SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 5, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1985 Federal Insurance Company, etc., Index 603926/05
Plaintiff-Respondent,

-against-

North American Specialty Insurance Company, et al.,
Defendants-Appellants,

Bruce A. Bendix, et al.,
Defendants.

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Crowell & Moring LLP, New York (Clifton S. Elgarten of counsel), for appellants.

Quick and Bakalor, P.C., New York (Timothy J. Keane of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 15, 2008, which, to the extent appealed from as limited by the briefs, granted plaintiff's cross motion for summary judgment on its cause of action for bad faith, unanimously reversed, on the law, without costs, and the cross motion denied.

Defendant-appellant Allied World Assurance Company (U.S.) Inc., formerly known as Commercial Underwriters Insurance Company (CUIC), insured Galaxy Contracting Corp. (Galaxy) under a commercial general liability (CGL) policy with a limit of $1,000,000. Plaintiff-respondent Federal Insurance Company (Federal) provided Galaxy with excess coverage up to $10,000,000. In addition, pursuant to its contractual indemnity obligation, Galaxy purchased from CUIC, for the property owners' benefit, a separate owners and contractors protective liability policy (OCP) with a limit of $1,000,000.

The underlying Labor Law action was settled for $3,000,000. This was paid $1,000,000 by CUIC pursuant to the CGL policy and $2,000,000 by Federal pursuant to the excess policy, without prejudice to Federal's right to recover from CUIC. This action followed and, as is relevant to this appeal, in the second cause of action, Federal alleged that it paid an extra $1,000,000 as a result of CUIC's bad faith in failing to defend Galaxy against the owners' indemnification claims on the basis of the antisubrogation rule. In a prior appeal (47 AD3d 52, 64 [2007]), we found that Federal sufficiently stated a cause of action for bad faith.

Under New York law, since an insurer has exclusive control

over a claim against its insured once it assumes defense of the suit, it has a duty to act in "good faith" when deciding whether to settle and may be held liable for breach of that duty (*see Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 452 (1993]). This duty also applies where an excess insurer is exposed to liability (*see Hartford Acc. & Indemn. Co. v Michigan Mut. Ins. Co.*, 61 NY2d 569 [1984]; *Elm Ins. Co. v GEICO Direct*, 23 AD3d 219 [2005]), and requires a primary insurer to give as much consideration to the excess carrier's interests as it does to its own (*Pavia*, 82 NY2d at 453; *St. Paul Fire & Mar. Ins. Co. v United States Fid. & Guar. Co.*, 43 NY2d 977, 978-979, [1978]).

An insurer does not breach its duty of good faith when it makes a mistake in judgment or behaves negligently. To establish bad faith, an excess insurer must show that the primary insurer's conduct constituted a "gross disregard" of the excess insurer's interests and that the insurer's conduct involved a "deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer" (*Pavia*, 82 NY2d at 453).

There is no formula to determine whether an insurer acted in good faith. The court must assess, among other factors, the "plaintiff's likelihood of success on the issue of liability, the

potential damages award, the financial burden on each party if the insurer refuses to settle, whether the claim was properly investigated, the information available to the insurer when the demand for settlement was made, and . . . any other relevant proof tending to establish or negate the insurer's good faith in refusing to settle" (s*ee Pinto v Allstate Ins. Co.*, 221 F3d 394, 399 [2d Cir 2000], citing *Pavia*, 82 NY2d at 454-55).

Given these stringent standards, there remains a material issue of fact as to whether CUIC was merely negligent or whether CUIC and/or its counsel were aware that the antisubrogation rule applied and deliberately failed to assert the defense in order to allow the owners to escape liability, thereby removing the OCP policy from the layer of coverage that had to be exhausted before triggering Federal's excess coverage. Although the memos and correspondence submitted by plaintiff could conceivably support a

bad faith verdict after trial, it is for the finder of fact to determine whether the documents establish a deliberate plan by CUIC or merely reflect discussions of the consequences of a valid indemnity claim by the owner against Galaxy.

