SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 17, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Andrias, Moskowitz, Manzanet-Daniels, JJ.

13117- Index 600920/08
13118-
13119-
13120-
13121 Millennium Holdings LLC,
Plaintiff,

The Northern Assurance Company
of America,
Plaintiff-Appellant,

Certain Underwriters at
Lloyd's, et al.,
Intervenor Plaintiffs-Appellants,

-against-

The Glidden Company, now known
as Akzo Nobel Paints, et al.,
Defendants-Respondents.

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Zuckerman Spaeder LLP, Washington, D.C. (Jason M. Knott of the bar of the District of Columbia, admitted pro hac vice, of counsel), for appellants.

Debevoise & Plimpton LLP, New York (Maura K. Monaghan and James Amler of counsel), for respondents.

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Upon remittitur from the Court of Appeals (27 NY3d 406 [May 5, 2016]), order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 26, 2013, which granted

defendants the Glidden Company, now known as Akzo Nobel Paints LLC and Akzo Nobel Paints LLC's (collectively ANP), motion for summary judgment dismissing the complaint, modified, on the law, to remand for a limited determination of whether the insurers are entitled to recover defense costs as against ANP on the basis of express subrogation, and otherwise affirmed, without costs.

Background

The Original Glidden and SCM

The original Glidden was an Ohio corporation that manufactured and sold lead-based paints and coatings. In 1924, Glidden acquired Euston Lead Company, a producer of lead pigments used in paints. The lead pigment was a key ingredient in Glidden's lead paint, which was sold under the Glidden name for four decades. In 1958, Glidden sold the lead pigment operation to Dumont Airplane and Marine Instruments, Inc. and exited the lead pigment business. Within several years it stopped selling paint containing lead.

In 1967, Glidden was acquired by and merged into SCM Corporation. Glidden's paint business was housed in SCM's Glidden-Durkee Division. In 1976, the paint business was transferred to the Coatings & Resins Division. The pigments business – limited to non-lead pigments following the sale of Euston – was placed in the chemical/metallurgical division of

SCM.

The Insurance Policies

Certain Underwriters at Lloyd's, London and certain London market insurance companies (London), subscribed to primary and excess policies in favor of Glidden and SCM's Glidden-Durkee Division for the period from 1962 to 1970. Plaintiff Northern Assurance Company of America's predecessor issued an excess policy to SCM for the period June 27, 1968 to January 1, 1970. The policies covered liability for property damage sustained during the policy period. The primary policy issued between 1965 and 1968, to which the excess policies followed form, contained the following express subrogation clause:

> "Subrogation: Upon payment of any claim, demand, suit or judgment covered hereby the Underwriters (or other insurers or the Assured in the event that more than one insurer or the Assured as self-insurer has paid any part of such claim it being understood that other insurance or excess insurance or self-insurance is permitted) shall be subrogated to all rights which the Assured may have against any and every person, partnership or corporation in respect of such claim, demand, suit or judgment. . ."

Hanson Acquisition

In 1985, Hanson Trust PLC attempted a hostile takeover of SCM. As part of an effort to thwart the takeover, SCM in September 1985 transferred the assets of the domestic pigments

business to ABC Chemicals, a newly-formed and wholly-owned subsidiary of SCM.

In 1986, Hanson succeeded in acquiring SCM in a hostile takeover. The plan of liquidation and dissolution distributed the company's remaining assets and liabilities among 20 "fan companies" known as HSCM 1 through 20. The paints, resins, coatings, caulking and adhesives business (i.e., the Coatings & Resins Division) was transferred to HSCM-6. The memorandum of distribution in liquidation between SCM and HSCM-6 provided that "HSCM-6 hereby assumes all of the obligations and liabilities relating to the Business, including all claims, whether asserted or unasserted, known or unknown, contingent or otherwise . . . attributable to all periods prior to the date hereof."

By another memorandum of distribution in liquidation, SCM distributed to HSCM-20 the assets "constitut[ing] all the remaining assets of SCM" that had not been transferred to other fan companies. Those assets included the stock of the new fan company subsidiaries, as well as the stock of ABC Chemicals, which then owned the pigments business. HSCM-20 assumed all of the obligations and liabilities related to such assets.

Thus, HSCM-20 separately owned both SCM's paint business (HSCM-6) and SCM's pigment business (ABC Chemicals).

Asset Purchase Agreement

Shortly thereafter, HSCM-20 sold HSCM-6 to ICI American Holdings, a subsidiary of Imperial Chemical Industries, PLC. The sale was memorialized in a purchase agreement dated August 14, 1986. HSCM-6 was later renamed "The Glidden Company," the predecessor of defendant ANP herein.

Under the asset purchase agreement, Millennium Holdings LLC and its predecessors were required to indemnify ANP and its predecessors from 1986 through 1994 for liabilities arising out of or resulting from "environmental events or environmental conditions" resulting from the use, manufacture, handling, etc., of "materials, substances or wastes in, about or relating to the Business, including, without limitation, the paints, coatings, resins, adhesives, caulkings or related businesses owned or held by any predecessor entity ('Predecessor Business') or formerly owned or held by Seller, HSCM-6, any of the Subsidiaries or any predecessor of any of the foregoing ('Former Business'), and to indemnify ANP in respect of any personal injury or property damage claims of or relating to the Business, the Predecessor Business or the Former Business."

ANP and its predecessors were required to indemnify Millennium and its predecessors thereafter "against and in respect of [claims] . . . relating to the Business arising from

or relating to acts, omissions, events or conditions of or relating to the Business, the Predecessor Business or the Former Business occurring or existing prior to, on or after the Closing or otherwise arising out of or relating to the conduct of the Business, the Predecessor Business or the Former Business . . . for matters referred to in Section 9.1(b)[i.e., environmental liabilities], 9.1[c] [i.e., personal injury and property damage claims], and 9.1(e) [i.e., other claims]."

Lead Paint Litigation

Beginning in 1987, a number of lawsuits were filed against ANP (the paint company) and Millennium (the pigment company), alleging property damage, personal injuries, and/or public nuisance arising from the presence of old lead paint in inner city housing.

From 1986 onward, Millennium indemnified ANP in accordance with the asset purchase agreement. Shortly before the end of Millennium's indemnification period, a dispute arose as to the scope of ANP's obligations (scheduled to commence in 1994 under the terms of the asset purchase agreement). ANP argued that it was not obligated to provide Millennium with indemnification for "pigment cases," but rather, only paint cases, contending that "pigment cases" fell outside the scope of the indemnity.

The dispute led to litigation in Ohio (*Glidden Co. v HM*

Holdings, Case. No. 269218, Ohio Court of Common Pleas 1994) and New York (*HM Holdings, Inc. v ICI American Holdings and The Glidden Company*, Index No. 110533/94, Sup Ct, NY County 1994). Both litigations were settled in 2000 with the parties executing an amended purchase agreement. Millennium assumed the rights and obligations of HSCM-20, including the pigment business, and ANP assumed the rights of ICI and ICI American (HSCM-6), including the paint business. The settlement left open the parties' indemnification obligations regarding the lead paint cases.

Between 1995 and 2000, the insurers paid defense costs for and on behalf of both Millennium and ANP for their joint defense of the lead litigation cases. The insurers terminated funding in 2000 and sought a declaration in Ohio state court that they were not required to provide ANP with a defense and indemnification in the lead cases. In 2006, the Ohio Supreme Court held that ANP was not covered under the relevant policies since it was not a named insured and was not the corporate successor to HSCM-20, the entity holding the policies following the liquidation and distribution of SCM's assets (*Glidden Co. v Lumbermens Mut. Cas. Co.*, 112 Ohio St 3d 470, 861 NE2d 109 [2006]).

The insurers entered into a new defense funding agreement with Millennium only. In 2011, the insurers paid $3.2 million to Millennium toward the settlement of an action brought by the

State of California alleging that a public nuisance had been created by the presence of lead paint in California buildings (the "Santa Clara action"). The insurers' payment in the Santa Clara action was made pursuant to a full reservation of rights, including the right to seek reimbursement from Millennium if there were no coverage. The insurers then brought a coverage action in Ohio seeking a declaration that the Santa Clara action was not covered by the policies. In an order entered August 8, 2013, the trial court in Ohio ruled in favor of the insurers, ruling that the Santa Clara action was not covered by the policies. The court reasoned that "whether property damage occurred or not by the Millennium Plaintiffs' product [wa]s irrelevant," since the California Court of Appeals had ruled that property damage was not an element of the claim for public nuisance, eliminating any possibility that Millennium would be held liable for property damage. The court declined to adopt a "continuous trigger" theory of recovery (which would have implicated more years of policy coverage). The court declined to permit the insurers to recover the $3.2 million payout from Millennium, finding that an insurer could not create a right to reimbursement from its insured based solely on a unilateral reservation of a right to seek repayment over an explicit objection by the insured (*see Millennium Holdings LLC v*

Lumbermens' Mut. Cas. Co., Case No. 00-CV-411388,*8-11 [Cuyahoga County 2013]).

The Instant Litigation

In 2008, Millennium commenced this action seeking indemnification from ANP for fees and claims associated with the lead cases. The insurers' motions to intervene in the action were granted. In 2010, Millennium declared bankruptcy and settled its dispute with ANP. The settlement preserved the insurers' subrogation rights.

Following the settlement in the Santa Clara action, the London insurers sought a declaration that they were entitled to subrogate (both equitably and contractually) to Millennium's indemnification rights in the 1986 asset purchase agreement and to recover from ANP amounts they had paid on behalf of Millennium in connection with the lead paint cases.

The insurers moved for partial summary judgment on liability, asserting that they were entitled to recover the $3.2 million payment they had made toward settlement of the Santa Clara action, as well as defense costs incurred in other lead paint litigations. ANP cross-moved for summary judgment dismissing the complaint on the ground, inter alia, that the insurers' subrogation claim was barred by the antisubrogation rule.

The motion court denied the insurers' motion and granted ANP's motion. The motion court reasoned that while ANP was obligated to indemnify Millennium for its losses related to the lead paint litigations, the "anti-subrogation rule" precluded the insurers from recovering from ANP the payments the insurers had made on Millennium's behalf. The court reasoned that the insurers, by seeking to enforce their subrogation rights against ANP, were seeking to recover for the very risk they had insured in the underlying lead cases. We affirmed (121 AD3d 444 [1st Dept 2014]).

The Court of Appeals reversed (27 NY3d 406 [2016]). Justice Abdus-Salaam, writing for the Court, reasoned that since ANP and its predecessor were not insured under the relevant insurance policies (as noted, *supra*, the insurance policies were transferred to HSCM-20, the predecessor to Millennium, and not HSCM-6, the predecessor to ANP), "the principal element for application of the antisubrogation rule -- that the insurer seeks to enforce its right of subrogation against its own insured, additional insured, or a party intended to be covered by the insurance policy" -- was absent (27 NY3d at 416). The Court remitted the matter for consideration of issues raised but not determined on the prior appeal. Those issues include whether the insurers have a right to subrogate to Millennium's

indemnification rights as set forth in the asset purchase agreement, the scope of any such indemnification obligation, and whether the insurers' payment in the Santa Clara action is barred by the voluntary payment doctrine.

