SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 18, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2096-
2097 Juliette DeJoie Cadichon, et al., Index 16878/03
Plaintiffs-Appellants,

-against-

Thomas Facelle, M.D., et al.,
Defendants-Respondents.

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

Martin Clearwater & Bell LLP, New York (Stewart G. Milch of counsel), for Thomas Facelle, M.D., respondent.

Steinberg, Symer & Platt, LLP, Poughkeepsie (Ellen Fischer Bopp of counsel), for Good Samaritan Hospital, respondent.

McAloon & Friedman, P.C., New York (Timothy J. O'Shaughnessy of counsel), for Montefiore Medical Center, respondent.

Clausen Miller PC, New York (Edward Tobin of counsel), for Louis May, M.D., respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered August 26, 2008, which denied plaintiffs' motion to vacate the dismissal of the action pursuant to CPLR 3216, affirmed, without costs. Order, same court and Justice, entered January 29, 2009, to the extent it denied plaintiffs' motion to renew, affirmed, without costs. Appeal from so much of the

January 29, 2009 order as denied plaintiffs' motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable order.

It is well settled that to vacate the dismissal of an action dismissed pursuant to CPLR 3216, a plaintiff must demonstrate both a reasonable excuse for the failure to comply with the 90-day demand to serve and file a note of issue and a meritorious cause of action (*Walker v City of New York*, 46 AD3d 278 [2007]). Plaintiffs failed to offer a reasonable excuse for their failure to file the note of issue. Indeed, while plaintiffs contended that defendants' noncompliance with their discovery obligations was to blame, and that such noncompliance was preventing them from filing a note of issue, "[they] had [their] remedies during the lengthy period of general delay (CPLR 3124, 3126)" (*McDonald v Montefiore Med. Ctr.*, 60 AD3d 547, 547 [2009]).

While we do not disagree with the dissent's conclusion that some of the delay was occasioned by defendant, our decision rests on the record and controlling law which required plaintiffs to take action. Once served with a 90-day demand, plaintiffs were required to either seek an extension to comply with the 90-day notice, move to vacate the same (*Brady v Benenson Capital Co.*, 2 AD3d 382, 382 [2003], *lv denied* 2 NY3d 702 [2004]) or file a note of issue (CPLR 3216[b][3]). Plaintiffs did none of these things and their case was thus properly dismissed. Subsequent to

dismissal, vacatur required a quantum of proof which plaintiffs utterly failed to satisfy with their first motion, and which they were unable to cure with the their second motion.

Plaintiffs also impermissibly addressed the merits of their action for the first time on reply (*Migdol v City of New York*, 291 AD2d 201, 201 [2002]; *Lumbermens Mut. Cas. Co. v Morse Shoe Company*, 218 AD2d 624, 625-626 [1995]; *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1992].

The excuse of law office failure offered on the motion to reargue and renew did not constitute a reasonable excuse (*Walker*, 46 AD3d at 280-281). Further, plaintiffs failed to explain why they failed to present the excuse of law office failure on the original motion.

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

All concur except Saxe and Manzanet-Daniels, JJ. who dissent in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting)

I respectfully dissent. Plaintiffs demonstrated a reasonable excuse for their failure to comply with the court-issued 90-day demand, as well as a meritorious cause of action.

The record shows that the discovery delays in this consolidated action were occasioned principally by defendants. At the time the court sua sponte dismissed the action for failure to prosecute, the depositions of Dr. May and Dr. Facelle had yet to take place, and defendants had yet to designate a physician to perform an independent medical examination (IME) of the injured plaintiff, as they had been ordered to do on May 3, 2007. The so-ordered stipulation entered that day provided that the physician defendants were to appear for EBTs on or before June 26 and July 10, 2007, respectively, and that the hospital defendants were to designate representatives to appear for EBTs on or before August 21, 2007. Defendants were ordered to designate a physician to perform the IME and to conduct the IME by July 16, 2007. The so-ordered stipulations stated that there were to be no further adjournments of the IME and that defendant Dr. May was to appear by July 10, 2007, without adjournment. Plaintiff was directed to file the note of issue on or before December 27, 2007. Defendants provided none of the court-ordered discovery, despite warnings that there would be no further adjournments. A defendant who fails to comply with a plaintiff's legitimate

discovery demands, and thus prevents the filing of the note of issue, cannot seek dismissal of a plaintiff's complaint for failure to file a note of issue in response to a "90-day demand" (*see Donegan v St. Joseph's Med. Ctr.*, 283 AD2d 152 [2001]).

Since the discovery delays herein were caused by defendants, the case should not have been dismissed, even in the absence of a medical affidavit demonstrating the merit of the action (*see Donegan*, 283 AD2d at 153). In any event, the merit of the action was demonstrated, inter alia, through the affirmation of plaintiffs' physician, board-certified in internal medicine and gastroenterology, who opined that plaintiff, during procedures performed in July 2002, suffered biliary injuries caused by deviations from standards of good and accepted medical practice by Dr. May and Dr. Facelle. Plaintiff's expert stated that Dr. May created a "surgical emergency" during a routine procedure by passing a wire and catheter through the distal common bile duct, rather than performing a sphincterotomy to extract a stone in the duct, as he had been directed to do by Dr. Facelle. The catheter passed by Dr. May perforated plaintiff's abdominal cavity, occasioning the "surgical emergency" and resulting in numerous complications including blood loss, transection of the bile duct, hepatic necrosis, hyperbilirubinemia, acute renal insufficiency and hepatic encephalopathy. Plaintiff's expert further opined that rather than performing an immediate repair of the bile duct,

Dr. Facelle should have "pursued non-operative drainage of the bile duct, drainage of the peritoneal cavity, and performed bile duct repair" at a later date when plaintiff's peritonitis had resolved. Plaintiff's expert opined that plaintiff's multiple subsequent hospitalizations and development of secondary biliary cirrhosis and sequelae were caused by the biliary injuries she suffered in July 2002, and opined that there was a high likelihood that plaintiff will require a liver transplant in the intermediate future. In his discharge summary, dated June 27, 2002, Dr. Facelle states, inter alia, that Dr. May passed the catheter "against [his] explicit instructions not to further probe the duct, but to stop with just doing a sphincterotomy," since Dr. Facelle was concerned about possible injury to the duct.[1]

On the motion to renew, counsel explained that the conference resulting in the May 3, 2007 so-ordered stipulation was handled by an "of counsel" attorney, and thus, the December 27, 2007 deadline set by the court for the filing of the note of

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[1]It is true that the present record does not disclose an independent basis for the negligence of the hospital defendants. As plaintiffs note, however, they have not yet had the opportunity to depose representatives of the hospital defendants. In any event, the showing of merit required on a motion to restore or to vacate a default (to the extent such a showing is even required, since, as discussed, *supra*, defendants failed to respond to plaintiffs' legitimate discovery demands and effectively prevented the filing of the note of issue) is minimal (*see Palermo v Lord & Taylor, Inc.*, 287 AD2d 258 [2001]).

issue was not entered into the firm's calendar system as would ordinarily be done. Counsel further stated that had he known about the deadline, he would have moved for an extension of time to file the note of issue and/or to strike defendants' answers based on defendants' failure to comply with discovery. I would hold that this failure to calendar the date was, under the circumstances, excusable law office failure (*see Kaufman v Bauer*, 36 AD3d 481 [2007] [deadline missed due to personnel change at law firm]; *Werner v Tiffany & Co.*, 291 AD2d 305 [2002] [counsel misplaced calendar and in reconstructing commitments forgot deadline]), particularly given defendants' delays and plaintiffs' inability, as a direct result thereof, to certify that discovery was complete. While this case was decided before the effective date of the amendment to CPLR 205, which provides that an action may not be dismissed under CPLR 3216 unless the judge sets forth "on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation," it is not without significance that plaintiffs did not engage in a pattern of neglect.