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

McGUIRE J. (dissenting)

I disagree with the majority's conclusion that plaintiff Federal Insurance Company (Federal) is not entitled to summary judgment as a matter of law on its second cause of action for bad faith. Accordingly, I would affirm Supreme Court's decision granting Federal's cross motion for summary judgment on that cause of action.

This declaratory judgment action arises from a personal injury action commenced by an employee of a subcontractor who was injured at a construction site. The employee sued the general contractor, Galaxy General Contracting Corporation (Galaxy), and the owners and sponsors of a construction housing project (Owners). Galaxy had obtained two separate primary insurance policies from defendant Commercial Underwriters Insurance Company (CUIC): a commercial general liability (CGL) policy for itself and an owners and contractors protective liability (OCP) policy for the Owners. Each policy provided coverage up to the amount of $1,000,000. Galaxy also obtained a $10,000,000 excess insurance policy for itself from Federal.

At the inception of the action in 1999, CUIC retained one law firm to represent both Galaxy and the Owners. In June 2002, however, CUIC assigned separate defense counsel for Galaxy and

the Owners. As CUIC states, it concluded that a potential indemnification claim by the Owners created a conflict of interest between its two insureds. Thereafter, the Owners amended their answer to assert cross claims against Galaxy for contractual and common-law indemnification, and moved for summary judgment on the cross claims. Galaxy opposed the motion but did not raise the antisubrogation rule, i.e., it did not argue that the owners were not entitled to indemnification because they were insured by the same insurer and an insurer "has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered" (*North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993]). In March 2003, Supreme Court conditionally granted the indemnification claims because no evidence had been presented that the Owners either were present at the work site or had any responsibility to control or supervise the work being performed. In a motion to renew or reargue, Galaxy belatedly raised the antisubrogation rule; the motion was denied on the ground that Galaxy had not provided a satisfactory explanation for failing to raise the antisubrogation rule on the original motion. Thereafter, the case was settled for $3,000,000; $1,000,000 was paid by CUIC pursuant to its CGL policy and $2,000,000 was paid by Federal

under the excess policy.

On or about November 4, 2005, Federal commenced this declaratory judgment action, individually and as a subrogee of Galaxy, against CUIC. Federal asserted five causes of action, including violation of the antisubrogation rule, bad faith in defending Galaxy against the Owners' indemnification claims, and legal malpractice. CUIC made a pre-answer motion to dismiss and Supreme Court granted the motion with respect to the causes of action for legal malpractice. This Court affirmed the dismissal of those causes of action and also dismissed the causes of action for violation of the antisubrogation rule (47 AD3d 52, 59-63 [2007]). With respect to the cause of action for bad faith, we held that "Federal's claim that CUIC manifested a 'conscious disregard' for Federal's rights by allowing one of its insureds, the owners, to escape liability in violation of the antisubrogation rule, thereby removing one of its policies (OCP) from the layer of coverage that had to be exhausted before triggering Federal's excess coverage, sufficiently states a cause of action for bad faith" (*id.* at 63-64 [internal citation omitted]).

In support of its motion for summary judgment, Federal submitted, inter alia, a hand-written memorandum by a CUIC claims

manager that diagrams the parties, states that the Owners were not actively negligent in connection with the underlying personal injury action and lays out CUIC'S reason for seeking indemnification: doing so "will save 1 of CUIC's limits." A subsequent note to the Owners' counsel, authored by the same claims manager, states:

> "Our goal is to get Galaxy the G.C. through its primary coverage . . . and Galaxy's excess carrier to resolve this claim thereby keep[ing] our $1 million for [the Owners] protected. Galaxy's primary and their [sic] excess is enough to settle this, the trick is to get Galaxy's excess carrier to agree they're [illegible]."