Discussion

Subrogation

The right to equitable subrogation accrues when an insurer can establish that it has paid for "losses sustained by its insured that were occasioned by a wrongdoer" (*Fasso v Doerr*, 12 NY3d 80, 86 [2009]; *Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577 [1995]).

The insurers argue that they have a right to equitably subrogate to Millennium's rights under the indemnification, relying on *National Sur. Co. v National City Bank of Brooklyn* (184 App Div 771 [1st Dept 1918]); ANP disagrees, asserting that under New York law a party may not proceed by way of equitable subrogation against a third party whose liability exists by way of contract.

We are compelled to agree with ANP. The Court of Appeals distinguished *National Sur. Co.* in *Federal Insurance Co. v Arthur Andersen & Co.* (75 NY2d 366 [1990]), stating "arguably a compensated insurer or surety should in fairness bear the loss where the third party's liability is solely contractual and not

based on fault" (*id.* at 377; *see also National Union Fire Ins. Co. v Ranger Ins. Co.*, 190 AD2d 395, 398 [4th Dept 1993] ["because National attempts to assert a right to equitable subrogation against Ranger, a third party that was not negligent and did not cause El Kam's loss, based solely on Ranger's contractual liability," the doctrine of equitable subrogation did not apply]).

ANP is not a third-party wrongdoer, but a party whose liability arises by contract. The insurers accordingly may not rely on a theory of equitable subrogation to pursue claims against ANP.

Contractual Subrogation

A possible theory of liability – but only as to those policies in effect from 1965 to 1968 which contain an express subrogation clause – is contractual subrogation.

The parties dispute the meaning and scope of the relevant indemnification provisions of the asset purchase agreement. The insurers assert that the indemnity extends to the lead paint litigations; ANP asserts that the indemnification was never intended to cover so-called "pigment," as opposed to "paint," cases.

A court will not find a duty to indemnify unless a contract manifests "a clear and unmistakable intent to indemnify" for

particular liabilities (*Commander Oil Corp. v Advance Food Serv. Equip.*, 991 F2d 49, 51 [2d Cir 1993] [internal quotation marks omitted]). The indemnity obligation will be strictly construed, and additional obligations may not be imposed beyond the explicit and unambiguous terms of the agreement (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]).

The indemnification provisions of the agreement define "predecessor" and "former" businesses broadly as "the paints, coatings, resins, adhesives, caulkings or related businesses owned or held by any predecessor entity" ('Predecessor Business') or formerly owned or held by Seller, HSCM-6, any of the Subsidiaries or any predecessor of any of the foregoing ('Former Business')."

The indemnification on its face does not purport to distinguish between pigment and paint-based liabilities in the manner suggested by ANP. While the pigment/paint distinction was of concern in the underlying litigations, the indemnity provisions were likely drafted broadly because the eventual liabilities of the corporate successors could not be contemplated with certainty. Indeed, as the motion court observed, "The bottom line is that the paint contained lead, and it was the lead that caused personal injuries, property damage, and public nuisances, not the 'paint' or the 'pigment'" (41 Misc3d 1231[A],

*6, 2013 NY Slip Op 51947[U]).

This does not end the inquiry, however. An indemnification provision must be read in conjunction with the other provisions of the agreement (*see Promuto v Waste Mgt., Inc.*, 44 F Supp 2d 628, 650 [SD NY 1999]). The asset purchase agreement as a whole contemplates that Millennium will maximize its insurance coverage before seeking indemnity from ANP, and that ANP will receive the benefits of Millennium's coverage under the policies. The subject policies, let us not forget, are occurrence policies that cover liabilities arising when both companies were owned by the same parent, SCM.

The side letter agreement provides that "Hanson shall give ICI [predecessor to ANP] and its subsidiaries the benefit of any policy of insurance to the extent the same would provide coverage for liability in respect of occurrences relating to the Business prior to Closing giving rise to loss, injury or damage thereafter subject to indemnity on costs." This provision would arguably be rendered meaningless if ANP were required to repay the insurers through subrogation.

Section 2 of the lead litigation agreement (incorporated by reference into the asset purchase agreement) includes an express undertaking by Millennium to share with ANP insurance proceeds relating to litigation conducted in the common defense, to assign

ANP choses in action for insurance coverage, and to "use [its] best efforts to maximize any and all insurance recoveries under the Insurance Policies."[1]

The Ohio Supreme Court's ruling that the side letter agreement did not cause the paint company (now ANP) to maintain coverage under the subject insurance policies answers the question of whether ANP could seek payment directly from the insurers. It does not address the present situation, where the insurers seek to proceed against ANP via subrogation and we are asked to construe the meaning of an indemnification agreement. The Ohio Supreme Court did not "invalidate" the side letter agreement in the manner suggested by the partial dissent; rather, it held that the parent company had not effectuated a transfer of insurance coverage on behalf of its subsidiary.

Given the ambiguities in the relevant agreements, we cannot find as a matter of law that the insurers are entitled to contractually subrogate to ANP's indemnification rights. On remand, the motion court is to consider the intent of these provisions in light of the extrinsic evidence.

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[1]Although this agreement was terminated in 2002, it extends to defense costs in respect of claims that were incurred prior to the effective date of the termination. Further, it does not address the question of whether ANP agreed to pay Millennium's insurers.

Voluntary Payment

The insurers' payment of $3.2 million to Millennium on account of the Santa Clara action was a "voluntary payment" precluding the exercise of the insurers' subrogation rights. It is axiomatic that a right of subrogation exists only for payments an insurer is contractually obligated to pay (*see Broadway Houston Mack Dev., LLC v Kohl*, 71 AD3d 937 [2d Dept 2010]). The Ohio court having already determined that the Santa Clara action is outside the scope of the policy coverage, the insurers have no right to recover the payment made on behalf of their insured (*see National Union Fire Ins. Co. v Ranger Ins. Co.*, 190 AD2d at 397-399). At the time the payment was made, the insurer was not acting under any mistake of fact or law (*see id.*) Thus, the insurer became a mere volunteer, and the $3.2 million paid is outside the scope of any right to subrogation (*see Broadway Houston Mack Dev., LLC v Kohl*, 71 AD3d at 937-938).

The fact that ANP did not plead the voluntary payment doctrine as an affirmative defense is irrelevant. Proof that the payment was legally compelled was part of the insurers' prima face case to establish a right to subrogation (*see id.*).

Conclusion

The insurers are not entitled to proceed by way of equitable subrogation. The insurers may not recover the $3.2 million

payment in settlement of the Santa Clara action. On remand, the motion court is to construe the relevant indemnification obligations set forth in the asset purchase agreement and to determine whether the insurers may proceed on a contractual subrogation theory with respect to those policies containing an express subrogation clause (1965-1968).

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

ANDRIAS J. (dissenting in part)

Appellant insurance companies claim that they are entitled to be subrogated (both equitably and contractually) to the right of their insured, plaintiff Millennium Holdings LLC (Millennium), to indemnification from defendant the Glidden Company, now known as Akzo Nobel Paints (ANP), for the amounts they expended on behalf of Millennium in certain lead paint related cases.[1] While agreeing with the insurers that the contractual indemnity provision at issue applies, the motion court granted summary judgment to ANP on the ground that the insurers' claims were barred by the antisubrogation rule because they sought to recover for the very risk they insured (*see* 41 Misc 3d 1231[A], 2013 NY Slip Op 51947 [U]). This Court affirmed for the reasons stated by the motion court (*see* 121 AD3d 444 [1st Dept 2014]). The Court of Appeals reversed and remitted to this Court for consideration of issues raised but not determined on the appeal, holding that the antisubrogation rule did not apply to a claim against ANP, a related successor company that was never an insured (*see* 27 NY3d 406 [2016]).

On remittitur, I agree with the majority that the insurers may not proceed by way of equitable subrogation against ANP, a

[1]Millennium and ANP have settled their claims in this action against each other.

third party whose liability exists by way of contract, and that the insurers' payment of $3.2 million to settle the "Santa Clara" action was a "voluntary payment," precluding the exercise of the insurers' subrogation rights with respect thereto. However, I do not agree with the majority that the matter should be remanded to Supreme Court for a limited determination of whether the insurers are entitled to recover defense costs as against ANP on the basis of an express subrogation agreement. Contrary to the view of the majority, the indemnity agreement is not ambiguous and supports the insurers' claim for indemnification for defense costs with respect to policies that contain a subrogation clause.

The original Glidden Company (Old Glidden) manufactured and sold lead paints and lead pigments used in paints. In 1958, it stopped manufacturing lead pigment, but continued to manufacture and sell paint containing lead. In 1967, it was acquired by and merged into SCM Corporation (SCM), which placed the paint business into its "Glidden-Durkee" division. Between 1962 and 1970, primary and excess insurance policies were issued to Old Glidden and the Glidden-Durkee division by the insurers or their predecessors for property damage liability arising from lead in their products. The policies in effect from 1965-1968 contained a subrogation clause.

In 1985, SCM transferred its pigments business (which no

longer involved lead) to a new subsidiary, ABC Chemicals Inc. (ABC). In 1986, Hanson Trust PLC (Hanson) acquired SCM, whose assets and liabilities were transferred to 20 "fan companies," entitled HSCM 1 through 20. The paint business went to HSCM-6 but the insurance policies were excluded from the transfer. The stock of HSCM-6 and all remaining undistributed assets of SCM were placed in HSCM-20, including ABC and the insurance policies.

In 1986, HSCM-20 sold the stock in HSCM-6 to ICI American Holdings (ICI) (the 1986 agreement). HSCM-20 retained the insurance policies. Under section 9.1(c) of the 1986 agreement, HSCM-20 agreed to indemnify ICI for an eight-year period between 1986 and 1994 for claims arising from

> "product safety or liability ..., health or welfare conditions or matters arising from or relating to acts, omissions, events or conditions of or relating to the Business, the Predecessor Business or the Former Business occurring or existing prior to the Closing or otherwise arising out of or relating to the conduct of the Business, the Predecessor Business or the Former Business prior to the Closing."

After 1994, the indemnification obligation flipped, with section 9.3 providing that ICI would indemnify HSCM-20

> "from, against and in respect of any Claims ... relating to the Business arising from or relating to acts, omissions, events or conditions of or relating to the Business, the Predecessor Business or the Former Business occurring or existing prior to, on or after the Closing or otherwise arising out of or relating to the conduct of the Business, the Predecessor Business or the Former Business prior to, on or after the

> Closing arising against Indemnitees for matters referred to in Section 9.1(b), 9.1(c) or 9.1(e) to the extent that [ICI] would not be entitled to indemnity under Sections 9.1 [4] and 9.2.[5]."

Hanson and ICI also entered into a side Letter Agreement that provided that "Hanson shall give ICI and its subsidiaries the benefit of any policy of insurance to the extent the same would provide coverage for liability in respect of occurrences relating to the Business prior to Closing giving rise to loss, injury, or damage thereafter subject to indemnity on costs."

In 1987, multiple lead paint lawsuits were filed against the predecessors of Millennium and ANP. Between 1987 and 1994, Millennium's predecessors indemnified ANP's predecessors for defense costs pursuant to section 9.1(c) of the 1986 agreement. In 1994, when the indemnity obligation flipped, ANP's predecessor (ICI) refused to indemnify Millennium's predecessors (Hanson and HSCM-20), resulting in litigation between them in New York and Ohio state courts.