While I agree with the motion court that the better practice would have been for plaintiffs to have made a motion to compel discovery or for an extension of time to file the note of issue, the failure to take these steps should not result in dismissal of a meritorious cause of action. It is the long established public

policy of this State to decide cases on their merits (*see Kaufman v Bauer*, 36 AD3d at 483).

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

ENTERED: MARCH 18, 2010

CLERK

Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1225 Hugo Nunez,
Plaintiff-Respondent,

Index 114538/03
591184/03

-against-

Laurence Levy, et al.,
Defendants-Appellants.

- - - - - - -

Tritec Building Company, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Diamond Demolition, Inc.,
Third-Party Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellants from a judgment of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about July 7, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 22, 2010,

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

ENTERED: MARCH 18, 2010

David Spolony

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, JJ.

1795 In re Everett Williams, Index 113031/08
Petitioner-Respondent,

-against-

New York State Division of Parole,
Respondent-Appellant.

Andrew M. Cuomo, Attorney General, New York (Richard O. Jackson of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Robert C. Newman of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Edward H. Lehner, J.), entered January 12, 2009, which, in an article 78 proceeding, modified a special condition of petitioner's parole which forbade him from having any contact with his wife without the permission of his parole officer, to permit petitioner to see his wife during non-curfew hours so long as the wife wished to see him, reversed, on the law, without costs, the special condition reinstated, and the proceeding dismissed on the merits.

On April 3, 2007, petitioner was released on parole subject to seventeen "Special Conditions." These included, SC 13(h), under which petitioner agreed to abide by a curfew established by his parole officer (P.O.), and SC 13(l), under which petitioner agreed that "I will not associate in any way or communicate by any means with [my] wife, Mary Provost, without the permission of

the P.O." While denying petitioner's application to vacate the curfew and to allow him to live with his wife, the Supreme Court held that although SC 13(l) was not a per se violation of petitioner's constitutional rights, it was arbitrary to deny petitioner visitation during non-curfew hours as long as the wife consented thereto. In so ruling, the court noted the wife's desire to see petitioner, that petitioner's rape conviction occurred in 1982 and that none of petitioner's domestic violence related arrests resulted in convictions. We now find that the Supreme Court improperly substituted its discretion for that of respondent New York State Division of Parole (the Division).

Because there is no federal or state constitutional right to be released to parole supervision before serving a full sentence, the state has discretion to place restrictions on parole release (*see Matter of M.G. v Travis*, 236 AD2d 163, 167 [1997], *lv denied* 91 NY2d 814 [1998]). Pursuant to Executive Law § 259-c[2] and 9 NYCRR § 8003.3, special conditions may be imposed by the Division before or after a parolee's release.

The imposition of a special condition is discretionary in nature and ordinarily beyond judicial review as long as it is made in accordance with law and no positive statutory requirement is violated (*see* Executive Law § 259-i; 9 NYCRR 8003.2; *see also*

Matter of Briguglio v New York State Bd. of Parole, 24 NY2d 21, 28-29 [1969]; *People ex rel. Stevenson v Warden of Rikers Is.*, 24 AD3d 122, 123 [2005], *lv denied* 6 NY3d 712 [2006]). If the condition is rationally related to the inmate's past conduct and future chances of recidivism, Supreme Court has no authority to substitute its own discretion for that of the individuals in charge of designing the terms of a petitioner's parole release (*see Matter of M.G. v Travis*, 232 AD2d at 169; *Matter of Gerena v Rodriguez*, 192 AD2d 606 [1993]; *Matter of Dickman v Trietley*, 268 AD2d 914, 915 [2000]).

SC 13(l), imposed in furtherance of the Division's "zero-tolerance" policy regarding domestic violence, codified in the Division's Policy and Procedures Manual No. 9401.07, was made in the lawful exercise of official discretion, violated no statutory requirement and was neither arbitrary or capricious in view of petitioner's criminal history, which included a conviction for rape, a classification as a Level 2 Sex Offender, violations of protective orders obtained by his former wife and by his present wife, Provost, and two arrests for assaulting and harassing Provost (*see Ciccarelli v New York State Div. of Parole*, 11 AD3d 843, 844 [2004]; *Ahlers v New York State Div. of Parole*, 1 AD3d 849, 850 [2003]; *Matter of Wright v Travis*, 297 AD2d 842 [2002]). The foregoing demonstrates petitioner's extensive history of violence against women, and there is a direct connection between

the orders of protection taken out by Provost and petitioner's two arrests for assaulting and harassing her, and the Division's determination that unsupervised contact with Provost is incompatible with rehabilitation and may lead to future conflict with her (*see Matter of Moller v Dennison*, 47 AD3d 818 [2008], *lv denied* 10 NY3d 708 [2008]). In *Moller*, a special condition prohibited the parolee from associating or communicating with his wife without the permission of the chairman. The chairman summarily denied the parolee's application to reside with his wife based on the existence of a policy strictly prohibiting the approval of a proposed residence with any victim of domestic violence perpetrated by the parolee, even if the victim claimed that there had been reconciliation. On appeal, the parolee's petition to lift the special condition or to allow him to live with his wife was denied on the merits.

As to petitioner's constitutional challenge, it was rejected by the Supreme Court and petitioner has not cross-appealed from that determination. Were we to consider petitioner's contention that SC 13(l) "seriously interferes" with the exercise of his "fundamental constitutional right to marry," we would find, for the reasons set forth above, that SC 13(l) was "reasonably related" to petitioner's criminal history and future chances of

recidivism, and thus permissible (*see Matter of Ariola v New York State Div. of Parole*, 62 AD3d 1228 [2009], *lv denied* 13 NY3d 707 [2009]; *People v Whindleton*, 54 AD3d 422, 423 [2008], *lv denied* 12 NY3d 822 [2009]). Even if a heightened level of scrutiny is warranted because a fundamental right is being burdened (*see Tremper v Ulster County Dept of Probation*, 160 F Supp 2d 352 [ND NY 2001]), here, unlike *Tremper*, there is a direct relationship between petitioner's criminal history and the challenged condition of parole, which does not impose a complete impediment to plaintiffs' fundamental right to family life (*see Bostic v Jackson*, 2008 US Dist. LEXIS 33888, 10-14 [ND NY 2008]; *see also Wheeler v Pennsylvania Bd. of Probation & Parole*, 862 A2d 127, 131 [Pa Commw Ct 2004]).

All concur except Manzanet-Daniels J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

I respectfully dissent. The record provides no factual support for respondent Division of Parole's (DOP) assertion that Special Condition 13(l), imposed in April 2007 as a condition to petitioner's release to parole, is necessary to protect petitioner's wife from domestic violence. The record does not indicate the grounds for issuance of a temporary order of protection to petitioner's current wife in August 2005. As for petitioner's arrest for assault in July 1997 based on allegations made by his then girlfriend, who is now his wife, the charges were dropped and no parole violation was found. Petitioner was arrested for "bothering" his wife in September 2005, but the record does not indicate how he "bothered" her. He was released, and again, there was no parole violation. Given that petitioner's wife supports the present application, I do not view how these unsubstantiated allegations warrant the draconian stricture of cutting petitioner off from all contact with his wife without the permission of his parole officer. Since petitioner's wife has custody of the couple's young daughter, the restriction also effectively prevents petitioner from having contact with his daughter. Thus, the restriction not only interferes unreasonably with petitioner's marriage, but is an obstruction to the father-child relationship.

