Port Authority grants its consent to be sued, subject to certain conditions. Those conditions include that a notice of claim must have been served upon the Port Authority at least 60 days before commencing suit, and that any action against the Port Authority must be "commenced within one year after the cause of action therefor shall have accrued."

On appeal, W&W advances two arguments concerning its compliance with § 7107: first, W&W asserts that the Port Authority waived sovereign immunity to actions under the contract by accepting the assignment without reservation, and thus, that the one-year limitations period does not apply. Second, W&W maintains that even if the one-year limitations period does apply, the cause of action accrued on or after September 17, 2012, within one year of W&W's filing suit.

To begin, in connection with the motion to dismiss, W&W

failed to argue before the motion court that the Port Authority waived sovereign immunity. However, where a party does not allege new facts, but merely raises a legal argument that appeared upon the face of the record, we are free to consider the argument "[s]o long as the issue is determinative and the record on appeal is sufficient to permit our review" (*Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]; *see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]). The waiver argument presents this very circumstance, and therefore, we consider W&W's waiver argument on this appeal. Nonetheless, we reject the argument.

Although no binding case law precisely addresses the waiver issue, *Trippe v Port of N.Y. Auth.* (14 NY2d 119 [1964]) is instructive on the issue. *Trippe* did not involve a private contract, but a constitutional "takings" claim against the Port Authority. The Court of Appeals held that compliance with § 7107 is "mandatory as to all suits against the Port Authority," and rejected the plaintiffs' argument that the New York Constitution's provision barring takings of private property for public use without just compensation was a fully self-executing waiver of sovereign immunity and consent to suit, so that § 7107 would not apply to takings claims (*id.* at 123-125).

Similarly, *Oneida Indian Nation v Hunt Constr. Grp., Inc.*, 67 AD3d 1345 [4th Dept 2009]) is also instructive on the waiver issue. In *Oneida*, the Fourth Department considered whether the relevant agreement, which specified that disputes "arising out of, or relating to" the contract were subject to review "in a court of competent jurisdiction," precluded judicial review of claims not seeking to enforce the terms of the contract (*id.* at 1346-1347). The court held that judicial review was permissible only with respect to the expressly specified set of claims – that is, claims "arising out of, or relating to" the contract (*id.*). Notably, the *Oneida* court observed that the contract permitted review only by a court "of competent jurisdiction," and there is no court that has jurisdiction to hear claims for which the government has not waived its sovereign immunity (*id.*). The phrase "of competent jurisdiction" is included in the arbitration clause of the contract at issue here.

Accordingly, we find that the Port Authority did not expressly waive its sovereign immunity with respect to assignments in general or with respect to this assignment in particular. Likewise, we find that a waiver cannot be read into the contract (*see Matter of Bello v Roswell Park Cancer Inst.*, 5

NY3d 170, 173 [2005]).[1]

We turn now to the issue of when W&W's causes of action accrued. W&W argues that its breach of contract cause of action accrued within one year of its filing suit on May 29, 2013. We reject this argument. In general, a construction contract is breached, and the resulting cause of action accrues, "upon substantial completion of the work" (*Eastco Bldg. Servs., Inc. v New York City Hous. Auth.*, 98 AD3d 920, 920 [1st Dept 2012]). Although there is evidence that W&W completed some work at a later date, admissions in the complaint, and in the papers attached to the complaint, establish that the work was substantially completed in April 2011 – more than two years before the suit was filed. The agreement contains procedures for dispute resolution, but, contrary to W&W's contention, the

[1] Because the assignment argument may be considered even though it is raised for the first time on appeal, we need not consider W&W's alternate theory that the argument may be considered because it was raised in connection with W&W's motion to reargue and renew. But even were we to consider the latter theory, it avails W&W nothing. Despite the fact that W&W denominated the assignment argument as part of a motion for renewal, the argument was not based on "new facts" or "a change in the law," as required for a motion to renew (CPLR 2221[e]). As a result, W&W's assertions regarding assignment would properly have been deemed part of a motion for reargument, and of course, denial of a motion for reargument is not appealable (*see Board of Educ. of the City Sch. Dist. of the City of N.Y. v Grullon*, 117 AD3d 572, 573 [1st Dept 2014]; CPLR 5701[a][2][viii]).

agreement does not set any additional conditions precedent to bringing suit that would require a finding that a different accrual date applies (*see Phillips Constr. Co. v City of New York*, 61 NY2d 949, 951 [1984]; *cf. Ardsley Constr. Co. v Port of N.Y. Auth.*, 52 AD2d 794, 794 [1st Dept 1976]).

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: AUGUST 25, 2016

DEPUTY CLERK

Tom, J.P., Mazzarelli, Manzanet-Daniels, Kapnick, Kahn, JJ.

1477 The Public Administrator, as Administrator of the Estate of Ronald Simpson,
Plaintiff-Respondent,

-against-

William N. Levine, M.D.,
Defendant-Appellant,

New York Presbyterian Hospital-Columbia Presbyterian Center,
Defendant.

Index 301453/08

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Marshall Dennehey Warner Coleman & Goggin, P.C., New York (Michael P. Kelly of counsel), for appellant.

Law Offices of Annette G. Hasapidis, Mt. Kisco (Annette G. Hasapidis of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered August 11, 2015, which, to the extent appealed from as limited by the briefs, denied defendant doctor's motion to dismiss the complaint for failure to timely substitute a representative for Ronald Simpson, and granted the Public Administrator's motion to be substituted for Simpson as the plaintiff in the action and to amend the caption and pleadings to reflect such substitution, affirmed, without costs.