In 2000, that litigation settled. Pursuant to a settlement agreement and three additional agreements attached as exhibits thereto, including "The Lead Litigation Agreement," an Amended Purchase Agreement (APA) was formed under which Millennium assumed the rights and obligations of Hanson and HSCM-20 and ANP assumed the rights and obligations of ICI. Accordingly, the

pigment business went to Millennium and the paints business went to ANP. Further, in the Lead Litigation Agreement, the parties agreed to continue their prior practice of sharing equally the costs associated with defending lead litigation cases in which both parties were defendants, without prejudice to later indemnification claims.

Subsequently, the London Insurers terminated that agreement and sought a declaration in Ohio state court that they were not required to provide ANP with a defense and indemnification. In 2006, the Ohio Supreme Court held that ANP was not covered under the relevant policies "by operation of law or by contract," as it was not a named insured and its subsequent purchase of HSCM-6 included an assumption of liabilities (*see Glidden Co. v Lumbermens Mut. Cas. Co.*, 112 Ohio St 3d 470, 470, 474-475, 861 NE2d 109, 112, 115-116 [2006]). The decision also invalidated Hanson's side letter agreement attempting to provide ANP's predecessor ICI with the benefits of SCM's insurance policies on the ground that Hanson was not a named insured in the relevant policies and consequently could not transfer them to ICI.

Stating that there is a distinction between "paint cases" and "pigment cases," ANP contends that section 9.3 of the 1986 agreement only applies to "paint cases" since its indemnification obligation was limited to "Claims relating to the Business," and

the term "Business" did not refer or relate to the "pigment" business.[2] However, as the majority finds, the plain language of the agreement refutes ANP's arguments.

Section 9.1(c), identifying the scope of Millennium's indemnification obligations, and section 9.3, identifying the scope of ANP's indemnity obligation, employ substantially similar language and reflect an intent to have the indemnity cover all facets of "The Business," i.e., anything relating to the "developing, manufacturing, marketing, selling, [licensing] and distributing of paints, industrial coatings, resins, caulkings, and adhesives." Moreover, section 9.4, states that, notwithstanding the "foregoing," with respect to any claim "incurred or suffered as a result of any Claim arising out of or in any way related to exposure to materials, substances, wastes, or products manufactured, used, stored, sold, handled, spilled discharged or disposed of by" ANP, or "any of the Subsidiaries or any predecessor entity of the foregoing ... (iii) if the Claim for exposure becomes first pending later than 8 years after Closing, Buyer [ANP's predecessor] shall indemnify the Indemnitees [Millennium's predecessor] in full." This language

[2]As the motion court observed, it appears that the plaintiffs in lead paint cases eventually made the decision to only maintain their cases against pigment companies.

indicates that after eight years, the period of 1986-1994, ANP's indemnification obligation was to be as broad as Millennium's was prior to that time. If the parties intended for "paint" claims to be paid for by the "paint" company (then HSCM-6, now ANP) and for "pigment" claims to be paid for by the "pigment" company (then ABC, now Millennium), the agreement could have just said so.

While agreeing that "[t]he indemnification on its face does not purport to distinguish between pigment and paint-based liabilities in the manner suggested by ANP," the majority nevertheless holds that ambiguities in the relevant agreements preclude a finding that the insurers are entitled, as a matter of law, to contractually subrogate to Millenium's indemnification rights. In support, stating that the indemnification must be read in conjunction with the other provisions of the relevant agreements, the majority asserts that: (1) the 1986 agreement as a whole "contemplates that Millennium will maximize its insurance coverage before seeking indemnity from ANP, and that ANP will receive the benefits of Millennium's coverage under the policies"; (2) the side letter agreement that provides that ICI (ANP's predecessor) would receive the benefits of the insurance policies "would arguably be rendered meaningless if ANP were required to repay the insurers through subrogation"; and (3)

section 2 of the Lead Defense Agreement "includes an express undertaking by Millennium to share with ANP insurance proceeds relating to litigation conducted in the common defense, to assign ANP choses in action for insurance coverage, and to 'use [its] best efforts to maximize any and all insurance recoveries under the Insurance Policies.'" However, none of these three points preclude summary judgment on the issue.

Whether a contract is ambiguous is a question of law for the court and is to be determined by looking "within the four corners of the document" (*Kass v Kass*, 91 NY2d 554, 566 [1998]; *Omansky v Whitacre*, 55 AD3d 373 [1st Dept 2008]). The existence of ambiguity is determined by examining the "entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed," with the wording to be considered "in the light of the obligation as a whole and the intention of the parties as manifested thereby" (*Kass* at 566 [internal quotation marks omitted]).

"A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [internal quotation marks omitted]). A contract is ambiguous if

its terms are "susceptible to more than one reasonable interpretation" (*Evans v Famous Music Corp.*, 1 NY3d 452 [2004]). "[P]rovisions in a contract are not ambiguous merely because the parties interpret them differently" (*Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 352 [1996]).

ANP's obligation to indemnify Millennium for the defense cost under section 9.3 of the 1986 agreement is not ambiguous. Further, the Court of Appeals' determination in this matter shows that neither the side letter nor any other document conferred insurance rights upon ANP.

The side letter agreement does not immunize ANP from liability for costs that the insurers paid to or on behalf of Millennium. Nothing in the letter, or in the 1986 agreement itself, states that the indemnity is ineffective to the extent that Millennium is able to obtain insurance coverage for the amounts owed by ANP; that Millennium cannot pursue indemnity for covered amounts; or that subrogation claims by insurers for those amounts are waived. Indeed, the Ohio Supreme Court held that the side letter did not convey any rights related to the policies, because Hanson had no rights to give (*see Glidden Co. v Lumbermens Mut. Cas. Co.*, 112 Ohio St 3d at 477, 861 NE2d at 117). Millennium terminated the Lead Litigation Agreement, and told ANP at that time that it would no longer share insurance

recoveries even if ANP had agreed to indemnify it for a claim.

Accordingly, I would deny ANP summary judgment insofar as the insurers seek to recover the defense costs.

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

ENTERED: JANUARY 17, 2017

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1840- Index 652183/14
1841-
1842-
1843

Vandashield Ltd, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Mark Isaacson, et al.,
Defendants-Appellants-Respondents,

Anthony Hilton,
Nonparty Appellant.

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Law Offices of Paul C. Cavaliere, New York (Paul C. Cavaliere of counsel), for appellant.

Anthony Hilton, New York, for appellants-respondents.

Frankfurt Kurnit Klein & Selz, P.C., New York (John B. Harris of counsel), for respondents-appellants.

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Appeal from order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 20, 2015, which denied defendants' application for an order to show cause, unanimously dismissed, without costs. Order, same court and Justice, entered May 20, 2015, which granted plaintiffs' motion for sanctions, unanimously affirmed, without costs. Order, same court and Justice, entered July 17, 2015, which ruled that defendants had waived their right to serve paper discovery demands, unanimously affirmed, without costs. Order, same court and Justice, entered on or about September 18, 2015, which, to the extent appealed

from as limited by the briefs, inter alia, granted defendants' first motion to dismiss (for failure to state a cause of action) so much of the fraud and breach of fiduciary duty claims as were predicated on misrepresentations allegedly made before the assignments by defendant Strategic Development Partners, LLC (SDP), the claims for constructive trust and punitive damages, and all claims against defendant Great Court Capital LLC, and denied the motion as to the remaining portion of the fraud and breach of fiduciary duty claims, the breach of contract claim, and the accounting claim as against SDP, and denied their second motion to dismiss (based on forum non conveniens), unanimously modified, on the law, to deny the first motion as to the request for punitive damages on the fiduciary duty claim, and otherwise affirmed, without costs. Appeal from so much of the September 18, 2015 order as denied vacatur of the orders entered April 3 and May 4, 2015, unanimously dismissed, without costs, as moot.

With respect to dismissal of the entire action, the motion court considered the factors relevant on a forum non conveniens motion and providently exercised its discretion in ruling that the action should proceed in New York rather than South Africa (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]).

The business judgment rule does not avail defendants since

plaintiffs are neither shareholders of a corporation, challenging the decisions of the corporation's directors (*see Auerbach v Bennett*, 47 NY2d 619, 629 [1979]), nor residents of a cooperative or condominium, challenging the decisions of the board of directors or board of managers (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537 [1990]). This case involves, in the first instance, contract interpretation, namely, whether defendant SDP has satisfied the conditions in paragraph 7(a) of the 2012 agreement to require plaintiffs to forbear from suit.

The court correctly dismissed so much of the fraud claim as dealt with the misrepresentations that defendants allegedly made before plaintiffs entered into their assignment agreements with SDP. "To establish a fraud claim, a plaintiff must demonstrate that a defendant's misrepresentations were the direct and proximate cause of the claimed losses" (*Friedman v Anderson*, 23 AD3d 163, 167 [1st Dept 2005]). "To establish causation, plaintiff must show both that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)" (*Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]).

Read liberally in plaintiffs' favor, the complaint

adequately alleges transaction causation. However, the complaint insufficiently alleges loss causation (*see id.*). Plaintiffs' losses are not alleged to have been caused by poor security for the loan or defendants' supposed failure to lend money to MOD; rather, the complaint alleges that plaintiffs' losses were caused by defendants' privileging of their own claims in the litigation and settlement with nonparty MOD. Plaintiffs allege, inter alia, that "the Actual Settlement Amount was more than sufficient to repay the Plaintiff Lenders in full, with interest, but Defendants sought to ... retain[] more than $12 million for themselves as supposed lost profits because [MOD] failed to pursue the public offering."

Since plaintiffs submitted no proposed amendment, the court properly denied their request – made in a footnote in their brief – to replead (*see Gerrish v State Univ. of N.Y. at Buffalo*, 129 AD3d 1611, 1613 [4th Dept 2015]).

Defendants contend that the individual defendants (Mark Isaacson and Ivan Berkowitz) are not subject to liability for fraud and breach of fiduciary duty because they acted on behalf of SDP and there is no basis for piercing SDP's corporate veil. However, the rule on which defendants rely is applicable to contract claims, not tort claims (*compare Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 282 [1st Dept 1989], *lv*

dismissed in part, denied in part 74 NY2d 874 [1989], *with Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 [1st Dept 2012]). Defendants' contention that the individual defendants did not profit personally is also unavailing (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]).

Defendants' claim that plaintiffs failed to plead the contract cause of action with particularity is without merit. There is no requirement of heightened particularity in a contract claim (*see East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 125 [2d Dept 2009], *affd* 16 NY3d 775 [2011]; CPLR 3016). Even if, arguendo, it were found that the complaint was not sufficiently particular to give the requisite notice (*see* CPLR 3013), in opposition to defendants' first motion to dismiss, plaintiffs submitted an affirmation by their counsel describing defendants' failure/refusal to give them full and timely access to information and documents pertaining to MOD's default in making the payments required under the South African settlement (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]).

Plaintiffs contend that the constructive trust claim should be reinstated. However, the purpose of a constructive trust is to prevent unjust enrichment (*Simonds v Simonds*, 45 NY2d 233, 242 [1978]), and plaintiffs do not argue that the motion court erred

in dismissing their unjust enrichment claim. Moreover, since constructive trust applies to property already acquired by a defendant (*see id.* at 241), the motion court correctly dismissed so much of the fourth cause of action as sought to impose a constructive trust over any future funds received by defendants from MOD. In addition, plaintiffs do not allege that defendants will fail to pass along plaintiffs' share of future MOD payments; on the contrary, the documentary evidence indicates that SDP has been fulfilling its obligation to pass plaintiffs' share along.