The special condition has no rational relationship to the crimes for which petitioner is currently subject to parole. The crime for which petitioner was most recently incarcerated -- second-degree criminal possession of a forged instrument -- is economic in nature and does not indicate that petitioner will pose any danger to his wife or child. Petitioner's 1982 conviction of first-degree rape was for a crime that, while heinous and of the utmost gravity, was committed when petitioner was 19 years old, against a stranger, not a spouse or domestic partner, and there is no evidence of petitioner having committed any sex offenses in the 27 years since that conviction. Hence, I find no rational relationship between that conviction and forbidding petitioner from having any contact with a wife who wants to see him. I note the special value of the marital relationship, to parolees like anyone else, as a source of emotional support and well-being (*see Turner v Safley*, 482 US 78, 95-96 [1987]). In that context, there is no evidence that petitioner's wife has a criminal record or would otherwise be a bad influence on him.

Accordingly, I would find that the special condition is not rationally related to the crimes for which petitioner is subject to parole, or to the State's objectives of reducing recidivism

and protecting the public (*compare People ex rel. Stevenson v Warden of Rikers Is.*, 24 AD3d 122, 123 [2005], *lv denied* 6 NY3d 712 [2006]), and would affirm the order.

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

ENTERED: MARCH 18, 2010

David Spokony

CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2172 John Francescon, Index 114399/01
Plaintiff-Respondent-Appellant, 590019/02
590139/06
590372/06

-against-

Gucci America, Inc., etc., et al.,
Defendants-Respondents.

[And a Third-Party Action]

Gucci America, Inc., etc., et al.,
Second Third-Party
Plaintiffs-Respondents,

-against-

Flooring Solutions, Inc.,
Second Third-Party
Defendant-Appellant-Respondent.

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Flooring Solutions, Inc.,
Fourth-Party Plaintiff-
Appellant-Respondent,

-against-

Consolidated Carpet Trade Workroom, Inc., et al.,
Fourth-Party Defendants-Respondents.

Cascone & Kluepfel, LLP, Garden City (Andrew M. Lauri of counsel), for Flooring Solutions, Inc., appellant-respondent/appellant-respondent.

Fortunato & Fortunato, P.C., Brooklyn (Annamarie Fortunato of counsel), for respondent-appellant.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for Gucci America, Inc. and Structure Tone, Inc., respondents.

Connors & Connors, P.C., Staten Island (Robert J. Pfuhler of counsel), for Consolidated Carpet respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 22, 2009, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, and for summary judgment on their remaining claims for contractual indemnification against second third-party defendant Flooring Solutions; denied without prejudice Flooring Solutions' motion for summary dismissal of plaintiff's Labor Law § 241(6) claims, and denied as premature summary judgment on its claim for common-law indemnification against the fourth-party Consolidated Carpet defendants; and granted plaintiff's motion to supplement or amend his bill of particulars post note of issue and to compel defendants' acceptance of a belated expert disclosure, unanimously modified, on the law, those portions of defendants' motion for summary dismissal of plaintiff's statutory and common-law negligence causes of action, as well as summary judgment on their contractual indemnification claim against Flooring Solutions, denied, and otherwise affirmed, without costs.

Plaintiff, an employee of a stone and marble subcontractor, was injured at a store under construction when he allegedly stepped on a piece of loose carpeting described as debris that lay over the border between a floor and the subfloor 15 inches below. The record discloses triable factual issues as to whether

defendants had constructive notice of the presence of the loose carpeting. The court properly granted plaintiff's motion, brought after he filed the note of issue, to supplement his bill of particulars with allegations of the violation of two additional Industrial Code provisions and to compel the acceptance of his new expert disclosure. Although the accident occurred 8½ years before plaintiff moved to amend, Flooring Solutions has not shown it would be prejudiced by the amendment (*see Sahdala v New York City Health & Hosps. Corp.*, 251 AD2d 70 [1998]). The additional alleged violations of the Code are based on facts in the record, and the court appropriately vacated the note of issue and granted Flooring Solutions additional discovery in connection therewith. Contrary to Flooring Solutions' contention, the belated expert disclosure does not assert a new theory of causation. Plaintiff's deposition testimony was unclear as to whether he had stepped on an extended portion of the sub-floor carpet or on a piece of carpet draped over the step-off area. However, it is not entirely his fault that defendants failed to clarify of this issue at the deposition. In any event, there is evidence in the record that reasonably supports the expert's piece-of-carpet theory.

Since issues of fact remain whether any negligence on Consolidated Carpet's part proximately caused plaintiff's injuries, summary judgment in Flooring Solutions' favor on its

claim for common-law indemnification against Consolidated Carpet was properly held not yet ripe for adjudication (*see Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161 [2004]). But since liability under Labor Law § 241(6), predicated on the newly-specified Industrial Code provisions, has yet to be determined, summary judgment in defendants' favor on their contractual indemnification claims against Flooring Solutions was also premature (*see Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808-809 [2009]).

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

ENTERED: MARCH 18, 2010

CLERK

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

2186 Ormit John, et al., Index 20895/99
Plaintiffs-Respondents,

-against-

SRM Construction Corporation, et al.,
Defendants-Appellants,

Clintonville Construction Corp. , et al.,
Defendants.

Welby, Brady & Greenblatt, LLP, White Plains (Geoffrey S. Pope of counsel), for appellants.

Cary Scott Goldinger, Garden City, for respondents.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about October 17, 2008, which, inter alia, denied the motion by SRM Construction Corporation, Fireman's Fund Insurance, Fidelity Guarantee Insurance Company and The American Insurance Co. for summary judgment dismissing plaintiffs' claims against the payment bonds, unanimously affirmed, with costs.

In view of the conflicting assertions as to the state of discovery, we cannot say that the surety defendants have

established their statute of limitations defense as a matter of law.

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

ENTERED: MARCH 18, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Freedman, JJ.

2251N Herbert Moreira-Brown, Index 26490/99
Plaintiff-Appellant,

-against-

The City of New York, et al.,
Defendants-Respondents.

Herbert Moreira-Brown, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 21, 2008, which granted defendants' cross motion to dismiss the complaint and denied as moot plaintiff's motion to restore the action to the calendar, unanimously reversed, on the law, without costs, the cross motion denied, the motion granted, the complaint reinstated, and the action remanded for further proceedings.

In this action for defamation and emotional distress, the verified complaint alleges that on or about September 12, 1998, defendant Police Detective Raymond Rivera, acting as agent for his codefendants, made written and verbal defamatory statements that plaintiff "had committed rape and sexual assault and was being sought by the police for arrest and prosecution [for] rape and sexual assault." These words were not demarcated as a quotation in the complaint. Dismissing the complaint, the motion court held that plaintiff had not complied with CPLR 3016(a)

because the complaint "does not set forth the particular words alleged to be defamatory."