In this action, Simpson alleged medical malpractice arising from surgery performed on him commencing when he was approximately 37 years old, in July 2005, and continuing until

July 2006, by defendant-appellant Levine at defendant the New York and Presbyterian Hospital (sued here as New York Presbyterian Hospital-Columbia Presbyterian Center), to address an injury to the right knee that Simpson had sustained in an accident.

On February 21, 2008, Simpson and his wife, Walnisha Simpson, suing derivatively, commenced the instant action. On September 9, 2008, Supreme Court issued a preliminary conference order directing the release to the parties of hospital authorizations, records related to prior anterior cruciate ligament (ACL) surgery, and IRS records from 2002 to September 2008 within 30 days of the date of the order.

Ronald Simpson's deposition was taken in November 2010 and December 2010. At that time, Simpson, the father of eight children, had been divorced, allegedly because of his inability to work due to the malpractice of the defendants. Prior to the accident resulting in his knee injury, he had worked as a porter, earning approximately $19,000 per year.

On October 25, 2011, Simpson, then age 43, was hit by a livery cab while crossing the street and then was struck immediately by a private sanitation truck. He was taken by ambulance to Lincoln Hospital, where he was pronounced dead.

Upon Simpson's death, this action was automatically stayed.

Two of his children disputed who should serve as the estate administrator and submitted petitions for letters testamentary in Surrogate's Court, Bronx County. Following numerous court appearances in that court, on May 3, 2013, the Public Administrator was appointed by the Surrogate's Court as the administrator of Simpson's estate.

Thereafter, the Public Administrator sought to retain counsel to continue the prosecution of this action. Due to drafting errors in the retainer agreement, however, counsel was not engaged until January 9, 2014. Counsel for the Public Administrator avers that she had begun her maternity leave in December 2013 and did not return to work until April 2014. She further maintains that she did not realize that the retainer had been left unaddressed until May 22, 2014, when defendant Levine filed a motion, pursuant to CPLR 1021, to dismiss the action for failure to timely substitute an estate representative for Simpson. By motion dated June 10, 2014, the Public Administrator moved for substitution. As stated above, by order dated August 11, 2015, Supreme Court denied defendant's motion and granted the Public Administrator's motion, substituting the Public Administrator for Ronald Simpson as the named plaintiff and removing Walnisha Simpson, decedent's former wife, as a named plaintiff.

Supreme Court providently exercised its discretion in denying defendant's motion and in granting the Public Administrator's motion under CPLR 1021. In order to defeat a motion to dismiss a medical malpractice complaint for failure to obtain a timely substitution of an estate representative pursuant to CPLR 1021, a plaintiff must provide "a reasonable excuse for the delay" and make "a prima facie showing of merit" (*Wynter v Our Lady of Mercy Med. Ctr.*, 3 AD3d 376, 378 [1st Dept 2004], citing *Schwartz v Montefiore Hosp. & Med. Ctr.*, 305 AD2d 174, 176 [1st Dept 2003]). In order to prevail on a CPLR 1021 motion to dismiss, a defendant must show that the plaintiff's failure to secure substitution in a timely fashion resulted in undue prejudice (*Noriega v Presbyterian Hosp. in City of N.Y.*, 305 AD2d 220, 221 [1st Dept 2003]).

With regard to whether the Public Administrator in this case has demonstrated a reasonable excuse for the delay in filing a motion for substitution, in *Wynter*, a case with striking factual similarities to the instant case, this Court found that the record established that there had been an ongoing dispute over who represented the plaintiffs and that the plaintiffs' counsel had been rendered inactive in the case due to a life-threatening and extended illness (3 AD3d at 378). Here, the record shows that there was a dispute between two of Simpson's children as to

who would administer the estate, and that the Public Administrator's counsel was on maternity leave for five months. In addition, in this case, inadvertent errors in drafting the agreement to retain counsel accounted for some of the delay. Thus, here, as in *Wynter*, there are circumstances present that "adequately explain[] the delay in issue" (*id.*).

With respect to determining whether the Public Administrator has made a prima facie showing of the merit of the underlying medical malpractice action, here, as in *Wynter*, we may look to the underlying pleadings, including the amended complaint, and the verified bill of particulars.[1] In this case, these documents, together with Simpson's deposition, adequately establish the merit of the underlying action without the need for a physician's affirmation (*see Leonardelli v Presbyterian Hosp. in City of N.Y.*, 288 AD2d 105, 106 [1st Dept 2001] ["Plaintiff's bill of particulars and verified complaint allege sufficient

[1] While, in *Wynter*, this Court also referred to the physician's affirmation as among the documents establishing the merit of the underlying action in that case, this Court also observed that Supreme Court in that case had found the affirmation "inadequate" in that it failed to specify what documents the physician reviewed in support of the opinion that the "decedent's quadriplegia was a contributing factor in his demise" (3 AD3d at 378). Nevertheless, in *Wynter*, we found that the overall record, including pleadings and other supporting documents, together with the affirmation, adequately established the merits of the action (*id.* at 379).

detailed facts to establish that the case has merit . . . ."]; *Ronsco Constr. Co. v 30 E. 85th St. Co.*, 219 AD2d 381 [1996] ["Plaintiff's factually scant showing as to the merit of its cause of action is nevertheless sufficient under the circumstances, since all it need show is a substantial possibility of success in the action" (internal quotation marks omitted)]).[2]

Furthermore, defendant's "bare allegations of prejudice are insufficient to defeat a motion for substitution especially where, as here, the case is likely to turn mainly on medical