In pleading alter ego liability against Great Court, plaintiffs failed to allege facts indicating that defendants abused or perverted the corporate form for the purpose of causing harm to them (*see East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011]). For example, they do not allege that they contracted with SDP because defendants led them to believe that it was the same as the more solid Great Court. Plaintiffs' plea for discovery is also unavailing (*see East Hampton*, 66 AD3d at 128-129).

The court properly struck plaintiffs' request for punitive damages on their fraud claim, which did not allege that the fraud was aimed at the public generally (*see Walker v Sheldon*, 10 NY2d 401, 405 [1961]). However, the requirement of conduct directed at the general public does not apply to punitive damages for

breach of fiduciary duty (*Don Buchwald & Assoc. v Rich*, 281 AD2d 329, 330 [1st Dept 2001]; *see also Banque Indosuez v Barclays Bank*, 181 AD2d 447 [1st Dept 1992]). Plaintiffs pleaded, at a minimum, "intentional or deliberate wrongdoing" on defendants' part (*Buchwald*, 281 AD2d at 330). "It is for the jury to decide whether [defendants'] ... dealings with [plaintiffs] were so reprehensible as to warrant punitive damages" (*Swersky v Dreyer & Traub*, 219 AD2d 321, 328 [1st Dept 1996]).

Since, on May 26, 2015, defendants disclosed the names of persons other than plaintiffs who participated in the loan to MOD, their appeal from so much of the September order as refused to vacate the April and May orders directing such disclosure is moot.

As to the sanctions imposed by the court on defendants and their counsel, the May 4, 2015, order said that "defendants shall ... turn over the names of the other lenders by 5/6/15 *or the court will impose a sanction"* (emphasis added). Defendants did not turn over the names by May 6; therefore, on May 20, the court ruled that they would have to pay plaintiffs' reasonable costs to compel them to comply.

The court imposed sanctions on defendants (as opposed to their counsel) pursuant to both CPLR 3126 and 22 NYCRR 130-1.1. To the extent sanctions were imposed pursuant to the former, the

court was not required to find that defendants' behavior was frivolous (*New v Scores Entertainment,* 255 AD2d 108, 109 [1st Dept 1998]).

The court providently exercised its discretion in sanctioning defendants for refusing to obey the order (*see Spira v Antoine*, 191 AD2d 219 [1st Dept 1993]; *see generally Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 83 [2010]). The court had the power to order defendants to pay plaintiffs' reasonable costs (*see Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 359-360 [1st Dept 2006]; *see also Baralan Intl. v Avant Indus.*, 242 AD2d 226, 227 [1st Dept 1997]).

On May 20, the court ordered defense counsel to pay $5,000 to the Lawyers' Fund for Client Protection pursuant to 22 NYCRR 130-1.3. Counsel contends that he should not be punished for his clients' disobedience of court orders. However, by his own admission, counsel did not file a notice of appeal from the order. We are therefore without authority to entertain his arguments (*see Hecht v City of New York*, 60 NY2d 57, 63 [1983]).

The court providently exercised its discretion in finding, on July 20, 2015, that defendants had waived their right to serve paper discovery demands by disregarding the deadlines set forth in two case management orders (*see e.g. Fletcher v Dakota, Inc.*, 127 AD3d 626 [1st Dept 2015]).

Citing nonbinding cases, defendants contend that the court could order preclusion only on a clear showing that their failure to comply with the case management orders was willful or contumacious. However, we have upheld preclusion even when a party's behavior was neither willful nor contumacious (*see New*, 255 AD2d at 108; *see also Christian v City of New York*, 269 AD2d 135, 137 [1st Dept 2000]).

Defendants contend that the sanction was disproportionate because their motion for a protective order stayed discovery pursuant to CPLR 3103(b). However, the statute says, "Service of a notice of motion for a protective order shall suspend *disclosure of the particular matter in dispute"* (emphasis added). Defendants' motion for a protective order against *plaintiffs'* discovery demands did not stay their obligation to serve their own discovery demands.

Defendants contend that the sanction was disproportionate because the reason for their delay in serving paper discovery demands was that the parties were engaged in settlement negotiations. However, as the motion court explained, defendants could have requested an extension of the discovery deadline on this basis but failed to do so (*see Gibbs*, 16 NY3d at 81).

The appeal from the May 20, 2015 order denying defendants' application for an order to show cause is dismissed, since no appeal lies from an order declining to sign an order to show cause ([*Kalyanaram v New York Inst. of Tech.*, 91 AD3d 532 [1st Dept 2012]). In any event, the appeal was abandoned.

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

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

ENTERED: JANUARY 17, 2017

CLERK

Sweeny, J.P., Mazzarelli, Andrias, Webber, Gesmer, JJ.

2254 Constellation Energy Services of New York, Inc., Plaintiff-Respondent, Index 651972/15

-against-

New Water Street Corp., Defendant-Appellant.

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The Law Office of John F. Olsen, LLC, Rye Brook (John F. Olsen of counsel), for appellant.

Wong Fleming, P.C., New York (Daniel C. Fleming of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 21, 2016, which denied defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Defendant failed to present documentary evidence that either flatly contradicts the allegations in the complaint so as to warrant dismissal pursuant to CPLR 3211(a)(7) (*see Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]) or conclusively establishes a defense as a matter of law so as to warrant dismissal pursuant to CPLR 3211(a)(1) (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]).

The parties entered a "Power Sale Agreement" and a "Confirmation" (collectively, the agreement) under which defendant agreed to purchase all of the electricity used in its building from plaintiff. The agreement provided that defendant

would pay a "Fixed Rate" for the electricity, which was based on a "Baseline" number of kilowatt hours. However, the agreement provided that the fixed rate was subject to adjustment, stating,

> "If Seller determines that there has been a material and sustained change from an Account's Baseline *for reasons other than Force Majeure* which results in an increased cost or decreased revenue to Seller ('Cost'), Seller may request that Buyer and Seller meet and agree on a Pricing adjustment to reflect such Cost; provided[,] however, if Buyer and Seller cannot mutually agree, then Seller may pass-through the Cost, without markup" (emphasis added).

On October 29, 2012, Hurricane Sandy flooded the building, leaving it without electrical power. Mechanical systems and telecommunications equipment in and around the building were also destroyed. While electricity was completely restored to the building no later than March 25, 2013, defendant contends that tenants with space below grade could not move back in until mid-2015, when repairs were completed, which led to energy usage below the baseline.

Plaintiff seeks to recover from defendant $1,290,865 in damages, representing its net lost revenue resulting from defendant's failure to meet the baseline. Asserting that it was unable to meet the baseline due to the effects of Hurricane Sandy, defendant moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), on the grounds that the force majeure and consequential damages clauses in the agreement provide an

absolute defense and that in any event plaintiff failed to follow the contractual requirements for a rate adjustment.

Force majeure clauses are to be interpreted in accord with their purpose, which is "to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties" (*United Equities Co. v First Natl City Bank*, 52 AD2d 154, 157 [1st Dept 1976], *affd on op below* 41 NY2d 1032 [1977]). "[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure" (*Route 6 Outparcels, LLC v Ruby Tuesday, Inc.*, 88 AD3d 1224, 1225 [3d Dept 2011]).

Here, the force majeure clause is expansive in scope and affords protection to *both* plaintiff and defendant, by stating, in pertinent part,

> "*A Party* shall not be considered to be in default in the performance of its obligations under this Agreement or any effective Confirmation if its ability to perform was prevented by Force Majeure. For purposes of this Agreement and any effective Confirmation, *Force Majeure means an event which prevents one Party from performing its obligations hereunder*, which event was not (i) within the reasonable control of, or (ii) the result of the negligence of, the Claiming Party, and which, by the exercise of due diligence, the claiming Party is unable to overcome or avoid. Force Majeure shall include, *without limitation*: a condition resulting in the curtailment or disruption of firm Energy supply or

> the transmission on the electric transmission and/or distribution system; restraint by court order; any action or non-action by, or the inability to obtain necessary authorizations or approvals from[,] any Authorized Entity; or a Force Majeure event experienced by an Authorized Entity. Force Majeure shall not include loss or failure of either Party's markets or supplies....” (emphasis added).

The agreement also provides that a force majeure event may be a defense to a price adjustment claim, stating that plaintiff may seek its increased costs or decreased revenue if it “determines that there has been a material and sustained change from an Account's Baseline for reasons other than Force Majeure.” By these express terms, the expansive force majeure clause was intended to protect *any party* to the agreement which was unable to perform its obligations under the contract by a force majeure event, defined as “an event which prevents *one Party* from performing its obligations hereunder, which event was not (i) within the reasonable control of, or (ii) the result of the negligence of, the Claiming Party, and which, by the exercise of due diligence, the claiming Party is unable to overcome or avoid” (emphasis added). The examples that follow this specific definition are qualified by the statement that they are “without limitation,” and do not limit the application of the clause to the scenario in which the force majeure event curtails or disrupts the transmission of electricity, rather than where the

buyer's actual usage did not meet the baseline because, as a result of the damage from an unforeseen event (Hurricane Sandy), a certain number of tenants were unable to occupy the building, even after power was restored.

Plaintiff argues that the force majeure clause does not provide a defense to its rate adjustment claim because the agreement did not impose a contractual obligation on defendant to reach the baseline, which only served as a basis for determining the final rate. However, plaintiff's interpretation fails to give due weight to the language of the price adjustment clause allowing plaintiff to recover its "increased cost or decreased revenue" if the baseline was not met. By allowing plaintiff to recover its decreased revenue, the clause effectively obligated defendant to pay for the baseline amount of electricity, whether it used it or not.

Nevertheless, the motion to dismiss should be denied because defendant has not shown that the force majeure clause would be an absolute defense. Defendant has not established as a matter of law that its failure to meet the baseline was an unavoidable result of the storm, including whether or not the tenants could have been restored to their space sooner, and whether the failure to do so was beyond its control.

Furthermore, the agreement states that "Force Majeure shall

not include loss or failure of either Party's markets or supplies." While defendant contends that there was no failure in the rental market in that its tenants continued to pay rent, this issue is not suitable for determination on a motion to dismiss.

The court correctly found that the limitation of liability provision precluding recovery of consequential damages does not negate or apply to the provision in the confirmation that provides for plaintiff's recovery of costs related to material energy usage deviations.

Defendant has not proven that plaintiff waived its right to the claimed amounts. The documentary evidence does not conclusively establish that plaintiff failed to follow the contractual procedures required for recovering those costs. Issues of fact exist as to whether plaintiff failed to initiate the process to implement the pricing adjustment by requesting that the parties meet and agree on the adjustment.