While a complaint alleging defamation must allege the particular spoken or published words on which the claim is based, the words need not be set in quotation marks (*see John Langenbacher Co. v Tolksdorf*, 199 AD2d 64 [1993]). When construed in the light most favorable to plaintiff, the complaint alleges that Detective Rivera specifically stated that plaintiff "had committed rape and sexual assault," and "was being sought by the police for arrest and prosecution" for those crimes. This allegation is sufficient to meet the requirements of CPLR 3016(a).

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

ENTERED: MARCH 18, 2010

David Apolony
CLERK

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2387 The People of the State of New York, Ind. 2046/06
Respondent,

-against-

Pedro Melendez,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Lisa A. Packard of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jennifer Marinaccio of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered March 19, 2008, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him to a term of 7 years, unanimously affirmed.

Since defendant's cross-examination of one of the victims raised issues regarding the details of the descriptions of the perpetrators that the victim gave to the police, and whether the victim could accurately recall those descriptions, the court properly permitted the People to elicit the descriptions from a detective (*see People v Figueroa*, 35 AD3d 204 [2006], *lv denied* 8 NY3d 880 [2007]; *People v Griffin*, 173 AD2d 216 [1991], *lv denied* 78 NY2d 1076 [1991]; *see also People v Rice*, 75 NY2d 929, 931 [1990]). In any event, any error in permitting the detective's testimony as to the descriptions was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). There is no reasonable

possibility that the verdict was affected by the circumstance that the jury heard both the victim and the detective testify as to the victim's description of defendant.

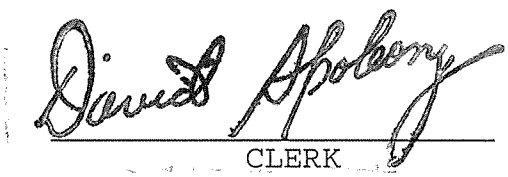
Defendant is not entitled to summary reversal as the result of the People's loss of a surveillance tape and 911 tape that were admitted at trial (*see People v Yavru-Sakuk*, 98 NY2d 56 [2002]). The record establishes that the surveillance tape had little value because it did not show anyone's faces, and a full transcript of the 911 call is in the record. Furthermore, defendant has not identified any issue that this Court could not decide without viewing the videotape or listening to the audiotape.

Defendant did not preserve any of his challenges to the prosecutor's summation and the court's charge, including his constitutional claims, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 18, 2010



CLERK

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2388 Victor Perez, Index 102524/07
Plaintiff-Respondent,

-against-

Pedro A. Vasquez, et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Jay S. Hausman & Associates, P.C., Hartsdale (Elizabeth M. Pendzick of counsel), for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 29, 2009, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to dismiss the 90/180 claim, and otherwise affirmed, without costs.

Defendants satisfied their initial burden on summary judgment by establishing, prima facie, with the submission of medical reports from their experts, that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d). Defendants also established, prima facie, that plaintiff had no 90/180 claim by submitting excerpts of plaintiff's deposition testimony indicating that, during the 180 days immediately following the accident, he was confined to home and bed for only three weeks (*see Guadalupe v Blondie Limo, Inc.*, 43 AD3d 669, 670 [2007]).

In opposition, plaintiff raised a triable issue of fact as to whether he suffered a significant or permanent consequential limitation of use his right knee. In the near aftermath of the accident, plaintiff commenced receiving physical therapy three to four times a week on his right knee and was prescribed a brace for support. Three months after the accident, Dr. McMahon found that plaintiff's knee was unstable and causing him pain. Dr. McMahon explained that his findings were consistent with the MRI findings of a torn meniscus. Based on the forgoing, Dr. McMahon performed arthroscopic surgery on plaintiff's right knee, during which he saw the tear of the medial meniscus and determined that it was irreparable. In his most recent examination of plaintiff, he found a 15 degree limitation in the range of motion of plaintiff's right knee. Dr. McMahon gave a sufficient qualitative assessment of the limitation in plaintiff's right knee by explaining that the surgery permanently altered the load distribution of the knee, lessening its ability to sustain the load of walking, running or other daily activities (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]).

Plaintiff, however, failed to raise a triable issue of fact as to his 90/180 claim. Plaintiff's subjective claims of pain are insufficient to raise a triable issue of fact (*see Guadalupe*, 43 AD3d at 670), and the record is devoid of any evidence showing that plaintiff was prevented from performing *substantially all* of

the material acts constituting his usual and customary daily activities (*see Gibbs v Hee Hong*, 63 AD3d 559, 560 [2009]).

Any injury in the nature of a permanent scar was not identified in the bill of particulars and need not be addressed by this Court (*see Lopez v Abdul-Wahab*, 67 AD3d 598, 599 [2009]). In any event, there is no medical evidence as to the severity of the scars or any photographs for this Court to evaluate (*see Aguilar v Hicks*, 9 AD3d 318, 319 [2004]).

Plaintiff adequately explained the gap in treatment by asserting in his affidavit that he stopped receiving treatment for his injuries in April 2007 when his no-fault insurance benefits were cut off, and that he did not have private health insurance at that time (*see Wadford v Gruz*, 35 AD3d 258, 259 [2006]).

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

ENTERED: MARCH 18, 2010

CLERK

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2390 In re Niyah E.,

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

Edwin E.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Kenneth M. Tuccillo, Hastings-On-Hudson, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), Law Guardian.

Order, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about January 15, 2009, which adjudged the child to be neglected by respondent father and released her to the custody of her mother, with supervision by petitioner, unanimously affirmed, without costs.

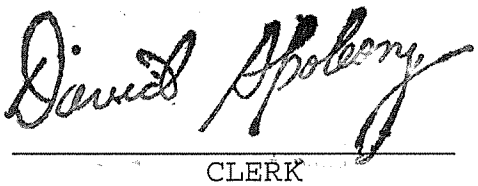
The finding of neglect was supported by a preponderance of the evidence, including testimony that respondent had engaged in acts of domestic violence against the child's mother in the presence of the child, and no expert or medical testimony is required to prove impairment or risk to the child under such circumstances (*Matter of Elijah C.*, 49 AD3d 340 [2008]). There is no basis for disturbing the court's findings of fact and credibility determinations, which are supported by the record

(*see Matter of Davion A.*, 68 AD3d 406 [2009]).

Respondent's argument that he was deprived of the right to counsel, or of the effective assistance of counsel, is unpreserved, and in any event is without merit.

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

ENTERED: MARCH 18, 2010



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Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2392 Nimkoff Rosenfeld & Schechter, LLP, formerly known as Schechter & Nimkoff, LLP, Plaintiff-Respondent, Index 601556/08

-against-

Kevin P. O'Flaherty, et al., Defendants-Appellants.

Phillips Nizer LLP, New York (Donald L. Kreindler of counsel), for appellants.

Nimkoff Rosenfeld & Schechter, LLP, New York (Jenni Spiritis of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 23, 2009, which denied defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff's failure to plead at the outset that the dispute over counsel fees and disbursements was not covered by the Fee Dispute Resolution Program (*see* 22 NYCRR 136.1[b][2],[6]) is not a jurisdictional defect precluding it from serving an amended complaint (*see Kerner & Kerner v Dunham*, 46 AD3d 372 [2007]). Therefore, plaintiff had the right to amend its complaint during the pendency of defendants' motion to dismiss (CPLR 3025[a]; *see Johnson v Spence*, 286 AD2d 481, 483 [2001]). It is well settled that an amended complaint supersedes the original complaint, thus rendering without legal effect the defective earlier pleading

(*see Chalasani v Neuman*, 64 NY2d 879 [1985]; *Elegante Leasing, Ltd. v Cross Trans Svc, Inc.*, 11 AD3d 650 [2004]).