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[2] The cases cited by defendant and by the dissent in support of the argument that a physician's affirmation is needed to establish a prima facie showing of merit are inapposite to the instant case, as they pertain to standards applicable to motions to dismiss pursuant to CPLR 3216 for failure to file timely a note of issue (*see Mosberg v Elahi*, 80 NY2d 941 [1992]) or to situations in which there was neither any physician's affirmation, nor any other prima facie showing of merit, nor was there any justification for the delay beyond law office failure (*see Rose v Frankel*, 83 AD3d 607 [1st Dept 2011]). In arguing that a physician's affirmation or affidavit of merit, as well as a reasonable excuse for the delay, was required to defeat defendant's motion to dismiss for untimely substitution, defendant conflates this case with cases involving review of motions for other forms of relief not relevant here, such as cases involving review of motions to vacate a default judgment (*see Tandy Computer Leasing v Video X Home Lib.*, 124 AD2d 530 [1st Dept 1986]). We have never held that a physician's affirmation of merit is the sole means for establishing a meritorious claim for purposes of a belated substitution of a party representative under CPLR 1021. In any event, under the circumstances presented here, the court providently exercised its discretion in permitting substitution.

records rather than witnesses' memories" (*Noriega*, 305 AD2d at 221), and where, as here, defendant has apparently been in possession of the relevant records since shortly after disclosure was ordered in September 2008 (*Schwartz*, 305 AD2d at 176). The sole ground defendant offers as demonstrating prejudice to him, i.e., the passage of time, is not, in itself, a sufficient basis for finding prejudice (*Appleby v Suggs*, 135 AD3d 623 [1st Dept 2016]; *Peterson v City of New York*, 286 AD2d 287, 289 [1st Dept 2001]). Defendant does not deny that this case turns on medical records or that he is in possession of them. He has mentioned no facts as to prejudice, even when he complained of the delay that had occurred in the case prior to Simpson's death.

In sum, the Public Administrator has provided a reasonable explanation for the delay in seeking substitution and has made a prima facie showing of merit on the basis of the pleadings, deposition testimony and other supporting documents, while defendant has failed to demonstrate prejudice. Under these circumstances, and in light of the strong public policy favoring disposition of cases such as this one on their merits (*Peters v City of N.Y. Health & Hosps. Corp.*, 48 AD3d 329 [1st Dept 2008]; *Noriega*, 305 AD2d at 221), and "our liberal policy to permit amended pleadings" (*Wynter*, 3 AD3d at 379), adequate cause has been shown as to why this action should not have been dismissed

for failure to make a timely motion for substitution has been shown (*see Schwartz*, 305 AD2d at 176).

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

TOM, J.P. (dissenting)

The Public Administrator's failure to submit a physician's affirmation of merit and failure to provide justification, other than law office failure, for its more than one-year delay in seeking substitution following the issuance of letters testamentary mandates the denial of its motion for substitution and the grant of defendant doctor's motion to dismiss the complaint pursuant to CPLR 1021 (*see Rose v Frankel*, 83 AD3d 607, 608 [1st Dept 2011]; *see also Terpis v Regal Hgts. Rehabilitation & Health Care Ctr., Inc.*, 108 AD3d 618, 619 [2d Dept 2013]). Accordingly, I respectfully dissent.

This medical malpractice action arises from surgery performed by defendant William N. Levine, M.D. on Ronald Simpson's right knee at defendant the New York and Presbyterian Hospital (sued here as New York Presbyterian Hospital-Columbia Presbyterian Center). On February 21, 2008, Simpson, and his wife, Walnisha Simpson, suing derivatively, commenced this action against defendants. However, on October 24, 2011, Ronald Simpson died, and the matter was automatically stayed.

Between May 2012 and August 2012, defendants sent at least three correspondences to Simpson's counsel seeking to obtain the identity of the administrator of Simpson's estate. On May 3, 2013, the Surrogate's Court issued letters testamentary

appointing the Public Administrator as the administrator of Simpson's estate. However, the Public Administrator failed to seek leave to substitute itself for the Simpson.

Thus, on May 22, 2014, more than a year after Surrogate's Court appointed the administrator of the estate, defendant Levine moved for an order, pursuant to CPLR 1021, dismissing the action, with prejudice, for failure to timely substitute an estate representative for Simpson. In response, the Public Adminstrator moved for leave to substitute itself for Simpson, pursuant to CPLR 1021, and to amend the caption and pleadings to reflect such substitution and remove Walnisha Simpson as a named plaintiff.

In support of the Public Administrator's motion and in opposition to defendant's motion, the Public Administrator asserted that subsequent to Simpson's death, there was an ongoing dispute between his children as to who would represent the estate, and that numerous court appearances were held before the Surrogate's Court for a determination of the matter. After its appointment, the Public Administrator retained Simpson's counsel's law firm as attorneys for Simpson's estate; however due to errors with the contingent fee terms, the retainer agreement was not fully executed until January 9, 2014. Counsel averred that it was not until the motions to dismiss were made that she realized that the matter had not been addressed while she was on

maternity leave from December 2013 to April 2014. Counsel argued that the five-month delay, following execution of the retainer agreement, was not "egregious or unreasonable" as to warrant dismissal of the action. Counsel further argued that since Simpson had testified at deposition prior to his death, there was no prejudice to defendants by substituting the Public Administrator as the administrator of the estate. Notably, the Public Administrator did not support its motion with a physician's affirmation of merit.

Supreme Court nevertheless denied defendant's motion to dismiss and granted the Public Administrator's motion for substitution. This was an improvident exercise of discretion.