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

ENTERED: JANUARY 17, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2413 The People of the State of New York, Ind. 491/12
Respondent,

-against-

Jeremy Simmons,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 9, 2013, convicting defendant, upon his plea of guilty, of two counts of attempted murder in the second degree, and sentencing him to concurrent terms of 20 years, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665-666 [1988]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits. Defendant's plea allocution establishes the voluntariness of the plea and contains nothing that casts any doubt on defendant's guilt (*see People v Toxey*, 86 NY2d 725 [1995]). Since defendant neither said anything inconsistent with

his guilt during the allocution nor moved to withdraw the plea, the court had no obligation to conduct a sua sponte inquiry into defendant's postplea exculpatory statements, reflected in the presentence report *(see e.g. People v Brimmage*, __ AD3d __, 2016 NY Slip Op 06986 [2016]; *People v Praileau*, 110 AD3d 415 [1st Dept 2013], *lv denied* 22 NY3d 1202 [2014]; *People v Pantoja*, 281 AD2d 245 [1st Dept 2001], *lv denied* 96 NY2d 905 [2001]),

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2754 The People of the State of New York, Ind. 128/14
Respondent,

-against-

Jaeshon Johnson,
Defendant-Appellant.

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Office of the Appellate Defender, New York (Margaret E. Knight of counsel), and Freshfields Bruckhaus Deringer US LLP, New York (Charles Jacob of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered August 29, 2014, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The record supports the court's finding that the police had, at least, reasonable suspicion upon which to forcibly detain defendant. An identified citizen informant told a police officer that he had just seen a man standing by the turnstiles in a nearby subway station while holding a knife with an exposed blade, and that the informant had immediately "backed out" of the station and "ran up the stairs." Accompanied by the officer, the

informant returned to the station and pointed out defendant, who was not then holding a knife, as the man he had described.

Based on these facts, the officer, at least, had reason to suspect that defendant possessed a knife with intent to use it unlawfully, in violation of Penal Law § 265.01(2). The citizen informant's report and conduct suggested either that he had seen a "dangerous knife" (*id.*), for which unlawful intent is presumed (Penal Law § 265.15[4]), or that defendant's conduct evinced unlawful intent given the absence of any lawful reason to display a knife in a subway station under the described circumstances. While defendant suggests innocuous reasons for this behavior, they are both far-fetched and incompatible with the informant's statement and conduct. Reasonable suspicion did not require "absolute certainty" that defendant possessed the knife with unlawful intent, and "under the circumstances, the officer possessed specific and articulable facts" from which he could infer such intent (*People v Brannon*, 16 NY3d 596, 602 [2011]).

Accordingly, the officer lawfully seized defendant. When defendant confirmed that he had a knife on his person, the

officer lawfully recovered it and discovered that it was an illegal gravity knife.

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2755 Mercedes Puello, Index 100098/12
Plaintiff-Respondent,

-against-

The Georges Units, LLC, et al.,
Defendants-Appellants,

The City of New York,
Defendant-Respondent.

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McMahon, Martine & Gallagher, LLP, Brooklyn (Patrick W. Brophy of counsel), for appellants.

Edelstein & Grossman, New York (Jonathan I. Edelstein of counsel), for Mercedes Puello, respondent.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for the City of New York, respondent.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered December 7, 2015, which granted defendant City of New York's motion for summary judgment dismissing the complaint and all cross claims as against it, and denied the cross motion of defendants The Georges Units, LLC and Eilat Management (the owners) for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

The City established its entitlement to judgment as a matter of law by submitting evidence, including plaintiff's testimony

and photographs, showing that the defect upon which plaintiff tripped was not located on the corner pedestrian ramp, which the City is required to maintain, but on the sidewalk abutting the owners' property, which the owners were required to maintain (*see Gary v 101 Owners Corp.*, 89 AD3d 627 [1st Dept 2011]; *Ortiz v City of New York*, 67 AD3d 21, 27 [1st Dept 2009], *revd on other grounds* 14 NY3d 779 [2010]; Administrative Code of City of NY § 7-210[a]).

The owners argue, based on certain construction standards and reference standards for curb ramps under the Americans with Disabilities Act of 1990, that the definition of a "pedestrian ramp" encompasses the landing area at the top of the ramp and the entire corner quadrant. However such a broad interpretation of the term is inconsistent with section 7-210(a) of the Administrative Code, which expressly defines the sidewalk to include the "intersection quadrant for corner property" (*see also* Administrative Code § 19-152[a]; § 19-112). Nor was there evidence that the City affirmatively created the defect.

Supreme Court properly denied the owners' cross motion for summary judgment as untimely with respect to dismissal of plaintiff's claims as against them, because the cross motion was an improper cross motion with respect to plaintiff, the nonmovant, and the owners did not show good cause for the delay

(*see Brill v City of New York*, 2 NY3d 648 [2004]*; Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). Furthermore, the cross motion, with respect to the City's cross claims as against the owners, was properly denied as academic in light of the granting of the City's motion.

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2756 In re Kimberly F.,

A Child under Eighteen Years, etc.,

Maria F.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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

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Order of fact-finding and disposition (one paper), Family Court, New York County (Stewart H. Weinstein, J.), entered on or about October 27, 2014, to the extent it found that respondent Maria F. neglected the subject child, unanimously affirmed, without costs. Appeal from so much of said order as limited Maria F.'s visitation with the child to only upon the child's request, unanimously dismissed, without costs, as academic.

The Family Court's finding of neglect against respondent is supported by a preponderance of the evidence (Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). After respondent was notified about a January 9, 2013 incident, she stated that the child was lying

about being raped and refused to take her back into her home or discuss services with petitioner (*see Matter of Stephanie M. [Miguel R.]*, 122 AD3d 508, 509 [1st Dept 2014], *lv denied* 24 NY3d 916 [2015]). The fact that respondent would have considered voluntary placement if she had been made aware of it at the time is of no moment, because voluntary placement is appropriate only when the parent is unable to care for his or her child, and not when he or she is unwilling to do so (*see Matter of Amondie T. [Karen S.]*, 107 AD3d 498, 499 [1st Dept 2013]).

Contrary to respondent's contention, by failing to offer a plan for the child other than foster care, she placed the child in imminent risk of harm and/or impairment, because her statements and actions reflected her clear intention to abdicate her parental obligations, including her responsibility to adequately plan for the child's needs (*see Matter of Shawntay S. [Stephanie R.]*, 114 AD3d 502 [1st Dept 2014]). Respondent's claims that her health problems and/or concerns prevented her from caring from the child were properly rejected by the court because they were undocumented. The fact that the child may have had disciplinary issues and petitioner may have previously failed to respond to a request for assistance with the child does not explain her failure to cooperate with petitioner's efforts to return the child home (*see Matter of Clayton OO. [Nikki PP.]*, 101

AD3d 1411, 1412 [3d Dept 2012]; *Matter of Jalil McC. [Denise C.]*, 84 AD3d 1089, 1090 [2d Dept 2011]).

Respondent's challenge to the visitation portion of the dispositional order has been rendered academic in light of the fact that she has surrendered her parental rights to the child and does not claim that she reserved rights of visitation and communication with the child as permitted by Social Services Law § 383-c.

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2757 Rohan Ragubir, Index 21298/13E
Plaintiff-Appellant-Respondent,

-against-

Gibraltar Management Co., Inc., et al.,
Defendants-Respondents-Appellants,
- - - - -
[And a Third-Party Action].

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The Altman Law firm PLLC, New York (Michael T. Altman of counsel), for appellant-respondent.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered December 7, 2015, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action, and denied defendants' motion for summary judgment dismissing the Labor Law § 240(1) and § 241(6) causes of action, unanimously modified, on the law, to the extent of granting plaintiff's motion, and otherwise affirmed, without costs.

Labor Law § 240(1) imposes on owners, general contractors and their agents a nondelegable duty to provide safety devices to protect against elevation-related hazards on construction sites, and they will be absolutely liable for any violation that results

in injury regardless of whether they supervised or controlled the work (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-288 [2003]). Where use of such a safety device would defeat or be contrary to the purpose of the work, however, no liability will attach for the failure to provide such a device (*see Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139-140 [2011]; *Maldonado v AMMM Props. Co.*, 107 AD3d 954 [2d Dept 2013]).

Here, Raymond Lynch, the owner of defendant RA Lynch Excavating, acknowledged that demolition of the structure was to occur bay by bay, that plaintiff was in a different bay 40 feet from where the excavator operated by Lynch was grabbing at the roof, and that he was not expecting the roof of the adjoining bay to collapse. Such testimony established that the roof above plaintiff was not the intended target of the demolition at the time it collapsed on him, notwithstanding Lynch's testimony that the object of the work was to get the entire roof on the ground as fast as possible and that he was happy the roof of the adjoining bay came down at the same time, although he was unaware plaintiff was there. Accordingly, plaintiff was entitled to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) claim (*compare Maldonado* at 954-955).

Since that part of the roof above plaintiff was not the intended target of demolition at the time of the collapse,

Supreme Court properly denied defendants' motion for summary judgment dismissing the Labor Law § 241(6) cause of action (*see Card v Cornell Univ.*, 117 AD3d 1225, 1228 [3d Dept 2014]; 12 NYCRR 23-3.4).

Furthermore, defendant Gibraltar Management Co., Inc. was the manager of the property, which handled all activities related to its management and contracted with RA Lynch Excavating for the demolition of the building. Accordingly, it may be held liable as an agent of the owner pursuant to Labor Law § 240(1) and § 241(6) (*see Voultepsis v Gumley-Haft-Klierer, Inc.*, 60 AD3d 524, 525 [1st Dept 2009]).

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2758 Lifelock, Inc., Index 651577/15
Plaintiff-Appellant,

-against-

Certain Underwriters
at Lloyd's, etc.,
Defendant-Respondent.

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Miller Friel, PLLC, New York (Brian G. Friel of counsel), and Mark E. Miller of the bar of the State of Texas and the bar of the District of Columbia, admitted pro hac vice, of counsel), for appellant.

Simpson Thacher & Bartlett LLP, New York (Bryce L. Friedman of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 19, 2015, which, to the extent appealed from, granted defendant's motion to dismiss counts one and two of the complaint, unanimously affirmed, with costs.

The insurance policy issued to plaintiff by defendant excludes from coverage claims "[a]rising out of any related or continuing acts, ... where the first such act ... was committed ... prior to the Retroactive Date" (Exclusion L). The policy shows January 8, 2008 as the Retroactive Date. In the underlying action, for which plaintiff seeks defense and indemnification from defendant, six of the eight causes of action are expressly based on allegations of acts performed before 2008, and the

remaining two specifically incorporate those allegations. Thus, the underlying complaint in its entirety falls within exclusion L (*see Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]; *see also Albert J. Schiff Assoc. v Flack*, 73 AD2d 329, 332-333 [1st Dept 1980], *affd* 51 NY2d 692 [1980]). It also falls in its entirety within Exclusion I, which excludes coverage for claims arising out of or resulting from unfair trade practices.

It is not necessary to reach defendant's contention that the complaint is untimely.

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2759 The People of the State of New York, Ind. 1251/14
Respondent,

-against-

Tyrel Colbert,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura Ward, J.), rendered November 24, 2014,

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: JANUARY 17, 2017

CLERK

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

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2760 In re Julian John C.,

A Child Under Eighteen Years of Age, etc.,

Brunilda S.,
Respondent-Appellant.,

-against-

Edwin Gould Services for Children and Families,
Petitioner-Respondent.

_____

Carol L. Kahn, New York, for appellant.

John R. Eyerman, New York, for respondent.