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

ENTERED: MARCH 18, 2010

CLERK

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2394-
2394A The People of the State of New York, Ind. 4194/04
Respondent, 6646/06

-against-

Kenneth Cameron,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

Judgments, Supreme Court, New York County (Bruce Allen, J.), rendered July 9, 2007, convicting defendant, upon his pleas of guilty, of criminal possession of a forged instrument in the second degree and bail jumping in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 3 to 6 years, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find defendant's claim to be without merit. The court accurately stated the law when, in response to a question from defendant at the plea proceeding, it told him he could raise an issue of grand jury perjury on appeal (*see People v Pelchat*, 62 NY2d 97 [1984]). It is of no moment that, as defendant now concedes, such an argument would have been baseless, since the court made no representations as to the

viability of such claim.

The court properly denied defendant's suppression motion. Although the lineup photograph was lost, the People established the lineup's fairness (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]) through the sufficiently detailed testimony of the arresting officer and complainant. It is also significant that at the lineup defendant was represented by counsel, who only noted a height difference among the participants that was minimized by having them seated.

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

ENTERED: MARCH 18, 2010

CLERK

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2395-
2395A The People of the State of New York, Ind. 1907/06
Respondent, 3100/07

-against-

Adam Abreu,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

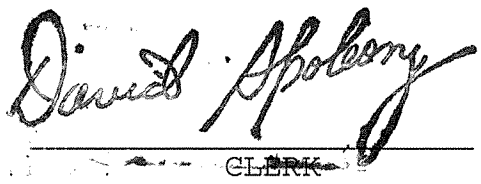
Judgments, Supreme Court, Bronx County (John S. Moore, J.), rendered March 19, 2009, convicting defendant, upon his pleas of guilty, of robbery in the first degree and promoting prison contraband in the second degree, and sentencing him, as a juvenile offender, to an aggregate term of 2⅓ to 7 years, unanimously affirmed.

Defendant's valid waiver of his right to appeal forecloses any challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]). Regardless of the validity of the waiver of the right to appeal, the court properly exercised its discretion in denying defendant's request for youthful

offender treatment, given defendant's serious and repeated crimes.

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

ENTERED: MARCH 18, 2010



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Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2396 In re Longwood Associates, LLC, Index 6073/07
Petitioner-Respondent,

-against-

New York State Department of
Environmental Conservation,
Respondent-Appellant.

Andrew M. Cuomo, Attorney General, New York (Janice A. Dean of counsel), for appellant.

Rothkrug Rothkrug & Spector, LLP, Great Neck (Simon H. Rothkrug of counsel), for respondent.

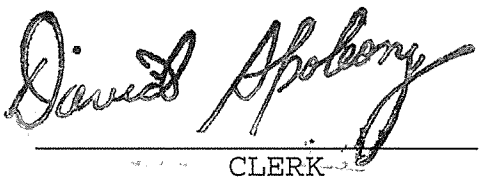
Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered October 10, 2007, which, insofar as appealed from, in this CPLR article 78 proceeding, reduced the administrative penalty of $250,000, imposed on petitioner for violation of provisions of the Environmental Conservation Law and the Navigation Law arising out of the presence of an unregistered 2,000 gallon petroleum bulk storage tank in the basement of its building, to $100,000, unanimously reversed, on the law, without costs, and the penalty of $250,000 reinstated.

Supreme Court lacked the authority to modify the administrative penalty since it dismissed the petition as time-barred (*see Matter of Van Cortlandt Park Dodge v Commissioner of Dept. of Consumer Affairs of City of N.Y.*, 178 AD2d 234, 235 [1991]). The reduction of the penalty was also improper because the original penalty did not shock the conscience (*see e.g.*

Matter of Kelly v Safir, 96 NY2d 32, 38 [2001]), particularly where Supreme Court had concluded that it was "very reasonable." Furthermore, although during settlement discussions respondent had offered to reduce the penalty to $100,000, this is not a basis on which to reduce the penalty.

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

ENTERED: MARCH 18, 2010



CLERK

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2397 The People of the State of New York, Ind. 2319/07
Respondent,

-against-

Lee Candelario,
Defendant-Appellant.

Susanna De La Pava, New York, for appellant.

Judgment, Supreme Court, Bronx County (Edward M. Davidowitz, J. at plea; David Stadtmauer, J. at sentence), rendered on or about September 5, 2008, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 18, 2010

CLERK

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2399 Cornell University, et al., Index 103966/01
Plaintiffs-Respondents,

-against-

Francine Gordon,
Defendant-Appellant.

Norman A. Olch, New York, for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Robert A. Jacobs of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Walter B. Tolub, J.), entered December 19, 2008, in favor of plaintiffs and against defendant in the amount of $39,449.43 (after offsetting a judgment in favor of defendant in another action), unanimously modified, on the law, to reduce the award to $8015, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiffs, who are defendant's landlord, originally sought attorneys' fees pursuant to a stipulation of settlement that provided for such fees in the event of defendant's noncompliance with the stipulation, and were awarded a money judgment. Inasmuch as $31,434.43 of the judgment on appeal was awarded to compensate plaintiffs for their attorneys' fees incurred in enforcing the money judgment, as opposed to enforcing the stipulation underlying the money judgment, that portion of the jury award amounted to a "fee on a fee" not expressly authorized

by the stipulation or by statute, and is therefore not recoverable (*see David Z. Inc. v Timur on Fifth Ave.*, 7 AD3d 257, 258 [2004]; *Getty Petroleum Corp. v G.M. Triple S. Corp.*, 187 AD2d 483, 484 [1992]).

The fee award of $15,000, compensating plaintiffs' attorneys for their efforts to compel defendant's compliance with the term of the stipulation that required defendant, at her sole cost and expense, to remove the final remaining Department of Buildings violation issued against the building because of her unauthorized apartment renovation, was not excessive under the circumstances.

Inasmuch as defendant fully consented to -- indeed even proposed -- having the two alternate jurors deliberate and render a verdict with the regular jurors, she has failed to preserve her argument that the court committed reversible error in submitting the case to a jury of eight persons rather than six (*see Fader v Planned Parenthood of N.Y. City*, 278 AD2d 41 [2000]; *see also Sharrow v Dick Corp.*, 86 NY2d 54, 59-60 [1995]; *Waldman v Cohen*, 125 AD2d 116, 118-124 [1987]). Also unpreserved, for failure to timely object, is defendant's argument that the 6 to 2 jury votes in favor of plaintiffs were contrary to the requirement of CPLR 4113(a) that a verdict must be rendered by not less than five-sixths of the jurors constituting a jury (*see Harvey v B & H Rests., Inc.*, 40 AD3d 241, 241 [2007]). We note, however, with respect to the merits, that while CPLR 4106 requires that

alternate jurors be discharged after the final submission of the case, there was no substitution here of the two alternates for regular jurors after deliberations had begun, the circumstance that invalidated the jury deliberations in *Gallegos v Elite Model Mgt. Corp.* (28 AD3d 50, 54-55 [2005]), and that all eight jurors deliberated as a group from start to finish and reached a verdict together.