Pursuant to CPLR 1021, if a required substitution is not made within a "reasonable time," the action is subject to dismissal for this reason alone as to the party for whom substitution should have been made. Although courts have shown relative liberality regarding the time of delay because of "the strong public policy" favoring disposition of cases on the merits (*see e.g. Peters v City of N.Y. Health & Hosps. Corp.*, 48 AD3d 329 [1st Dept 2008]), the failure to demonstrate a reasonable excuse for the delay will warrant dismissal of the action (*see Rose*, 83 AD3d at 608). The 19-month delay in obtaining letters testamentary and the more than one-year delay in moving to

substitute from the time the Surrogate's Court appointed the administrator of the estate in May 2013 cannot be considered reasonable, and the Public Administrator offers only law office failure as an excuse, which is inadequate. Further, the approximately five-month delay attributable to counsel's maternity leave does not explain the eight additional months of delay.

More significantly, it is well established that when faced with a motion to dismiss pursuant to CPLR 1021, a plaintiff in a medical malpractice action must demonstrate the merit of his or her case through the introduction of a physician's affirmation of merit (*see Rose*, 83 AD3d at 608 ["(P)laintiffs failed to submit a physician's affirmation of merit and provided no justification, other than law office failure, for the almost five-year delay in making the motion."]; *Peters*, 48 AD3d at 329 ["By submitting its expert's affidavit of merit and a reasonable explanation for the delay in seeking substitution, decedent's estate showed adequate cause why this medical malpractice action should not have been dismissed for failure to timely move for substitution."]; *Wynter v Our Lady of Mercy Med. Ctr.*, 3 AD3d 376 [1st Dept 2004]["(T)he merit of the underlying medical malpractice action is adequately established by the pleadings, including plaintiffs' verified bills of particulars and supporting documents, and the

physician's affirmation"]). Here, the Public Administrator's failure to submit a physician's affirmation of merit is fatal to its opposition and requires dismissal of the action.

There is no merit to the Public Administrator's contention that the merits of this action can be established by the pleadings. The Court of Appeals has ruled that "except as to matters within the ordinary experience and knowledge of laymen, in a medical malpractice action, expert medical opinion evidence is required to demonstrate merit" (*Fiore v Galang*, 64 NY2d 999, 1001 [1985]; *see also Mosberg v Elahi*, 80 NY2d 941, 942 [1992]). This Court has followed this precedent (*see e.g. Navarro v Plus Endopothetik*, 105 AD3d 586 [1st Dept 2013]). In *Wynter*, this Court found that the merit of the underlying medical malpractice action was established by the pleadings in conjunction with the physician's affirmation (3 AD3d at 379); contrary to the majority's claim, the pleadings alone would not have sufficed. Rather, the physician's affirmation was a necessary submission to establish the merits of that medical malpractice action. Indeed, this is why our other precedents in medical malpractice actions have affirmed dismissal of the action pursuant to CPLR 1021 when a plaintiff fails to submit a physician's affirmation of merit (*see e.g. Rose*, 83 AD3d 607).

In any event, even assuming the majority is correct that

merit can be proven without a physician's affirmation, this case cannot be proven without resorting to expert medical testimony. Indeed, the bill of particulars vaguely alleges, inter alia, that the defendants failed to properly repair Ronald Simpson's knee and negligently placed hardware in his knee and failed to timely remove the hardware. These allegations are completely denied by defendants. Simpson's pleadings fail to set forth evidentiary facts, and are thus, insufficient to demonstrate merit (*see Celnick v Freitag*, 242 AD2d 436, 437 [1st Dept 1997]). Expert testimony is thus necessary to establish specifically how defendants departed from the standard of care in performing the knee surgery.

Moreover, the pleadings and verified bill of particulars are insufficient to show that the action has merit because the complaint is verified "only by counsel, rather than a person with knowledge" (*JPMorgan Chase Bank, N.A. v Clancy*, 117 AD3d 472, 472 [1st Dept 2014]; *see also Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006] [noting that "a complaint verified by counsel is purely hearsay, devoid of evidentiary value"]).

Accordingly, I would reverse the order of the Supreme Court, grant defendant's motion to dismiss, and deny the Public Administrator's motion for substitution.

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

ENTERED: AUGUST 25, 2016

DEPUTY CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1614 Lurline Fox, Index 307421/11
Plaintiff-Appellant, 83828/13

-against-

Grand Slam Banquet Hall, et al.,
Defendants-Respondents,

Tremont 470, LLC, et al.,
Defendants.

- - - - -

[And a Third-Party Action]

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

Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, New York (Erika L. Omundson of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered December 17, 2015, which, to the extent appealed from as limited by the briefs, dismissed the complaint against defendants Grand Slam Family Club Corporation, Grand Slam Corporation d/b/a Grand Slam Banquet Hall, sued herein as Grand Slam Banquet Hall, and Grand Slam Club (collectively Grand Slam), unanimously reversed, on the law and the facts, without costs, the complaint against Grand Slam reinstated, and the matter remanded for further discovery and a jury trial in accordance with this decision.

Plaintiff allegedly tripped and fell on wires laid across

the floor while attending a party at the Grand Slam Banquet Hall, leased and operated by Grand Slam. Third-party defendant Jacqueline Cowan rented out the banquet hall and promoted the party.[1]

Prior to opening statements at trial, plaintiff and Grand Slam entered into a high-low agreement, with $400,000 being the lowest amount plaintiff could recover, and $800,000 being the highest amount she could recover. On the third day of trial, during cross-examination, plaintiff testified that, on the previous day, she searched her home and found a video of the party that she had misplaced. Plaintiff gave the video to her attorney around noon that day but the attorney did not notify the court and defendants about it until 3:00 or 4:00 p.m., during plaintiff's cross-examination.