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

_____

Order of fact-finding and disposition (one paper), of the Family Court, Bronx County (Carol R. Sherman, J.), entered on or about June 26, 2015, insofar as it determined, after a hearing, that respondent mother permanently neglected the subject child, unanimously affirmed, without costs.

The agency demonstrated by clear and convincing evidence that it made diligent efforts to assist respondent to reunite with the child, and that respondent rejected such assistance in that she failed to follow through on referrals for a mental health evaluation, drug treatment, drug testing, and parenting

skills and failed to consistently attend agency-supervised weekly scheduled visits with the child (*see Matter of Essence T.W. [Destinee R.W.]*, 139 AD3d 403, 404 [1st Dept 2016]; *Matter of Jenna Nicole B. [Jennifer Nicole B.]*, 118 AD3d 628, 629 [1st Dept 2014]; *Matter of Jaylin Elia G. [Jessica Enid G.]*, 115 AD3d 452, 452-453 [1st Dept 2014]). The mother failed to visit with the child for a period of almost 6 months (*see Matter of Calvario Chase Norall W. [Denise W.]*, 85 AD3d 582, 583 [1st Dept 2011; *Matter of Aisha C.*, 58 AD3d 471, 472 [1st Dept 2009], *lv denied* 12 NY3d 706 [2009]). She also failed to plan for the child's future by failing to address the problems that led to the child's removal (*see* Social Services Law § 384-b[7] [a]; *Matter of Neveah Karen B. [Tamara B.]*, 134 AD3d 438, 439 [1st Dept 2015]).

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2761- Index 650291/13
2762 651959/13

In re Part 60 Put-Back Litigation

- - - - -

Federal Housing Finance Agency, etc.,
Plaintiff,

Deutsche Bank National Trust Company,
in its Capacity as Trustee for the
MSAC 2007-NC1 Trust,
Plaintiff-Appellant,

-against-

Morgan Stanley ABS Capital I Inc.,
Defendant-Respondent.

- - - - -

In re: Part 60 Put-Back Litigation

- - - - -

Federal Housing Finance Agency, etc.,
Plaintiff,

Deutsche Bank National Trust Company,
in its Capacity as Trustee for the
MSAC 2007-NC3 Trust,
Plaintiff-Appellant,

-against-

Morgan Stanley Mortgage Capital
Holdings LLC, as Successor-by-Merger
to Morgan Stanley Mortgage Capital Inc.,
Defendant-Respondent.

_____

MoloLamken LLP, New York (Robert K. Kry of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (Brian S. Weinstein of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Marcy S. Friedman, J.), entered April 20, 2016, which, insofar as appealed from, granted defendant's motions to dismiss, unanimously affirmed, with costs.

The NC3 Trust

The tolling agreement between nonparty National Credit Union Administration (NCUA) – a certificateholder in the NC3 Trust – and various Morgan Stanley entities – the sponsor of the securitization – states, "the Potential Claims do not include causes of action and claims by any person or entity that is not a party to this tolling agreement as set forth in the first paragraph," i.e., any person or entity other than NCUA and Morgan Stanley. Hence, plaintiff is not an intended third-party beneficiary (*see e.g. Fort Lincoln Civic Assn., Inc. v Fort Lincoln New Town Corp.*, 944 A2d 1055, 1069 [DC App 2008]). (The NCUA tolling agreement is governed by District of Columbia law.)

Plaintiff contends that we should infer that NCUA and Morgan Stanley intended to benefit plaintiff because it was the only one who could pursue a claim. That is incorrect. First, while certificateholders' rights to sue *"upon or under or with respect to" the Pooling and Servicing Agreement* (PSA) are *limited* (emphasis added), that is not the same as saying that only plaintiff (the trustee under the PSA) can pursue a claim.

Second, the tolling agreement was not limited to claims under the PSA. To the extent NCUA had non-contract claims, they would not have been barred by the no-action clause in the PSA (*see Quadrant Structured Prods. Co., Ltd. v Vertin,* 23 NY3d 549, 552 [2014]). Third, as a matter of fact, NCUA brought its own lawsuit.

Because plaintiff cannot take advantage of the tolling agreement, its deadline to sue was May 31, 2013. On that date, Federal Housing Finance Agency (FHFA), as conservator for the Federal Home Loan Mortgage Corporation – an NC3 certificateholder – filed a summons with notice, purportedly on behalf of the trustee (i.e., plaintiff). On August 27, 2013, plaintiff first asked defendant to cure or repurchase defective loans. On November 6, 2013, plaintiff filed the complaint. Under similar circumstances, we have held that the trustee's claims are time-barred on standing grounds (*see U.S. Bank N.A. v DLJ Mtge. Capital, Inc.,* 141 AD3d 431, 432-433 [1st Dept 2016]; *Nomura Asset Acceptance Corp. Alternative Loan Trust v Nomura Credit & Capital, Inc.,* 139 AD3d 519, 520 [1st Dept 2016]; *ACE Sec. Corp. v DB Structured Prods., Inc.,* 112 AD3d 522 [1st Dept 2013], *affd* 25 NY3d 581 [2015]).

Citing *Campbell v Hudson & Manhattan R.R. Co.* (277 App Div 731 [1st Dept 1951], *affd* 302 NY 902 [1951]), plaintiff contends that the above cases and the no-action clause in the PSA do not

apply because FHFA commenced this action on behalf of the trustee. This argument is unavailing. *Campbell* said, "*If a trustee* under ... an indenture *acts in bad faith, or,* abdicating its function ..., *declines to act at all,* bondholders for themselves and others similarly situated may bring a derivative action in the right of the trustee .... *In that event* they are not subject to the limitations of" the no-action clause (277 App Div at 734-735 [emphasis added]; *see also Velez v Feinstein,* 87 AD2d 309, 314 [1st Dept 1982], *lv dismissed in part and denied in part* 57 NY2d 605 [1982]). FHFA did not allege that plaintiff (the trustee) had acted in bad faith or declined to act. In addition, FHFA failed to "set forth with particularity [its] efforts ... to secure the initiation of the action by the trustee[], or the reasons for not making such effort" (*Velez,* 87 AD2d at 316 [internal quotation marks omitted]).

The NC1 Trust

The tolling agreement between various HSH entities (at least one of which was a certificateholder in the NC1 trust) and various Morgan Stanley entities did not clearly establish HSH's and Morgan Stanley's intent to confer an immediate benefit on plaintiff (*see e.g. State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling,* 95 NY2d 427, 434-435 [2000]; *LaSalle Natl.*

Bank v Ernst & Young, 285 AD2d 101, 108-109 [1st Dept 2001]). The word "representatives" simply will not bear the weight that plaintiff wants to put on it (*see generally Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003] ["The meaning of a writing may be distorted where undue force is given to single words or phrases"] [internal quotation marks omitted]).

Plaintiff's arguments that (1) it is an implied intended beneficiary of the HSH-Morgan Stanley agreement because it is the only one who can recover and (2) the no-action clause does not apply to a derivative action are unavailing for the same reasons set forth relative to "The NC3 Trust," *supra*.

In light of the particular wording of the backstop obligation in this case, we find that plaintiff's demand on defendant was not a condition to defendant's performance; therefore, accrual of plaintiff's claim was not delayed (*see ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581, 597 [2015]; *Deutsche Bank Natl. Trust Co. v Flagstar Capital Mkts. Corp.*, 143 AD3d 15, 22 [1st Dept 2016]). Unlike the situation in *U.S. Bank*, it was not

a condition precedent to enforcement of defendant's backstop obligation that the trustee first provide notice of the alleged breaches to nonparty NC Capital Corporation and allow a cure period to expire (*cf. U.S. Bank N.A.*, 141 AD3d 431, 432).

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2765 The People of the State of New York, Ind. 1624/11
Respondent,

-against-

Ramon Walker,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (William Terrell III of of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered April 30, 2014, which adjudicated defendant a level three sexually violent predicate offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant is subject to the presumptive override for a prior felony sex crime conviction, which results in a level three adjudication independent of any point assessments (*see People v Howard*, 27 NY3d 337, 342 [2016]). In any event, we find that the court correctly assessed 15 points under the risk factor for failure to accept responsibility, based on defendant's refusal to participate in sex offender treatment.

The court providently exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument

or were outweighed by the egregiousness of the underlying offense and defendant's extensive criminal record.

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2769 The People of the State of New York, Ind. 1723/13
Respondent,

-against-

Moses Thomas,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (William Terrell, III of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William McGuire, J. at plea; Robert Torres, J. at sentencing), rendered November 6, 2014,

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: JANUARY 17, 2017

CLERK

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

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2770 In re Izora W.,

A Person Under Twenty-One
Years of Age, etc.,

Marissa W.,
Respondent-Appellant,

Administration for Children's
Services, et al.,
Petitioners-Respondents.

_____

Andrew J. Baer, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for Administration for Children's Services, respondent.

Bruce A. Young, New York, for Izora P., respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Sara H. Reisberg of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Erik S. Pitchal, J.), entered on or about January 7, 2015, which appointed the grandmother of the subject child as guardian under the subsidized kinship guardian program, unanimously affirmed, without costs.

The court properly determined that the grandmother demonstrated the requisite extraordinary circumstances to seek custody (*see* Domestic Relations Law § 72[2][a]). Specifically, the child came into foster care due to a finding of excessive corporal punishment inflicted upon her by respondent mother, and

for almost two years, the mother has failed to engage in services, communicate with the agency or visit with the child (*see Matter of Colon v Delgado*, 106 AD3d 414, 415 [1st Dept 2013]).

Moreover, it was in the child's best interest to grant the grandmother's petition (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]; *Matter of Brian S. v Stephanie P.*, 34 AD3d 685, 686 [2d Dept 2006], *lv denied* 8 NY3d 805 [2007]), in light of the finding of excessive corporal punishment based on the mother's severe beating of the child, as well as evidence of the mother's abject failure to engage in any services or develop a relationship with the child, and no indication that she would do so in the future. On the other hand, the grandmother, for almost two years, had been providing the child with a safe and stable home, where she was attending high school and was thriving. The court aptly noted that, given the child's age and the circumstances of the case, neither adoption nor return home were in her best interest.

We decline to address the mother's argument that the attorney for the child did not adequately represent the child since she failed to raise the issue before the trial court. In any event, contrary to the mother's argument, the child's attorney clearly stated that he had met and consulted with the child, who stated that she fully supported the grandmother's

petition, which position is entirely consistent with the child's signed and notarized preference form.

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

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2771 In re Tamara Silverman, Index 100167/15
Petitioner-Appellant,

-against-

Gladys Carrion, etc.,
Respondent-Respondent.

_____

Law Offices of David L. Silverman, Lake Success (David L. Silverman of counsel), for appellant.

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

_____

Order and judgment (one paper), Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered July 14, 2015, inter alia, denying the petition to annul respondent's determination, dated October 20, 2014, which sustained charges that petitioner disclosed confidential information and disobeyed supervisors' orders, and imposed a penalty of a 23-day unpaid suspension, and dismissing the proceeding, unanimously affirmed, without costs.

Since this proceeding presents no substantial evidence question, the article 78 court correctly declined to transfer it to this Court (*see* CPLR 7803[4]).

The determination that petitioner was insubordinate is rationally based in the record and not arbitrary and capricious (*see Matter of Baker v Mahon*, 72 AD3d 811 [2d Dept 2010]; CPLR

7803[3]). It is undisputed that petitioner walked out of a performance evaluation meeting, in open disregard of her supervisors' admonition that she stay and receive their guidance on her performance.