We reject defendant's contention that the court erred in giving a missing witness charge due to her failure to testify. While much of the trial indeed focused on the amount of attorneys' fees that would constitute a reasonable award, an issue about which defendant would not likely have had anything meaningful to contribute, the issue of whether attorneys' fees were properly awardable at all was also submitted for the jury's consideration, an issue that turned, at least in part, on the actions that defendant took to have the remaining plumbing violation removed. As plaintiffs' lay witness testified that defendant was not cooperative in producing the documents necessary to certify removal of the plumbing violation, defendant could be expected to dispute those facts or to explain why she cannot (*see Crowder v Wells & Wells Equip., Inc.*, 11 AD3d 360, 361 [2004]).

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

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

ENTERED: MARCH 18, 2010

CLERK

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2400N Wing Wong Realty Corp., Index 101323/05
Plaintiff-Appellant,

-against-

Flintlock Construction Services, LLC, et al.,
Defendants-Respondents,

Diamond Point Excavation Corp.,
Defendant.

[And a Third-Party Action]

Weg and Myers, P.C., New York (Joshua L. Mallin and Jonathan C. Corbett of counsel), for appellant.

Rubin, Fiorella & Friedman, LLP, New York (Paul Kovner of counsel), for Flintlock Construction Services, LLC and Well-Come Holdings, Inc., respondents.

Babchik & Young LLP, White Plains (Siobhan Healy of counsel), for Roman Sorokko and Versatile Consulting & Testing Services, Inc., respondents.

Milber Makris Plousadis & Seiden, LLP, White Plains (Thomas H. Kukowski of counsel), for John S. Deerkoski, P.E. & Associates, Inc. and Deerkoski Engineering, P.C., respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered February 19, 2009, which denied plaintiff's motion for leave to amend the complaint to add a cause of action for gross negligence and a demand for punitive damages, unanimously affirmed, without costs.

The court correctly examined the proposed amended complaint to determine if there was evidentiary proof that could be

considered on a summary judgment motion (*see American Theatre for the Performing Arts, Inc. v Consolidated Credit Corp.*, 45 AD3d 506 [2007]) and correctly determined that plaintiff failed to allege facts that would support a finding that defendants' conduct evinced a "conscious disregard of the rights of others or [was] so reckless as to amount to such disregard" (*Home Ins. Co. v American Home Prods. Corp.*, 75 N.Y.2d 196, 200 [1990] [internal quotation marks and citation omitted]).

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

ENTERED: MARCH 18, 2010

CLERK

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2401N Arlene Lado, Index 16625/04
Plaintiff-Respondent-Appellant,

Hector Niz,
Plaintiff,

-against-

Sylvia Wardaska, et al.,
Defendants.
- - - - - -
Robert Kaminski, Esq.,
Nonparty Appellant-Respondent.

Stephen R. Krawitz, LLC, New York (Stephen R. Krawitz of counsel), for appellant-respondent.

The Breakstone Law Firm, P.C., Bellmore (Jay L.T. Breakstone of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered March 11, 2008, which awarded plaintiff Lado's outgoing counsel Kaminski 10% of the net legal fee, unanimously affirmed, without costs.

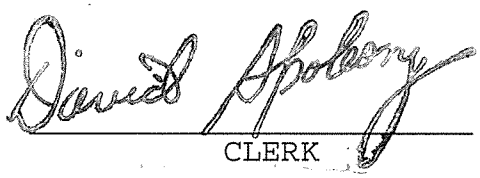
Having analyzed the relevant factors including the amount of time spent by the attorneys on the case, the nature and quality of the work performed and the relative contributions of counsel toward achieving the outcome, the motion court's apportionment of the contingency fee was a provident exercise of discretion (*see Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 458 [1989]; *Diakrousis v Maganga*, 61 AD3d 469 [2009]). The court properly declined to enforce the pre-existing fee sharing agreement in the

circumstances of this case (*see Dugan v Dorff Constr. Co.*, 281 AD2d 158 [2001], *lv denied* 98 NY2d 606 [2002]).

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

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

ENTERED: MARCH 18, 2010



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MAR 18 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David B. Saxe
Karla Moskowitz
Sheila Abdus-Salaam
Nelson S. Román, JJ.

2156-
2157
Index 600674/06

x

JPMorgan Chase & Co., et al.,
Plaintiffs-Respondents,

-against-

The Travelers Indemnity Company, et al.,
Defendants,

Twin City Fire Insurance Company,
Defendant-Appellant.

x

Defendant Twin City Fire Insurance Company appeals from a judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered May 21, 2009, awarding plaintiffs damages against said defendant pursuant to an order, same court and Justice, entered May 19, 2009, which granted plaintiffs' motion for summary judgment, and order, same court and Justice, entered March 10, 2009, which, inter alia, granted plaintiffs' motion for partial summary judgment and denied said defendant's cross motion for summary judgment dismissing the complaint.

Arkin Kaplan Rice LLP, New York (Howard J. Kaplan, Lisa C. Solbakken, Michael J. McLaughlin and Elizabeth A. Fitzwater of counsel), for appellant.

Proskauer Rose LLP, New York (John H. Gross, Steven E. Obus, Francis D. Landrey and Michelle R. Migdon of counsel), for respondents.

ABDUS-SALAAM, J.

In this declaratory judgment and breach of contract action, plaintiffs JPMorgan Chase & Co., JPMorgan Chase Bank and J.P. Morgan Securities, Inc. (collectively JPMC) seek a declaration that defendant Twin City Fire Insurance, Inc. (Twin City) is obligated to indemnify them in the amount of the limits of their coverage ($22.5 million) for losses incurred in connection with the defense and settlement of a series of federal court class action suits arising out of Enron's financial collapse, as well as several lawsuits filed by Enron investors in state courts. JPMC ultimately paid more than $2.2 billion to settle the Enron actions. The motion court rejected Twin City's defenses, including that JPMC had failed to comply with the notice provision of the "claims-made" policy at issue here, and directed that judgment be entered in favor of plaintiffs in the amount of $22,500,000 plus prejudgment interest, together with costs and disbursements, all together amounting to $28,358,180.14.

Twin City was a $22.5 million participant in a combined lines program providing JPMC with a total of $200 million in Bankers Professional Liability insurance, effective November 30, 1997 to November 30, 2001 (the 97-01 Program). Twin City was not a participating insurer at the inception of the 97-01 Program, but, effective July 15, 2000, replaced Reliance Insurance Company

as an excess insurer by providing coverage for the second excess layer of $10 million excess of $30 million and for the sixth excess layer of $12.5 million excess of $70 million. The binders issued by Twin City adopted the terms of coverage as bound by Reliance, which incorporated the terms and conditions of the primary policy issued by Lloyd's, London. The "claims-made" policy afforded coverage both for claims made against the insured during the policy period, as well as claims made subsequent to the policy period, provided that the insured gave notice during the policy term of any act, error or omission that may subsequently give rise to a claim. As set forth in the Lloyd's primary policy:

> "If during the Policy Period . . . the Risk and Insurance Management Department shall become aware of any act, error or omission which may subsequently give rise to a claim being made against an Insured and shall during the Policy Period . . . give written notice of such act, error or omission, then any claim which is subsequently made against the Insured arising out of such act, error or omission shall for the purpose of this policy be treated as a claim made during the Policy Period."

An addendum to the Lloyd's primary policy substituted the words "Wrongful Act" for all references to "acts, errors or omissions" throughout the policy. Another addendum defined "Wrongful Act" to include any "(i) act, error or omission by the Insured or any

person or entity for whom the Insured is legally responsible, or (iv) dishonest or fraudulent act or omission by any officer or employee of the Named Corporation or any Subsidiary Company."