Additionally, in a letter to CUIC regarding a possible settlement, the Owners' counsel advises:

> "In summary, there is no settlement that makes sense for [the Owners] unless our contribution is substantially less than the $1 million policy limits and there is no further litigation. If, for example, Federal requested that [the Owners] pay $500,000 toward settlement and agreed not to challenge the indemnification finding, CUIC would be able to end the litigation without risking the full exposure of both its policies in this case."

Federal maintains that these documents establish that pursuant to a plan it developed, CUIC acted to shift the financial responsibility for the personal injury claim to place a

greater burden on Federal by triggering the excess coverage instead of CUIC's OCP policy. CUIC maintains that the plan was to protect the Owners, that the documents demonstrate a lack of knowledge of the antisubrogation rule and that this lack of legal knowledge reflects mere negligence (which they blame on counsel retained to represent the Owners) rather than a violation in bad faith of their fiduciary duty to Federal as the excess carrier. CUIC also maintains that after the file was split, i.e., after it retained separate counsel and assigned separate claims handlers to the claims against Galaxy and the Owners, "[t]heir duty ran only to the Owners, *and not to Federal*, which only insured Galaxy."

Under New York law, "the primary carrier owes to the excess insurer the same fiduciary obligation which the primary insurer owes to its insured, namely, a duty to proceed in good faith and in the exercise of honest discretion" (*Hartford Acc. & Indem. Co. v Michigan Mut. Ins.* Co., 93 AD2d 337, 341 [1983], *affd* 61 NY2d 569 [1984]). A primary insurer is considered to act in good faith when it gives the same consideration to the excess insurer's interests that it gives to its own interests (*see Pavia v State Farm Mut. Auto Ins. Co.*, 82 NY2d 445, 453 [1993]; *New England Ins. Co. v Healthcare Underwriters Mut. Ins. Co.*, 295 F3d

232 [2d Cir 2002]). In the context of a bad-faith claim founded on a failure to settle, "the plaintiff must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interests -- that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer" (*Pavia*, 82 NY2d at 453 [internal citation omitted]).

Here, summary judgment is warranted because CUIC knowingly and deliberately placed its interests ahead of those of the excess carrier to avoid exposure beyond the $1 million limit of the CGL policy it issued to Galaxy. Specifically, the record establishes that CUIC devised and executed a plan to avoid exposure of the Owners' primary policy, i.e., to save one of CUIC's two limits of $1 million, with the knowledge and intent that a successful indemnification claim against its other insured would shift the financial burden to Federal (*id.*; *see also Hartford Acc.*, 93 AD2d at 341-342).

Nor can CUIC avoid liability on the ground that neither it nor the attorneys it retained to represent the Owners knew that a doctrine called the antisubrogation rule barred the indemnification claim. This defense is predicated not on what CUIC did or did not do, but on what it did or did not know about

the law. Even assuming neither CUIC nor the attorneys for the Owners knew of the rule, that lack of knowledge is not a defense for it does not alter the crucial fact that CUIC knowingly and deliberately placed its interest ahead of those of the excess carrier to which it owed the same fiduciary obligation it owed to its insureds. Obviously, to recognize such a defense -- CUIC cites no authority recognizing it -- would run afoul of the precept that ignorance of the law is not an excuse. Moreover, it would have the unseemly effect of permitting an insurer ignorant of the rule, a rule premised in part on the need to avoid the conflicts of interest inherent in situations in which an insurer provides coverage to two insureds for the same risk (*Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 472 [1986]), to be in a superior position than an insurer knowledgeable about the rule. The former can avoid a loss for which it provided coverage (here, a $1 million loss) while the latter must pay it. In short, CUIC's liability should turn on the self-serving nature of the conduct it knowingly committed, not on whether it knew that a rule of law prohibited that conduct.