There is no evidence that the Administrative Law Judge's findings (which were adopted by respondent) were rooted in bias. The determination that petitioner disclosed confidential information is rationally based in the record, which shows that petitioner copied her personal attorney on an email disclosing confidential information about children under her care at a juvenile detention center, in violation of governing law (*see* Social Services Law § 372[1], [4][a]) and the agency code of conduct. Petitioner's alleged concern about her direct supervisor's inefficiency, based on repetitive emails requesting information that petitioner had already provided to her, does not rise to the level of a complaint about government "waste" (New York City Charter § 2604[b] [permitting disclosure of certain information by a public servant that she "knows or reasonably believes to involve waste, inefficiency, corruption, criminal activity or conflict of interest"]; *see Munafo v Metropolitan Transp. Auth.*, 2003 WL 21799913, *8-9, 2003 US Dist LEXIS 13495, *26-28 [ED NY 2003]). In any event, petitioner could have reported her supervisor without disclosing confidential

information. Nor does the First Amendment protect the disclosure (*see Jacobs v Schiffer*, 204 F3d 259, 265-266 [DC Cir 2000]).

The penalty, a suspension of three days for the insubordination and 20 for the disclosure of confidential information, is not shockingly disproportionate to petitioner's misconduct (*see e.g. Matter of Waters v City of Glen Cove*, 181 AD2d 783 [2d Dept 1992] [four-day suspension for insubordination]; *Matter of Silverstein v Goldin*, 55 AD2d 561 [1st Dept 1976] [15-day suspension for insubordination notwithstanding unblemished 26-year record]; *Matter of Price v Delaney*, 81 AD2d 837, 840 [2d Dept 1981] [one-month suspension for disclosure of confidential information]).

Petitioner's remaining contentions are without merit.

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2772 Candis Jackson, Index 308957/09
Plaintiff-Appellant,

-against-

Montefiore Medical Center/The Jack D. Weiler Hospital of the Albert Einstein College of Medicine,
Defendant-Respondent.

_____

The Fitzgerald Law Firm, P.C., Yonkers (John M. Daly of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered May 1, 2015, in favor defendant, pursuant to an order, same court and Justice, entered April 6, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant made a prima facie showing that it did not depart from the standard of care in placing plaintiff on bedrest in the Trendelenburg position, rather than performing or offering to perform a cerclage (*see Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]). In opposition, the evidence plaintiff submitted was speculative and insufficient to raise a triable issue of fact as to whether defendant had departed from the standard of care or whether such departure was a proximate cause

of the stillbirth (*id.*). Plaintiff's expert opined that emergency cerclage was a "feasible" alternative to the Trendelenburg position, albeit one presenting substantial risks to the mother and fetus, and that plaintiff's cervical incompetency condition "might have been amenable to successful treatment with cerclage." Further, the medical literature submitted by the expert indicated that studies had concluded that emergency cerclage might be an alternative treatment option, but that further studies concerning its risk and efficacy were required.

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2773 The People of the State of New York, Ind. 103/13
Respondent,

-against-

Michael Forbes,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Juan Merchan, J.), rendered June 4, 2014,

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: JANUARY 17, 2017

CLERK

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

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2774 In re Prabir Dhar, Index 100527/15
Petitioner-Appellant,

-against-

Commissioner, New York City (NYC) Department of Transportation, et al.,
Respondents-Respondents.

_____

Martin Druyan, New York, for appellant.

Prabir Dhar, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered August 14, 2015, dismissing the petition seeking to annul a decision of the New York City Civil Service Commission, dated November 25, 2014, which affirmed a determination by respondent New York City Department of Transportation suspending petitioner for three days without pay, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Since petitioner elected to appeal to the Civil Service Commission, his challenges to the weighing of the evidence and the penalty imposed after the hearing are outside the narrow scope of review (*see Matter of New York City Dept. of Envtl. Protection v New York City Civ. Serv. Commn.*, 78 NY2d 318 [1991];

Matter of Griffin v New York City Dept. of Correction, 179 AD2d 585 [1st Dept 1992]; *see also* Civil Service Law § 76 [1],[3]).

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

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2775 Donizete Jose DeFreitas, Index 305433/13
Plaintiff-Respondent,

-against-

Penta Painting & Decorating Corp., et al.,
Defendants,

Arthur Lange Inc.,
Defendant-Appellant.

- - - - -

[And a Third-Party Action]

_____

Burke, Conway, Loccisano & Dillon, White Plains (Martin Galvin of counsel), for appellant.

Morgan Levine Dolan, P.C., New York (Glenn P. Dolan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered February 23, 2016, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim as against defendant Arthur Lange Inc., unanimously affirmed, without costs.

Plaintiff made a prima facie showing of his entitlement to partial summary judgment on his Labor Law § 240(1) claim through his own deposition testimony and affidavit, in which he stated that the wooden plank he used to traverse a gap between the roof on which he had been standing and an adjacent retaining wall unexpectedly collapsed when he was halfway across it, causing him

to fall to the ground (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 6, 8-9 [1st Dept 2011]; *Ageitos v Chatham Towers*, 256 AD2d 156, 156-157 [1st Dept 1998]).

In opposition, defendant general contractor failed to raise an issue of fact. The alleged discrepancies between plaintiff's account of the accident and the accounts of two of plaintiff's coworkers are irrelevant to plaintiff's central contention that he fell when the plank collapsed, and that he was not provided with proper protection (*see Ortiz v Burke Ave. Realty, Inc.*, 126 AD3d 577, 578 [1st Dept 2015]; *Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592, 592 [1st Dept 2010]). Moreover, defendant raised no issues of fact as to whether plaintiff was the sole proximate cause of the accident. Even assuming the presence of additional safety devices at the work site, there was no evidence that plaintiff was aware of their availability or that he was expected to use them (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *McCrea v Arnlie Realty Co. LLC*, 140 AD3d 427, 429 [1st Dept 2016]).

We have considered defendant's remaining contentions, including its arguments regarding the alleged defects in plaintiff's motion papers, and find them unavailing.

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2776 The People of the State of New York, Dkt. 30017C/09
Respondent,

-against-

Taiquan James,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Cassandra M. Mullen, J. at suppression hearing and nonjury trial; Wayne Ozzi, J. at sentencing), rendered November 29, 2010, convicting defendant of attempted criminal possession of a weapon in the fourth degree, and sentencing him to a term of one year of probation, unanimously affirmed.

Although the consolidated suppression hearing and nonjury trial, conducted over defendant's objection, was contrary to CPL 710.40(3), reversal is unwarranted. We find that defendant was not prejudiced as a result of the procedure (*see People v Gonzalez*, 214 AD2d 451 [1st Dept 1995], *lv denied* 86 NY2d 794 [1995]). In any event, the only relief defendant requests is dismissal of the accusatory instrument rather than a remand for further proceedings, and he expressly requests this Court to

affirm his conviction if it does not grant a dismissal. Defendant has not shown that this case should be dismissed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. The record supports the court's finding that the search was based on valid consent (*see generally People v Gonzalez*, 39 NY2d 122, 128 [1976]). Among other things, the police advised the consenting party of her right to refuse consent, and she affirmatively requested the officers to remove any firearm that might be secreted in her apartment.

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, JJ.

2778N & M-6065 & M-6252
Anthony Zappin, Plaintiff-Appellant, Index 301568/14

-against-

Claire Comfort, Defendant-Respondent.

_____

Anthony Zappin, appellant pro se.

The Wallack Firm, P.C., New York (Robert M. Wallack of counsel), for respondent.

Cohen Rabin Stine Schumann LLP, New York (Harriet Newman Cohen of counsel), attorney for the child.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered September 21, 2015, which, insofar as appealed from as limited by the briefs, imposed sanctions against plaintiff husband for violating the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1, unanimously affirmed, with costs.

Supreme Court's detailed decision is amply supported by the record, and the husband does not advance any meritorious argument that his conduct was not frivolous or in bad faith, or not designed to "harass or maliciously injure another," such that his conduct should not be sanctioned (22 NYCRR 130-1.1[c]). The record establishes that the husband engaged in unprofessional, outrageous and malicious conduct on multiple occasions, most recently by filing the bad faith disciplinary complaint against

the attorney for the child's (AFC) medical expert with the Department of Health's Office of Professional Medical Conduct. Under the circumstances, particularly where the husband has exhibited a pattern of bad faith conduct throughout the proceedings despite repeated warnings not to do so, the sanctions imposed by Supreme Court were entirely proper (*see* 22 NYCRR 130-1.3; 22 NYCRR 130-1.1).

We have considered each of the husband's procedural arguments, including that he was entitled to a hearing because he did not have fair notice that sanctions were being considered against him, and find them unavailing. The husband had fair notice that sanctions were being considered, as the AFC requested sanctions in both her moving affirmation and again in her reply papers on the motion, but the husband did not address the AFC's request either in opposition or in surreply (*see Matter of Minister, Elders & Deacons of Refm. Prot. Dutch Church of City of N.Y. v 198 Broadway*, 76 NY2d 411 [1990]). The husband was also

warned repeatedly throughout the proceedings that he must adhere to the Rules of Professional Conduct (22 NYCRR 1200.0).

M-6065
M-6252 - *Anthony Zappin v Claire Comfort*

Motion to strike brief and for sanctions, and cross motion to strike portions of reply brief denied.

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

ENTERED: JANUARY 17, 2017

CLERK

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2779 In re Gilbert Diaz Ind. 453/11
[M-6164] Petitioner,

-against-

Hon. Arlene Goldberg, etc., et al.,
Respondents.

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Gilbert Diaz, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Jonathan D. Conley of counsel), for Hon. Arlene Goldberg, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Grace Vee of counsel), for Cyrus R. Vance, Jr., Michelle Warren and Ahmed Almudallal, respondents.

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The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: JANUARY 17, 2017

CLERK

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

1753 Aracelis On, et al., Index 307160/11
Plaintiffs-Appellants,

-against-

BKO Express LLC., et al.,
Defendants-Respondents.

_____

Meagher & Meagher, P.C., White Plains (Keith Clarke of counsel), for appellants.

Dwyer & Taglia, New York (Gary J. Dwyer of counsel), for respondents.

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Order Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered March 20, 2015, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Angela M. Mazzarelli
David B. Saxe
Karla Moskowitz
Ellen Gesmer, JJ.

1753
Index 307160/11

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Aracelis On, et al.,
Plaintiffs-Appellants,

-against-

BKO Express LLC, et al.,
Defendants-Respondents.
_____x

Plaintiffs appeal from the order of the Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered March 20, 2015, which granted defendants' motion for summary judgment dismissing the complaint.

Meagher & Meagher, P.C., White Plains (Keith Clarke of counsel), for appellants.

Dwyer & Taglia, New York (Gary J. Dwyer of counsel), for respondents.

SAXE, J.

This appeal requires us to consider, once again, a seminal issue that has been central to our study of tort law since *Palsgraf v Long Is. R.R. Co.* (248 NY 339 [1928]) -- how the foreseeability of harm interconnects with the imposition of a duty in tort. The facts are as follows:

On a late, rainy summer night in 2009, defendant Mohamed Laaribi, a livery cab driver for defendant BKO Express LLC, picked up two fares from a street hail after he had stopped for a red light. The passengers asked Laaribi to take them to a Hunts Point address in the Bronx, and gave him some payment in advance to induce him to provide transportation. He agreed to take them.