At her deposition, plaintiff testified that a video was shot of the party, although she misidentified the photographer as the videographer. When asked if the videographer would sell the video to people, plaintiff responded, "[N]o," and said that she believed that the video was for the promoter's own use, which Grand Slam interpreted to mean that she did not have a copy of

[1]The claims against defendants Tremont 470, LLC and 550 Realty Company, LLC were dismissed by order dated February 27, 2013. At trial, the parties stipulated to discontinue the action against defendant Belkis Lora.

it. During discovery, when defendants requested production of any photographs taken at the time of the alleged accident, plaintiff responded that she did not possess any. Although plaintiff asserts that Cowan hired the videographer, at her deposition, Cowan testified that she was not sure whether the party had been videotaped.

Under the particular circumstances of this case, the court abused its discretion in dismissing the complaint due to plaintiff's belated disclosure of a video. Although CPLR 3101(i) requires disclosure of "any films, photographs, video tapes or audio tapes" of a party upon demand (*see Falk v Inzinna*, 299 AD2d 120 [2d Dept 2002]), there was insufficient evidence of willful or contumacious conduct on plaintiff's part, or prejudice to Grand Slam, to warrant the dismissal of her complaint in the midst of the jury trial (*see Colome v Grand Concourse 2075*, 302 AD2d 251 [1st Dept 2003]; *Ahroni v City of New York*, 175 AD2d 789 [2d Dept 1991]), even if the dismissal was without prejudice.

There was no court order directing plaintiff to produce the video, and Grand Slam's discovery demands only requested that she produce photographs. Furthermore, plaintiff, who claimed to have misplaced the video, did not seek to introduce the edited video, which did not show her fall, into evidence at trial, and was willing to consent to its preclusion, the striking of her

testimony concerning its existence, and a curative instruction, even though she believed the video to be favorable to her because it showed a cord across the floor and one of Grand Slam's principals standing in the vicinity.

To mitigate any potential prejudice to Grand Slam resulting from the belated production or the potential use of the video at retrial, we direct that Grand Slam be given 60 days from the date of this order to conduct additional discovery of the videographer and plaintiff with respect to the video, as it deems appropriate. Because we are reversing the dismissal of the complaint, the high-low agreement should be enforced upon the retrial.

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

ENTERED: AUGUST 25, 2016

DEPUTY CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Gische, Gesmer, JJ.

1626 Fan-Dorf Properties, Inc., et al., Index 113094/10
Plaintiffs-Appellants,

-against-

Classic Brownstones Unlimited, LLC, et al.,
Defendants,

Cathay Bank,
Defendant-Respondent.

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Law Office of Craig K. Tyson, New York (Craig T. Tyson of counsel), for appellants.

Ganfer & Shore, LLP, New York (Mark A. Berman and Virginia K Trunkes of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 7, 2015, which denied plaintiffs' motion for leave to renew defendant Cathay Bank's CPLR 3211(a)(3) motion to dismiss the complaint for lack of capacity to sue, unanimously reversed, on the law, without costs, the motion to renew granted, and, upon renewal, the motion to dismiss denied.

In 1974, plaintiff Fan-Dorf Properties, Inc. (Fan-Dorf) acquired title to the property located at 15 West 129th Street. In 1993, Fan-Dorf was dissolved by proclamation of the Secretary of State for failure to pay New York State franchise taxes, pursuant to Tax Law § 203-a. In 1999, its owner, Randolph Adamson, passed away. In October 2000, a deed was recorded

transferring the property to defendant 15 West 129th Street Corp. (15 West). Between 2001 and 2006, the property was transferred several times, with defendant Classic Brownstones Unlimited, LLC (Classic) being the most recent owner. Defendant Cathay Bank holds two mortgages totaling about $900,000, pursuant to mortgage loans to Classic. Fan-Dorf and plaintiff Michael Adamson as administrator of Randolph Adamson's estate claim that the October 2000 deed transferring the property was forged.

Thus, in October 2010, plaintiffs commenced this action against 15 West and Classic, seeking to quiet title to the property. In October 2014, they amended the complaint to add Cathay Bank as a defendant. In December 2014, Cathay Bank moved to dismiss the complaint as against it under CPLR 3211(a)(3), contending that Fan-Dorf lacked capacity to maintain the action because it had been dissolved as of 1993. By order entered on or about March 13, 2015, the motion court granted the motion. However, three days later, Fan-Dorf received from the Department of Taxation and Finance a "Consent to Reinstatement" and "Certificate of Consent," pursuant to Tax Law § 203-a(7). Based on this, plaintiffs moved for renewal under CPLR 2221(e), arguing that the Consent to Reinstatement revived the corporation as if the dissolution had never occurred and, therefore, Fan-Dorf had capacity to maintain the present action.

Plaintiffs are entitled to renewal. The Consent to Reinstatement constitutes new facts unavailable at the time of the initial motion (*see* CPLR 2221[e][2], [3]).

Although we have rejected interpretations of Tax Law § 203-a(7) that would result in extensions of limitation periods (*see e.g. Matter of Lewis v Schwartz*, 119 AD2d 116, 119-121 [1st Dept 1986]), those decisions are irrelevant here because of the Court of Appeals' decision in *Faison v Lewis* (25 NY3d 220 [2015]). In *Faison*, the Court of Appeals held unequivocally that a forged deed, such as plaintiff claims exists here, is void ab initio, and is not subject to the statute of limitations. The *Faison* decision changed the law when it eliminated the statute of limitations, in effect modifying our decision in a previous appeal in this case (*Fan-Dorf Props., Inc. v Classic Brownstones Unlimited, LLC*, 103 AD3d 589 [1st Dept 2013]).