CUIC asserts that it acted in good faith because it was in the Owners' best interest not to trigger coverage under the Owners' OCP policy. More specifically, it maintains that

"pressing and protecting the Owner's [*sic*] right of indemnification . . . served, inter alia, to minimize the erosion of the Owners' primary policy, to protect the policy to be available to pay a judgment above any amounts available from Galaxy, and to safeguard the Owners' loss history." The same claims handler who testified to these ostensible reasons for conserving the OCP policy wrote the contemporaneous notes quoted above setting out a very different reason for seeking indemnification: doing so "will save 1 of *CUIC's* limits" (emphasis added). And in the handwritten note quoted above, the claims handler expressly stated that "Galaxy's primary and their [*sic*] excess is enough to settle this." Moreover, when the indemnification motion was made, no other claims had been made against the Owners that might trigger coverage under the OCP policy. In any event, even assuming that its plan to seek indemnification was motivated in part by a beneficent regard for the interests of the Owners, that does not negate the evidence establishing that CUIC knowingly and deliberately placed its interests above those of Federal. Finally, as Federal notes, after it did become aware of the antisubrogation rule and learned that it had benefitted from the rule's violation, CUIC was asked to contribute to the settlement but refused, essentially

insisting on the advantage it had obtained from the successful realization of its plan.

Whether the plan was devised before or after the defense was split between law firms and claims handlers is irrelevant. CUIC's duty to Federal did not evaporate simply because separate counsel for each insured was obtained. Not surprisingly, CUIC cites nothing in support of its argument that its duty ran only to the owners, and not to Federal, after the split. An "insurer does not satisfy its duty to defend merely by designating independent counsel to defend the litigation" (*Feliberty v Damon*, 72 NY2d 112, 117 [1988]). Likewise, its fiduciary duty to act in good faith toward both its insured and the excess carrier were not discharged upon the assignment of separate counsel. Finally, the mere fact that CUIC obtained separate counsel is hardly conclusive proof that it was acting selflessly. After all, the firm that initially represented both insureds could not bring a cross claim against one of its clients on behalf of the other.

Accordingly, I would affirm the Supreme Court's decision granting Federal's cross motion for summary judgment on its cause

of action for bad faith. As there is no dispute that the appropriate measure of damages is $1 million, I assume, without deciding, that it is the amount to which Federal is entitled.

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

ENTERED: APRIL 5, 2011

CLERK

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

3277-
3277A Maria Auqui, etc., et al., Index 100232/04
Plaintiffs-Appellants,

-against-

Seven Thirty Limited Partnership, et al.,
Defendants-Respondents.

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Law Offices of Annette G. Hasapidis, South Salem (Annette G. Hasapidis of counsel), for appellants.

Fabiani Cohen & Hall, LLP, New York (Joseph J. Rava of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 7, 2009, which, insofar as appealed from, as limited by the briefs, granted defendants' motion to preclude plaintiffs from litigating the issue of plaintiff Jose Verdugo's accident-related disability beyond January 24, 2006, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered on or about December 8, 2009, which, inter alia, upon granting reargument and renewal, adhered to the prior determination, unanimously dismissed, without costs, as academic.

The motion court erred in according collateral estoppel effect to the determination of the Workers' Compensation Law

Judge that plaintiff's post-January 24, 2006 disability was not causally related to his December 24, 2003 accident. The determination that workers' compensation coverage would terminate as of a certain date for plaintiff's injuries (including head, neck and back injuries, and depression and post-traumatic stress disorder, which are not disputed, and which were caused when plaintiff was struck in the head by a falling sheet of plywood in the course of his employment) is not, nor could it be, a definitive determination as to whether plaintiff's documented and continuing injuries were proximately caused by defendants' actions. While factual issues necessarily decided in an administrative proceeding may have collateral estoppel effect, it is well settled that "an administrative agency's final conclusion, characterized as an ultimate fact or mixed question of law and fact, is not entitled to preclusive effect" (*Akgul v Prime Time Transp., Inc.*, 293 AD2d 631, 633 [2002]; *see Tounkara v Fernicola*, 63 AD3d 648 [2009] [no identity of issues between proceeding before workers' compensation board, which involved determination of whether party was plaintiff's employer for purposes of workers' compensation coverage, and third-party action, which involved determination of whether party was plaintiff's employer for purposes of indemnification provision]).