The cab, a 2003 Lincoln sedan, had an inoperative CB radio and did not have a partition between the front and back seats; the emergency lights, installed to be used to alert police and passersby if help was necessary, were working.

When they arrived at the destination, one of the passengers asked Laaribi to go a bit farther. Although this request made him suspect that they were planning to rob him, he drove them to the next block, where it was dark, and stopped the car. One of the passengers then said, "Give me my money back" and "Give me your f—ing money too," and put something to the back of Laaribi's head that Laaribi thought might be a gun or other weapon.

Laaribi gave him money, but the passenger demanded more. The second passenger never said anything, but he looked strong, and Laaribi was afraid he was going to hit him. When the second passenger began to get out, Laaribi accelerated the car a bit, thinking to get away from him, but the first passenger stayed in the car and hit him, saying, "Stop your f-ing car." The passenger again demanded more money, and when Laaribi again told him he had given him all the money, the passenger hit him again, harder than the first time. At that point, Laaribi said, he was rendered unconscious, after which his car proceeded forward, causing the collisions that ultimately injured plaintiff Aracelis On. At some point during the incident, Laaribi activated his emergency light, but he explained that he never tried to call the base because everything happened in a short time and because the passengers had instructed him not to move or do anything.

Aracelis On brought this negligence action against Laaribi and BKO Express for her personal injuries; her husband Joe On sues for loss of consortium.

The motion court correctly granted defendants' motion for summary judgment dismissing the complaint.

Initially, there is no issue of fact regarding Laaribi's loss of consciousness from the attack, or the assertion that the collision occurred while he was unconscious. Laaribi's

assertions are supported by medical evidence of a head injury, and nothing in the records contradicts or undermines Laaribi's assertions. In the absence of any showing contrary to Laaribi's position that he was unconscious at the time of the collision with plaintiffs' car, the emergency doctrine precludes plaintiffs' negligence claim against Laaribi, as well as any claim against cab owner BKO Express based on a theory of vicarious liability. Laaribi's loss of consciousness due to the attack on him qualified as "a sudden and unforeseen emergency not of the actor's own making" (*Rivera v New York City Tr. Auth.*, 54 AD3d 545 [1st Dept 2008], quoting *Caristo v Sanzone*, 96 NY2d 172, 175 [2001]).

The issue requiring greater attention is whether plaintiffs may proceed with their direct claim against BKO Express on the theory that as the livery cab's owner, it violated a duty it owed to plaintiffs, by failing to install a partition or maintain a working CB radio in the cab. The motion court concluded that the failure to install a partition, as then required by the Rules of the City of New York, could not form the basis of a finding of negligence against BKO Express because plaintiffs were not within the class of individuals protected by that rule.

We conclude that plaintiffs' claim against BKO Express cannot prevail because, as the motion court correctly held, the

owner of the livery cab does not owe a duty to the general public to install a partition in its cab. Any legal duty to install a partition, assuming any such duty is owed, is owed to the driver alone.

It is a fundamental principle of tort law that a plaintiff in a negligence claim "must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016] [internal quotation marks omitted]). The question of whether a defendant owes a legally recognized duty of care to a plaintiff is the "threshold question in any negligence action" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001]), and it is a legal question for the court (*Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988]). "In the absence of a duty, as a matter of law, there can be no liability" (*Pasternack*, 27 NY3d at 825). That is, if a defendant owes no duty to a plaintiff, "there can be no liability in damages, *however careless the conduct or foreseeable the harm*" (*Lauer v City of New York*, 95 NY2d 95, 100 [2000]).

At the time of the accident, the applicable rule relating to the installation of partitions in taxicabs (*see* 35 RCNY former § 1-17 [now § 59A-32]) did not impose a statutory duty on the part of BKO Express (the owner of the vehicle) toward plaintiffs,

since that rule did not impose a duty on a cab owner toward the general public. In fact, the rule did not even impose an absolute requirement that a partition be installed in all cabs in all circumstances. For instance, it allowed for alternative safety devices, such as special lights and emergency radios and telephones, rather than a partition, as long as "the taxicab [was] driven only by the medallion owner or corporate shareholders" (*see* 35 RCNY former § 1-17[b][i]). The rule clearly intended to impose an obligation to install a partition *only* where the driver was *not* the medallion owner (*see* 35 RCNY former § 1-17[b][i], [v]).

Since alternative safety devices would not physically prevent a sudden attack on a driver by a passenger the way a partition would, the rule allowing alternative devices instead of a partition to be installed when the owner-driver was the only driver of a cab clearly was not intended to protect against all attacks on drivers by passengers. The only protection it intended to provide was to ensure that *non-owner drivers* be protected with a partition. If the rule had been intended to protect not only the drivers, but the public at large from injury that could follow from attacks on drivers, then it would have required partitions in all taxicabs, regardless of who was driving. Therefore, the rule cannot form the basis for imposing

a direct duty owed by BKO Express to plaintiffs.

Nor may a common-law duty to plaintiffs properly be imposed on BKO Express.

The question of whether the court should impose on a defendant a common-law duty to a plaintiff involves consideration of "morality, logic and . . . the social consequences of imposing the duty" (*Tenuto v Lederle Lab., Div. of Am. Cyanamid Co.*, 90 NY2d 606, 612 [1997]). The inquiry may involve "the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability" (*532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 288 [2001] [internal quotation marks omitted]).

Plaintiffs focus on the foreseeability of the type of accident that occurred in the absence of safety devices that would have protected the driver from assault. They argue that since those safety devices would protect not only the driver, but other motorists and pedestrians who might be injured by the driver, the owner of the vehicle owed a duty to both the driver and to plaintiffs to install safety equipment that would protect them.

With regard to how foreseeability interconnects with duty,

some confusion has arisen from the classic language of Chief Judge Cardozo's decision in *Palsgraf v Long Is. R.R. Co.* (248 NY 339, 344 [1928]), that "[t]he risk reasonably to be perceived defines the duty to be obeyed." These words have sometimes been misinterpreted to mean that the foreseeability of harm can "spawn[] a duty" to prevent that harm (*see e.g. Pulka v Edelman*, 40 NY2d 781, 787 [1976] [dissenting opinion]). However, the majority in *Pulka v Edelman* clarified the error of this reasoning, to explain that foreseeability may not be relied on to create a duty:

> "Foreseeability should not be confused with duty. The principle expressed in *Palsgraf v Long Is. R.R. Co.* (248 NY 339, *supra*), quoted by the dissent, is applicable to determine the scope of duty — only after it has been determined that there is a duty. Since there is no duty here, that principle is inapplicable" (*Pulka*, 40 NY2d at 785).

In *Pulka v Edelman*, the Court therefore concluded that the foreseeability of the type of accident that occurred was irrelevant; a parking garage owed no duty to a pedestrian on the sidewalk outside the garage who was struck by a car leaving the garage, driven by the car's owner (*id.*).

In contrast, where the defendant owes some duty of care, and the question is the breadth of that duty, foreseeability of the injury to the plaintiff has been viewed as relevant to the discussion (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d

579, 586 [1994]). However, courts focus carefully on how far a duty should be extended, and for what type of harm.

For example, a maintenance company that had a contractual duty toward a hospital had its duty extended so as to cover a hospital employee injured by a falling wall-mounted fan, because, the Court said, the employee had a reasonable expectation that the defendant would use ordinary care and skill to avoid the injury that occurred (*see id.*).

Further elaboration of the limited ways an existing duty may be extended is provided in cases addressing whether to impose a duty on a physician beyond that owed directly to the patient. The Court of Appeals has permitted the imposition of a duty to the members of an infant patient's immediate family or household who may suffer harm as a result of the medical care a physician renders to the patient (*see Tenuto v Lederle Lab., Div. of Am. Cyanamid Co.*, 90 NY2d 606, 612 [1997], *supra*), and has remarked that a physician may "owe[] a duty of care to his patient and to persons he knew or reasonably should have known were relying on him for this service to his patient" (*see Eiseman v State of New York*, 70 NY2d 175, 188 [1987]). The Court has gone as far as to hold that "where a medical provider has administered to a patient medication that impairs or could impair the patient's ability to safely operate an automobile, the medical provider has a duty to

[unknown] third parties to warn the patient of that danger" (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 570 [2015]). However, generally, the courts of this State have declined to extend a broad duty of care to the "indeterminate, faceless, and ultimately prohibitively large class of plaintiffs" consisting of the community at large, as opposed to "a known and identifiable group" (*Davis*, 26 NY3d at 573, quoting *Palka*, 83 NY2d at 589, and citing *McNulty v City of New York*, 100 NY2d 227, 232 [2003] and *Eiseman v State of New York*, 70 NY2d at 187).

The limitations of extending an existing duty are also discussed in *532 Madison Ave. Gourmet Foods v Finlandia Ctr.* (96 NY2d 280 [2001], *supra*). The Court there explained that while "a landowner who engages in activities that may cause injury to persons on adjoining premises surely owes those persons a duty to take reasonable precautions to avoid injuring them, ... a landowner [does not] owe[] a duty to protect an entire urban neighborhood against purely economic losses" (*id.* at 290). It particularly pointed out that a landowner's duty extends to tenants, patrons and invitees on the property, "because the special relationship puts them in the best position to protect against the risk," but "does not extend to members of the general public" (*id.* at 289).

"[C]ourts must be mindful of the precedential, and

consequential, future effects of their rulings, and 'limit the legal consequences of wrongs to a controllable degree'" (*Lauer v City of New York*, 95 NY2d 95, 100 [2000], *supra*, quoting *Tobin v Grossman*, 24 NY2d 609, 619 [1969]). Turning to the situation before us, while the owner of a livery cab has a relationship to the driver of its cab, and therefore some duty to the driver, there is no "special relationship" between the owner of a livery cab and the members of the general public who may end up in a collision with the owner's vehicle. Even assuming, without deciding, that BKO Express was under a statutory duty toward its driver to install a safety device that would prevent attacks by passengers, an extension of any such duty to plaintiffs would improperly create an unwieldy duty toward essentially every member of the general public with whom the cab might come into contact in the event the driver was knocked unconscious by a criminal in the passenger seat, amounting to an "indeterminate, faceless, and ultimately prohibitively large class of plaintiffs" with whom the car company had no special relationship (*see Davis*, 26 NY3d at 573), improperly "exposing defendants to unlimited liability to an indeterminate class of persons" (*see 532 Madison*, 96 NY2d at 289).

Nor does the broken CB radio provide plaintiffs with a viable basis for a claim of negligence; there is even less reason

to impose on defendants a duty to maintain a functioning radio for the benefit of the general public where there is no evidentiary basis for arguing that it would have assisted in preventing the attack.

In the absence of any duty on the part of BKO Express toward plaintiffs, there can be no liability. Therefore, it is not relevant whether the causal chain between defendants' negligence and plaintiff's injury was broken by the passenger's criminal act. The dismissal of the complaint against BKO as well as against Laaribi is required.

Accordingly, the order of the Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered March 20, 2015, which granted defendants' motion for summary judgment dismissing the complaint, should be affirmed, without costs.

All concur.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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