The record shows that in late November 2001, as the 97-01 Program was nearing expiration and JPMC was seeking renewal of its insurance for the 2001-2002 policy period, Enron's credit rating had been downgraded to junk status and there was speculation in the press that Enron was headed for bankruptcy. According to Richard Straub, Vice President, Corporate Insurance Services for JPMC, the insurers that were considering participating in the renewal program, including Twin City, "began to balk at providing coverage for Enron claims under the subsequent program," because [t]hey did not want to effectively 'buy a loss.'" These insurers inquired as to whether JPMC had noticed or was going to notice Enron claims under the 97-01 policy, and certain of them made clear that JPMC must provide notice of the Enron circumstances to the 97-01 insurers as a condition of these prospective insurers binding coverage under the new 01-02 Program. Mr. Straub, in conjunction with others, made the decision to notice potential claims to the 97-01 Program both because he was concerned about potential claims that might arise from JPMC's provision of professional services to Enron and because he wanted to obtain coverage for the 01-02 period.

On November 29, 2001 JPMC's insurance broker, Marsh & McLennan, sent an e-mail to the 01-02 insurers, including Twin City, outlining the terms pursuant to which the insurers agreed to bind coverage:

> "As discussed, it was agreed to put the expiring contract on notice of the ENRON circumstance. JP Morgan Chase is in the process of drafting this notice and putting the prior policy on notice. It was also agreed, that in the event a Claim does arise out of this ENRON matter, this current policy shall apply (subject to this policy's terms and conditions) in the event that there is a final adjudication that no coverage exists under the prior Blended policy solely due to such claim not fulfilling the notice requirements under the prior policy - wording to be agreed."

Twin City's binder for the 01-02 Program provides that it will follow the terms and conditions of the November 29, 2001 e-mail. Stephen Guglielmo, a Twin City underwriter, testified that Enron's demise caused him concern about the renewal of JPMC's policy because of the possible exposure to an Enron claim, and that as he recalls, Enron claims were going to be noticed for the 97-01 policy and excluded from the 01-02 policy which gave him "some comfort in being part of an ongoing program with JPMorgan Chase."

On November 29, 2001 at 9 P.M., three hours before the 97-01 policy was to expire, JPMC sent the following e-mail to Twin City through its broker, Marsh:

> "On November 28th 2001 it was announced that various credit agencies had downgraded Enron, Inc. debt to junk status. In addition it was announced that merger discussions with Dynegy, Inc. had been terminated. In light of this situation J.P. Morgan Chase & Co. released a statement disclosing that it has approximately $500 million of unsecured exposure to various Enron entities, including loans, letters of credit and derivatives. It was also confirmed that it has additional exposures of $400 million secured by the Transwestern and Northern Natural pipelines.
>
> J.P. Morgan Chase & Co. and its subsidiaries and affiliates, and their directors and officers ("JP Morgan Chase") have an extensive relationship with Enron which includes, but is not necessarily limited to, lending, merger & acquisition advisory services, restructuring advisory services, various SWAPS transactions, purchaser of gas/energy and serving as indenture trustee for Enron's public debt. While we have not received notice of any claim or potential claim at this time[,] it is anticipated that we may be named in litigation expected to arise out of the financial difficulties of Enron as a result of the relationship described above."

Fifteen minutes later, JPMC, again through Marsh, sent another e-mail which advised "please disregard the earlier email regarding this matter." The second e-mail contained the language quoted above, but with the following language added:

> "Such litigation could include, among other things, allegations of breaches of fiduciary duty, aiding and abetting breaches of fiduciary duty, errors and omissions, securities fraud, negligence (including gross negligence), fraudulent conveyance, equitable subordination and misrepresentation. While JP Morgan Chase would vigorously contest the validity of any such claims, and has no actual knowledge of such acts, we believe that all of the foregoing constitute Wrongful Acts that could give rise to a claim under the policy."

Twin City responded on November 30, 2001 with a letter acknowledging receipt of the correspondence, informing Marsh of the name of the individual assigned to the matter, and stating that "[i]n the meantime all rights and defenses afforded under any applicable policy, at law, or in equity should be considered reserved." On January 17, 2002, Lloyd's accepted the notice "as notice of a potential claim under the BPL [Bankers Professional Liability] section of the [p]olicy." Subsequently, other insurers did so as well. Only one excess insurer, American International Specialty Lines Insurance Company (AISLIC), asserted that the notice was deficient. AISLIC, which was a defendant in this lawsuit, ultimately settled with JPMC for its Enron claims under the 97-01 program after the motion court denied its motion for an order dismissing the complaint pursuant to CPLR 3211 (a)(1) and (7).

Twin City never indicated to JPMC its position that the

notice was in any way deficient until this litigation, where in its answer it asserted affirmative defenses, alleging, among other things, that coverage is barred because JPMC failed to satisfy conditions precedent to coverage, failed to provide timely, sufficient and appropriate written notice of claims and made false statements in the notices of claims.

Additionally, Twin City maintains that it has no obligation under the 01-02 policy, and has interposed counterclaims seeking damages and rescission of its participation in the 01-02 Program, alleging that it was induced to renew coverage to JPMC as the result of the fraudulent misrepresentation contained in the notice that JPMC had "no actual knowledge" of acts that could give rise to claims in connection with Enron under the 97-01 program, when JPMC in fact had actual knowledge that it had assisted Enron in manipulating its financial statements, and had learned "[b]y no later than November 19, 2001 . . . that many of the transactions it had either designed for Enron, or had engaged in as a participant, were directly responsible for Enron's deteriorating financial conditions."

Twin City initially moved in July 2006 for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint on the ground that JPMC's November 29, 2001 letter did not provide it with sufficient notice of the potential claim. The motion court

denied the motion, finding that the notice was sufficient. In June 2007, in response to a motion by JPMC for partial summary judgment, Twin City cross-moved for summary judgment, again asserting that the notice was legally insufficient. That cross motion was denied. In June 2008, following extensive discovery, JPMC moved, in this action and two related actions it had commenced against Twin City arising out of Twin City's refusal to indemnify JPMC in connection with professional services rendered to other corporations (the Worldcom action and the National Century Financial Enterprises, Inc., action), for partial summary judgment dismissing Twin City's counterclaims and certain affirmative defenses. Twin City cross-moved (in this action only) for summary judgment dismissing the complaint on the ground that the notice was insufficient to invoke coverage under the 97-01 policy period. JPMC "cross-moved"[1] (in this action only) for partial summary judgment dismissing the affirmative defenses to the extent that they contested the legal sufficiency of the notice. On March 10, 2009 the motion court granted JPMC's motion for partial summary judgment dismissing Twin City's affirmative defenses insofar as they challenged the sufficiency of the

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[1]The motion court noted the impropriety of attempting to file a cross motion to a cross motion but nonetheless considered the application, in the absence of prejudice to Twin City, which had submitted its opposition to that application.

notice, denied Twin City's motion for summary judgment, and ordered that JPMC's motion for summary judgment dismissing defendant's counterclaims and certain affirmative defenses is sub judice and that the remainder of the action was to continue. In December 2008, following the completion of discovery, JPMC moved for summary judgment on all remaining liability issues and damages. The motion was granted and Twin City appealed from the March 10 order and the May 21 judgment.