The agency's determination on ultimate facts, as opposed to mere evidentiary facts, is imbued with policy considerations as well as the agency's expertise (*see Matter of Engel v Calgon Corp.*, 114 AD2d 108, 110 [1986], *affd* 69 NY2d 753 [1987]). Therefore, the Workers' Compensation Board's determination is not entitled to preclusive effect because it involved the ultimate issues of disability and proximate cause, which were committed to the Board's discretion. Indeed, the October 13, 2009 guardianship order that was the partial basis for plaintiffs' renewal motion raises an issue of fact as to the cause of plaintiff's ongoing disability sufficient to warrant denial of defendants' motion.

All concur except Sweeny and Catterson, JJ. who dissent in a memorandum by Catterson, J. as follows:

CATTERSON, J. (dissenting)

Because I believe that the duration of plaintiff's disability was an evidentiary determination fully and fairly litigated by him at the Workers' Compensation proceeding terminating his benefits, he should be precluded from relitigating the issue of continuing disability in this personal injury action. Furthermore, in my opinion, the uncontested appointment of a guardian for the plaintiff more than three years later does not raise a triable issue of fact as to when his work-related disability ended. Therefore, I respectfully dissent.

The plaintiff, a food service deliveryman, was injured on December 24, 2003 when a sheet of plywood allegedly fell from a building under construction owned by defendant Seven Thirty One Limited Partnership. Defendant Bovis Lend Lease LMB, Inc. was the construction manager, and defendant Northside Structure, Inc. was the concrete superstructure subcontractor. The plaintiff's claim for Workers' Compensation (hereinafter referred to as "WC") benefits was approved, and he was compensated for treatment of his head, neck, and back injuries, as well as post-traumatic stress disorder and depression. While receiving benefits, the plaintiff commenced this personal injury action in Supreme Court in 2004.

The following year, in December 2005, while this action was pending, the insurance carrier for the plaintiff's employer moved the WC Board to discontinue plaintiff's benefits on the grounds that he was no longer disabled from the accident. In the January 2006 WC proceeding, the Administrative Law Judge (hereinafter referred to as "ALJ") reviewed the evidence and expert testimony submitted by the plaintiff and the insurance carrier. The ALJ found that the plaintiff no longer suffered any disability as of January 24, 2006 and terminated his benefits. The plaintiff appealed, but on February 1, 2007, a full panel of the WC Board concluded that the plaintiff was no longer disabled as of January 24, 2006, and required no further treatment.

In April 2009, the defendants in the instant personal injury action moved to preclude the plaintiff from relitigating the duration of his work-related injury on the grounds that the issue was already fully litigated and decided in the WC administrative proceeding. While the motion was pending in Supreme Court, the plaintiff's attorney commenced a separate Mental Hygiene Law article 81 proceeding to appoint a guardian for the plaintiff. On October 7, 2009, Supreme Court granted the defendants' motion to preclude.

Based on uncontested evidence of incapacity, the plaintiff's

sister-in-law and wife were appointed as co-guardians on October 13, 2009. The plaintiff then moved for leave to renew and/or reargue the defendants' motion in Supreme Court on the grounds that, inter alia, the guardianship order raised a triable issue of fact with regard to the plaintiff's ongoing work-related disability. By order and decision dated December 3, 2009, Supreme Court granted the plaintiff's motion, but nonetheless adhered to its earlier determination that the plaintiff was precluded from relitigating his ongoing disability.

On appeal, the plaintiff argues that Supreme Court erred because there is no identity of issues between the causation element in a WC determination and proximate cause in a personal injury claim. In addition, the plaintiff asserts that Supreme Court further erred because the appointment of a guardian raises a triable issue of fact with regard to the plaintiff's ongoing disability.