Nonetheless, plaintiffs may not maintain this action under Business Corporation Law § 1006(b). The statute provides that "[t]he dissolution of a corporation shall not affect any remedy available to or against such corporation . . . for any right or claim existing or any liability incurred before such dissolution." However, plaintiffs' claim against Cathay Bank did

not exist before Fan-Dorf's dissolution, since the alleged fraudulent conveyance did not occur until seven years thereafter (*see MMI Trading, Inc. v Nathan H. Kelman, Inc.*, 120 AD3d 478, 480 [2nd Dept 2014]).

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

ENTERED: AUGUST 25, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1668 Antoinette Sardina Pinkham, Index 150953/14
Plaintiff-Respondent,

-against-

West Elm doing business as Williams-Sonoma Stores, Inc., et al.,
Defendants-Appellants.

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McAndrew, Conboy & Prisco, Melville (Michael J. Prisco of counsel), for appellants.

The Dweck Law Firm, LLP, New York (H.P. Sean Dweck of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered January 15, 2016, which, insofar as appealed from, 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.

Defendants established entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she fell off an elevated display platform in defendants' store. Defendants submitted evidence demonstrating that the platform and steps leading to the platform were not dangerous conditions as a matter of law through photographic evidence showing that the steps of the platform were clearly demarcated with thick black lines which contrasted with the light

color of the floorboards. The evidence also showed that the steps were well lit and free of debris (*see Langer v 116 Lexington Ave., Inc.,* 92 AD3d 597, 599 [1st Dept 2012], *lv denied* 24 NY3d 907 [2014]).

Furthermore, plaintiff testified that she turned and stepped without looking down because she was seeking a sales associate and that the steps played no part in her fall (*see Baker v Roman Catholic Church of the Holy See,* 136 AD3d 596, 597 [1st Dept 2016]*; Franchini v American Legion Post,* 107 AD3d 432 [1st Dept 2013]). Thus, defendants met their initial burden of showing that they neither created a dangerous condition at the platform and steps, nor had actual or constructive notice of such a condition (*see Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [1st Dept 2010]).

In opposition, plaintiff failed to raise a triable issue. The report of plaintiff's expert relies upon the expert's theories of violation of the New Jersey Handicap Accessibility Code and optical confusion due to the monochromatic floor covering used on the platform and steps. However, plaintiff improperly raised these issues for the first time in response to defendants' motion for summary judgment, as both her complaint

and the bill of particulars fail to allege either of these theories (*see Ceron v Yeshiva Univ.*, 126 AD3d 630, 632-633 [1st Dept 2015]; *Atkins v Beth Abraham Health Servs.*, 133 AD3d 491, 492 [1st Dept 2015]).

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

ENTERED: AUGUST 25, 2016

DEPUTY CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

16558 The People of the State of New York Ind. 4590/07
Respondent,

-against-

Dwight Smith,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, Bronx County (Steven L. Barrett, J. at pretrial proceedings; John W. Carter, J. at plea and sentencing), rendered September 28, 2012, reversed, on the law, the pleas vacated, and the indictment dismissed without prejudice to the People to represent any appropriate charges to another grand jury.

Opinion by Manzanet-Daniels, J. All concur except Andrias and Kapnick, JJ. who dissent in an Opinion by Kapnick, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Richard T. Andrias
Sallie Manzanet-Daniels
Barbara R. Kapnick
Ellen Gesmer, JJ.

16558
Ind. 4590/07

_____x

The People of the State of New York
Respondent,

-against-

Dwight Smith,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Steven L. Barrett, J. at pretrial proceedings; John W. Carter, J. at plea and sentencing), rendered September 28, 2012, convicting him of manslaughter in the first degree and burglary in the first degree, and imposing sentence.

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

Robert T. Johnson, District Attorney, Bronx (Marianne Stracquadanio, Stanley R. Kaplan and Ramandeep Singh of counsel), for respondent.

MANZANET-DANIELS, J.

We find defendant's right-to-counsel claim to be meritorious. The court here pressured defendant into giving a buccal swab for DNA testing, incorrectly advised him that he had no arguments against the prosecutor's untimely discovery, and ignored defendant's explicit and repeated requests for a lawyer during the critical pretrial stage of the proceedings. Proceeding without counsel under the circumstances violated defendant's Sixth Amendment rights.

On September 7, 2007, the Office of the Chief Medical Examiner [OCME] reported that it had found biological material on items inside of the apartment where the homicide occurred.

On March 11, 2009 – more than seven months after defendant's arraignment, and nearly six months after the prosecution's discovery request deadline under CPL 240.90(1) – the People filed a motion for discovery of a saliva sample. The motion did not even purport to explain why the prosecution had missed the discovery deadline by 179 days.

After the People served defense counsel with a written copy of the motion to compel in court the next day, the prosecutor asked defense counsel whether "it's something that defense is willing to consent to," and defense counsel replied, "I will

discuss it with my client, Your Honor." The court stated, "If your client is not inclined to agree, would you put in your answer," and defense counsel replied, "Yes, I will."

Codefendant Fair's attorney opposed the DNA test, contending that the prosecution had violated the 45-day discovery deadline (CPL 240.90[1]). Defendant did not file papers opposing the motion to compel.