The motion court correctly held that the notice to Twin City was valid under the 97-01 Program. Twin City argues that JPMC did not meet the condition precedent to coverage because 1) at the time of the notice, JPMC's Risk and Insurance Management Department, in particular Mr. Straub, had no awareness of any wrongful act, and 2) the notice did not identify any specific wrongful act. Twin City puts great stock in the fact that the notice states that JPMC has no actual knowledge of the acts listed, including breach of fiduciary duty, misrepresentation, fraud and negligence, and that Straub testified that the notice was JPMC's "effort to identify the types of acts and activities which we were involved with which, not specific to us, JPMorgan Chase, but as a general situation could, in the financial world . . . give rise to a claim."

However, Twin City's assertion that there was no awareness

by JPMC of any wrongful acts, but only conjecture, rings hollow. It is clear from the record that there was heightened awareness, by both JPMC and its insurers in the days prior to the expiration of the 97-01 policy, of the impending implosion of JPMC's client Enron, which awareness led to the last minute filing of the notice of potential claims encompassing wide-ranging legal and financial issues that were almost certain to arise.

It is beyond cavil that the entire purpose of the notice, from both the perspective of the insured and the insurers, including Twin City, was "to put the expiring contract on notice of the ENRON *circumstance*" (emphasis added). And the notice accomplished this goal, as it presaged the allegations of the Enron lawsuits, including claims that JPMC, as one of the principal lending banks, loaning over a billion dollars to Enron, knew that Enron was falsifying its publicly reported financial results and that JPMC helped raise over $2 billion from the investing public for Enron and made false and misleading statements in registration statements and prospectuses used by Enron to raise billions of dollars in new capital for Enron. The notice identified claims that were likely to arise out of enumerated acts and in the context of the particular unfolding circumstances of the Enron debacle, all of which were described in the notice.

In a "claims-made" policy, the purpose of the provision requiring notice of potential claims before the end of the policy is to provide "a certain date after which an insurer knows that it is no longer liable under the policy, and accordingly, allows the insurer to more accurately fix its reserves for future liabilities and compute premiums with greater certainty" (*City of Harrisburg v International Surplus Lines Ins. Co.*, 596 F Supp 954, 962 [M D Pa 1984], *affd* 770 F2d 1067 [3rd Cir 1985]).

The notice here, with its reference to Enron and its catalog of the transactions with Enron, is analogous to, if not more detailed than, other notices that have been held to be sufficient pursuant to similar notice provisions in claims-made policies.

For example, in *Federal Sav. & Loan Ins. Corp. v Heidrick* (774 F Supp 352, 355 [D Md 1991], *on reconsideration* 812 F Supp 586 [D Md 1991], *affd sub nom. Federal Deposit Ins. Co v American Cas. Co.*, 995 F2d 471 [4th Cir 1993]) where the notice set forth wrongful acts including "possible self-dealing by certain officers and directors in the construction of the . . . main office building, and violations of regulations, breaches of fiduciary duty, and negligent acts or omissions by Officers and Directors . . . relating to the construction of [the] main office building and by authorizing, approving and administering various loans and projects," the court held that the notice satisfied the

purpose of the policy by giving the insurer a date certain and allowing it to fix its reserves accurately and compute premiums. In *Bodewes v Ulico Cas. Co.* (336 F Supp 2d 263 [WD NY 2004], *affd in part and vacated in part on other grounds,* 165 Fed Appx 125 [2d Cir 2006]), the notice was held valid where the Trustees of the Buffalo Carpenters Health Care Premium Benefit, Annuity & Pension Funds gave notice that claims would likely be made as the result of the decline in the financial status of the funds and of certain specific instances of alleged mismanagement, "as well as additional claims [that] would be likely to result in the filing of legal action against the Trustees" (336 F Supp 2d at 278 [internal quotation marks omitted]).

Furthermore, in *Resolution Trust Corp. v American Cas. Co.* (874 F Supp 961 [ED Mo 1995]), the court upheld a notice by a savings and loan reporting that a Federal Home Loan Bank supervisor had made statements regarding certain real estate projects to the effect that because of some deficiencies in documentation, if the projects result in losses, responsibility for these losses would be placed directly on the bank's board of directors. A follow up letter contained the identity of a potential claimant and "very vague descriptions of the circumstances under which the insureds became aware of a potential claim and the nature of claim" (*id.* at 965). The court

rejected the insurer's contention that the letters did not provide "enough specific information to constitute adequate notice" (*id.*), noting that there was no requirement of such specificity in the policy. Nor is there such a requirement of specificity in this policy, which requires only that the insured give written notice of "wrongful acts," defined as any act, error or omission, or dishonest or fraudulent act or omission.

Twin City's citation to *Home Ins. Co. v Cooper & Cooper, Ltd.* (889 F 2d 746 [7th Cir 1989]), is unpersuasive, as it actually supports JPMC's position. In *Home Ins.*, an attorney who was the sole shareholder of his firm embezzled from accounts held by his firm, casting the firm into bankruptcy. The bankruptcy trustee made claims before the policy expired on every matter the firm had ever handled. The court held the notice ineffective, finding that

> "[i]f the trustee had reason to believe that the firm's work *in a given case* would lead to liability, it was entitled under the policy to inform the insurer within the period of coverage and to ensure indemnity if the potential came to pass. An effort to lodge claims on everything, to extend indefinitely the coverage of a 15-month policy, has no similar effect; it is merely vexatious" (*id.* at 750 [emphasis added]).

Here, the notice focused on a given situation - the Enron collapse - and set forth the many different aspects of professional services that might give rise to claims.

Similarly, Twin City's reliance on *American Cas. Co v Wilkinson* (1990 WL 302175, 1990 US Dist LEXIS 20153 [WD Okla 1990], is misplaced. In that case, the insured bank's notice listed 50 different individuals or entities who did business with the bank, and unlike the notice here, "[no] information was given about the events or circumstances giving rise to these alleged potential claims" (1990 WL 302175, *3, 1990 US Dist LEXIS 20153, *9).

In sum, the notice here was sufficient and the insured met the condition precedent for coverage.

We have considered Twin City's other arguments and find them unavailing, including the assertion that the loss arising out of the defense and settlement of the underlying litigation was not entirely for "professional services" covered under the policy and that there should have been some allocation performed by the trial court in awarding damages. Professional services is defined broadly in the policy to include all services provided by JPMC, including, but not limited to, Investment Banking Activities and Lending Activity. The underlying litigation specified these types of activities as giving rise to the claims.

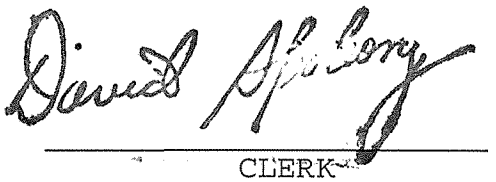
Thus, the losses are covered under the policy.

Accordingly, the judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered May 21, 2009, awarding plaintiffs the aggregate amount of $28,359,180.14 against defendant-appellant pursuant to an order, same court and Justice, entered May 19, 2009, which granted plaintiffs' motion for summary judgment, and order, same court and Justice, entered March 10, 2009, which, inter alia, granted plaintiffs' motion for partial summary judgment and denied appellant's cross motion for summary judgment dismissing the complaint should be affirmed, with costs.

All concur.

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

ENTERED: MARCH 18, 2010



CLERK