The defendants argue that the WC determination that the plaintiff's disability ended on January 24, 2006 was factual and identical to the issue in the personal injury action, and, further, that the plaintiff had a full and fair opportunity to litigate that question before the ALJ. Therefore, he should be precluded from relitigating whether his disability extended

beyond that date. For the reasons set forth below, I agree with the defendants.

The doctrine of collateral estoppel is applicable where the issue in the current litigation is identical to a material issue decided in a prior proceeding, and the party to be precluded had a full and fair opportunity to litigate the issue in that proceeding. Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500-501, 478 N.Y.S.2d 823, 826-827, 467 N.E.2d 487, 490-491 (1984); Matter of Abady, 22 A.D.3d 71, 81, 800 N.Y.S.2d 651, 658 (1st Dept. 2005).

It is well settled that a final determination by a quasi-judicial administrative agency may be accorded preclusive effect. Ryan, 62 N.Y.2d at 499, 478 N.Y.S.2d at 825. The Workers' Compensation Board has been deemed to be such a quasi-judicial administrative agency. See e.g. Rigopolous v. American Museum of Natural History, 297 A.D.2d 728, 747 N.Y.S.2d 566 (2d Dept. 2002); Lee v. Jones, 230 A.D.2d 435, 659 N.Y.S.2d 549 (3d Dept. 1997), lv. denied, 91 N.Y.2d 802, 666 N.Y.S.2d 564, 689 N.E.2d 534 (1997); Matter of Maresco v. Rozzi, 162 A.D.2d 534, 556 N.Y.S.2d 731 (2d Dept. 1990).

Although an agency's ultimate conclusion of mixed law and fact is not entitled to preclusive effect, collateral estoppel

may be applied to determinations of specific evidentiary facts essential to that conclusion. Matter of Engel v. Calgon Corp., 114 A.D.2d 108, 111, 498 N.Y.S.2d 877, 879 (3d Dept. 1986), aff'd, 69 N.Y.2d 753, 512 N.Y.S.2d 801, 505 N.E.2d 244 (1987), citing Hinchey v. Sellers, 7 N.Y.2d 287, 197 N.Y.S.2d 129, 165 N.E.2d 156 (1959); see e.g. Ryan, 62 N.Y.2d at 502, 487 N.Y.S.2d at 827 (while the ultimate fact of misconduct was not entitled to collateral estoppel effect, determinations of material factual issues by the ALJ in the plaintiff's unemployment claim precluded relitigation of those issues in his wrongful discharge action).

Here, the evidentiary fact necessarily determined in the WC proceeding was that the plaintiff was no longer disabled *at all* beyond January 24, 2006. The decision of the ALJ clearly indicates that the plaintiff's claim of continuing disability was rejected because he failed to present sufficient medical evidence to show any disability after that date. Observing that the plaintiff's cane appeared to be "merely a prop," the ALJ credited the defendants' orthopedic expert opinion that the plaintiff's test results were normal and necessarily rejected the testimony of the plaintiff's neurologist. Furthermore, the ALJ completely discounted the plaintiff's treating psychiatrist's opinion that the plaintiff suffered permanent psychiatric disability, noting

that inconsistencies in the doctor's responses rendered his testimony not credible.

Determination of the duration of the plaintiff's work-related disability was material and the very point of the WC proceeding, and is the exact issue that the defendants seek to preclude the plaintiff from litigating in the personal injury action. Additionally, the plaintiff's representation by an attorney, presentation and cross-examination of expert testimony, and submission of medical reports, assured that he had a full and fair opportunity to litigate the issue.

In my opinion, the majority is mistaken in its characterization of the ALJ's determination as an ultimate fact involving disability and proximate cause. An agency's determination of an ultimate fact as opposed to a "pure or evidentiary fact[]" is based upon analysis of "unique, and often times complex, statutes and regulations which apply specifically to [that agency]." Engel, 114 A.D.2d at 110, 498 N.Y.S.2d at 878.