On April 30, 2009, defense counsel Gilbert Parris appeared before the court without defendant present and asked to be excused from the case because defendant would not be able to pay his fees. Following a discussion off the record, the court stated that "[w]ith respect to this matter, Mr. Parris will be relieved." When the court officer stated that defendant had not yet been produced, defense counsel stated, "He's not produced so I waive my client's production in this matter." The prosecutor stated, "We're going to ask the card be held so we can go get a swab."

Defendant appeared before the court later that same day, without an attorney. The court asked defendant whether he would "mind doing [the buccal swab] without your lawyer in light of the fact that there has been an order signed by this Court indicating that you have to do that?" In the exchange that ensued,

defendant repeatedly indicated that he wanted to wait for his lawyer before agreeing to provide a sample or actually providing one. Defendant stated that he "wasn't aware of [the] buccal swab" and had not spoken to his attorney for "two months." He even stated, "I will probably want to [file] a motion to oppose."

Instead of adjourning, the court informed defendant that the motion practice "was already taken care of. The motions are finished. All I want to ask you is to cooperate." Defendant continued to insist that counsel be present, stating, "I don't want to do it. I want to wait for the attorney to be here. I don't mind doing [the test], but with [the attorney's] consent. I don't want to do things I'm not aware of basically. I don't want to do something that's not in my favor."

The court retreated from its initial statement that it would "wait for [defendant's] lawyer," advising defendant that his resistance to the DNA test was futile. The court explained that attorney Parris had consented to the taking of a buccal swab, and that "[t]he [new] attorney is not going to be able to help you in any way of preventing because I issued the order." The court explained that refusing to proceed with the test would significantly delay the trial, and suggested that it would order that the sample be obtained from defendant involuntarily if

necessary. When defendant continued to insist that a lawyer be present, the court stated that he was "making a mistake," admonishing him that he had "no basis for fighting [the test]."

Defendant still declined to consent, explaining that while he "trust[ed]" the judge, he did not "know the law." The judge replied, "I know the law." Defendant stated that he wanted to "make sure," but the judge responded, "It is absolutely a hundred [percent]," and asked him whether he "want[ed] to see the order in writing? Would that change your mind?" Defendant replied, "That will help." The judge showed defendant the order, and defendant acquiesced.

As an initial matter, we find that defendant's putative waiver of his right to appeal to be invalid inasmuch as the court failed to apprise defendant that his right to appeal was separate and distinct from those trial rights automatically forfeited upon entry of his guilty plea (*see People v Oquendo*, 105 AD3d 447, 448 [1st Dept 2013], *lv denied* 21 NY3d 1007 [2013]). Indeed, the court expressly instructed defendant that he retained the right to appeal "constitutional" errors.

Further, the "waiver" included the illegal notice of appeal provision we recently invalidated in *People v Santiago* (119 AD3d 484 [1st Dept 2014], *lv denied* 24 NY3d 964 [2014]) because it

purports to foreclose appellate review of claims found to be unwaivable owing to their constitutional significance.

Claims alleging deprivation of the right to counsel "go to the very heart of the process" and survive a guilty plea (*see People v Griffin*, 20 NY3d 626, 630 [2013] [internal quotation marks omitted]).

The right to counsel attaches at arraignment and requires the presence of counsel at each subsequent "critical stage of the proceedings" (*Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010] [internal quotation marks omitted]). The period between arraignment and trial when the case is "factually developed and researched," "plea negotiations conducted, and pretrial motions filed" is "critical." As recognized by our own Court of Appeals, "[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself" (*id.* at 21-22 [internal quotation marks omitted]; *see also* CPL 180.10[3] [explicitly providing for the right to counsel "at the arraignment and at every subsequent stage of the action," and prohibiting a court from going forward without counsel for the defendant, unless the defendant has knowingly agreed to counsel's absence]).

The pretrial proceedings concerning the DNA test were

"critical" within the meaning of the law. The DNA test fundamentally changed the outcome of the case, undermining defendant's plea bargaining posture and his chances for acquittal.

The order was based on the putative consent of former counsel Mr. Parris. However, defendant's protests put the court on notice that defendant had never communicated with his former attorney about the issue, nor did he wish to consent to the test. Defendant was unrepresented not only in the sense that he had been denied an attorney for the proceeding, but insofar as his former attorney evidently had never discussed the matter with him. Had the court appointed new counsel, he or she could have withdrawn consent and sought preclusion on the ground that the prosecutor had failed to show good cause for the late discovery under CPL 240.90(1).

The People's argument that defendant's "concerns" are more properly expressed via a CPL 440.10 motion for ineffective assistance is unpersuasive. Claims that attorneys "waived important rights without authorization from their clients . . . [are] reasonably understood to allege nonrepresentation rather than ineffective representation" (*Hurrell-Harring v State*, 15 NY3d at 22).

The court rejected defendant's repeated pleas for a lawyer, pressured him into submitting to the DNA test, and incorrectly advised him that he had no argument against the prosecutor's untimely discovery. The denial of defendant's repeated entreaties to consult with a lawyer during this critical stage of the proceedings violated his Sixth Amendment rights. The deprivation of his Sixth Amendment rights is of constitutional dimension and is not subject to a harmless error analysis (*see People v Hilliard*, 73 NY2d 584, 587 [1989]). The appropriate remedy under the circumstances is to vacate both pleas, and to dismiss the indictment (*see Hilliard*, 73 NY2d at 587 [reversing conviction and dismissing indictment where counsel was precluded by the court from visiting his client for 30 days]; *People v Chappelle*, 121 AD3d 1166, 1168 [3d Dept 2014], *lv denied* 24 NY3d 1118 [2015] [pretrial deprivation to right to counsel required vacatur of plea and dismissal of the indictment]).

Accordingly, the judgment of the Supreme Court, Bronx County (Steven L. Barrett, J. at pretrial proceedings; John W. Carter, J. at plea and sentencing), rendered September 28, 2012, convicting defendant of manslaughter in the first degree and burglary in the first degree, and sentencing him to concurrent terms of 18 years, should be reversed, on the law, the pleas

vacated, and the indictment dismissed without prejudice to the People to represent any appropriate charges to another grand jury.

All concur except Andrias and Kapnick, JJ.
who dissent in an Opinion by Kapnick, J.

KAPNICK, J. (dissenting)

I disagree with the majority's holding that the right to counsel claim is meritorious under the facts of this case and that dismissal of the indictment is the appropriate remedy. The People moved by notice of motion dated March 11, 2009 for an order directing the removal of a saliva sample from defendant and his codefendants for the purpose of DNA analysis. The record indicates that on March 12, 2009, when counsel appeared to set a trial date, defense counsel was given a courtesy copy of the motion and indicated that if his client was not going to agree to provide the sample, he would submit opposition papers. The record also shows that counsel for one of the codefendants did submit opposition papers arguing that the discovery request was not timely and should be denied since the People's lateness was not justified. On April 30, 2009, defense counsel made an application to be relieved due to difficulty getting paid, which was granted. On the same day, the court issued an order granting the People's motion for buccal swabs "on consent" with respect to defendant.[1] Also on April 30, 2009, after defendant's counsel

[1] The motion was also granted "on consent" as to one of the other codefendants and "over objection" with respect to the codefendant who had submitted opposition papers.

was permitted to withdraw, and the order was signed, defendant appeared before the court without counsel and was informed that the People's motion for a buccal swab had been granted. Defendant was also informed that arrangements had been made for an 18-b attorney to take over his representation and that he would meet the new attorney on May 21, 2009. Defendant indicated to the court several times that he would prefer to wait for new counsel before he went forward with the buccal swab. The court instructed defendant that the motion was already decided and there was nothing he or his attorney could do to legally challenge the order at that time. Defendant once more expressed his hesitation to agree to the swab without counsel advising him. The court explained that waiting for new counsel would delay the trial and would not be charged to the People. After being shown a copy of the order, defendant agreed, and the swab was conducted in the courtroom.

In my view, the salient fact here is that prior to the time the defendant claims he was unconstitutionally without counsel, the motion to compel the saliva sample had already been considered by the court and a decision made, granting the motion "on consent" with respect to defendant. There is no dispute that no opposition papers were submitted on behalf of defendant.

While the right to counsel undoubtedly attaches during pretrial motion practice, there is no basis to hold that counsel must be present for the physical administration of the already-ordered collection of a saliva sample; nor is there a basis to view the actual collection of the sample as a "critical stage" of the proceedings (*see Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010]). Although defendant argues that he was without counsel during a "pre-DNA-test hearing," the record is clear that the court had already issued its order and defendant had not been left without counsel during the pendency of the motion, which I would agree was a "critical stage."

Despite defendant's attempts to characterize it otherwise, the colloquy that ensued between the court and defendant was not a "critical stage" of the proceedings because the motion had already been decided and there was no indication that the court was reconsidering its ruling. The fact that defendant told the motion court that he "wasn't aware of the buccal swab" and had not spoken to his attorney for "two months," while troubling, raises an issue that cannot be adequately reviewed here, where the record on appeal does not contain sufficient facts to allow this Court to conduct a record-based review and defendant did not raise this non-record based claim collaterally pursuant to CPL

440.10.

While it clearly would have been more prudent and advisable for the court to have adjourned the swab until new counsel appeared, it cannot be said that the failure to do so amounted to a constitutional violation. Defendant's argument suggesting that there were defenses to the motion that prior counsel could have raised, but failed to, and that new counsel could have successfully challenged the court's order and prevented the saliva sample altogether, is based on speculation, especially since we know that counsel for one of the codefendants did oppose the motion on the same timeliness grounds now raised by defendant, and that the objection to the People's motion was unsuccessful. To the extent defendant wishes to raise an ineffective assistance of counsel claim, this cannot be done under the guise of a right to counsel violation.

Even assuming a right to counsel violation occurred here, the majority's holding that the appropriate remedy is to vacate defendant's guilty plea *and* dismiss the indictment is unsupported. Even counsel for defendant does not go so far as to ask that the indictment be dismissed. Defendant only asks that in the interest of justice this Court fashion a remedy precluding the DNA evidence. While it is unclear whether he is asking for

the DNA evidence to be precluded from trial, should the case go to trial, or for the evidence to be precluded from consideration in the proceeding altogether, defendant only argues that preclusion will provide "teeth" to the finding that there was a right to counsel violation. Neither *People v Hilliard* (73 NY2d 584 [1989]), nor *People v Chappelle* (121 AD3d 1166 [3d Dept 2014], *lv denied* 24 NY3d 118 [2015]) stands for the broad proposition that any pretrial deprivation of the right to counsel requires dismissal of the indictment. Both of those cases involved right to counsel violations that occurred at or around the time of grand jury proceedings. It follows logically that any indictment secured while a defendant's right to counsel was being violated is tainted and dismissal of the indictment would be warranted. This is clearly very different from the instant scenario, where the alleged violation occurred almost one year after defendant was indicted and during proceedings related to a discovery motion. I submit that the alleged violation does not

taint or call the validity of the indictment into question, and dismissing it, even without prejudice to the People re-presenting any appropriate charges to another grand jury, is not an appropriate remedy.

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

ENTERED: AUGUST 25, 2016

DEPUTY CLERK