That is not the case here. There is no indication that the ALJ considered causation at all much less that the decision analyzed causation in the specific context of WC claims. The defendants did not contest whether the plaintiff's injuries were

related to an on-the-job accident, or offer any proof that his claimed disability was caused by a prior non-work-related incident. The ALJ did not interpret complex statutes or regulations, but rather evaluated the credibility of each party's medical testimony to determine if the plaintiff was still disabled.

Nor is the duration of the plaintiff's disability an ultimate fact in the personal injury action. The length of time that a plaintiff is disabled is relevant to the quantum of damages, an evidentiary factual determination, not, as the plaintiff asserts, a mixed issue of law and fact involving proximate cause.

Moreover, the majority's reliance on Engel, Akgul, and Tounkara is entirely misplaced. The agency decisions at issue in these cases all deal with the classification of parties based upon statutory definitions. See Tounkara v. Fernicola, 63 A.D.3d 648, 650, 883 N.Y.S.2d 27, 29 (1st Dept. 2009); Akgul v. Prime Time Transp., 293 A.D.2d 631, 633, 741 N.Y.S.2d 553, 557 (2d Dept. 2002); Engel, 114 A.D.2d at 110-111, 498 N.Y.S.2d at 878-879 (the National Labor Relations Board's definition of the plaintiffs as employees did not preclude a finding that they were defined as sub-contractors by the Division of Human Rights). In

Tounkara, the decision not to give collateral estoppel effect to a WC determination was also based on the fact that the third-party plaintiff to be precluded was not a party to the WC proceeding and therefore had no prior full and fair opportunity to litigate. Tounkara, 63 A.D.3d at 650, 883 N.Y.S.2d at 29. Here, there is a total identity of issues with regard to the factual determination of the duration of the plaintiff's disability, and this plaintiff had a full and fair opportunity to litigate at the WC proceeding.

Furthermore, the plaintiff's guardianship order does not raise a triable issue of fact with regard to the ALJ's determination, or have any bearing on the application of collateral estoppel in the personal injury action. The appointment of a guardian is a highly discretionary, flexible decision taking into account the individual needs of the incapacitated person, and his wishes and preferences. See N.Y. Mental Hygiene Law § 81.01. In the plaintiff's article 81 proceeding, the appointment of his wife and sister-in-law as guardians was unchallenged and fully supported by the plaintiff. The same psychiatrist that testified before the ALJ also testified in the guardianship proceeding; however, in the guardianship proceeding there was no evidence required to rebut

the plaintiff's claimed incapacity or show that his incapacity more than three years later was unrelated to the accident. As such, a determination of incapacity based upon the same testimony that was discredited by the WC ALJ does not raise a triable issue of fact warranting denial of the defendant's motion.

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

ENTERED: APRIL 5, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3522 Gettinger Associates, L.P., et al., Index 111166/06
Plaintiffs-Respondents,

-against-

Abraham Kamber Company LLC,
Defendant-Appellant.

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Penn Proefriedt Schwarzfeld & Schwartz, New York (Neal Schwarzfeld of counsel), for appellant.

Akerman Senterfitt LLP, New York (Donald N. David and Martin Domb of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered June 11, 2010, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the fourth, sixth and seventh causes of action of the complaint in the action entitled *1407 Broadway Real Estate LLC v Abraham Kamber & Company LLC*, unanimously reversed, on the law, with costs, and the motion granted.

This consolidated action arises primarily from the service of a number of notices of default by defendant as sublessor in connection with its sublease of a 43-story commercial building to plaintiff Gettinger Associates, LLP (Gettinger). Gettinger assigned the sublease to plaintiff 1407 Broadway Real Estate LLC (Broadway) for $122 million in January 2007.

A notice of default, dated July 21, 2006, alleged that the building was not maintained in thorough repair. An 11-page schedule of defects included severe deterioration of the roof, "[a]ntiquated and deteriorated windows throughout" and "[m]ain electric service inadequate for modern requirements."

Subsequent notices of default alleged failure to comply with sections of the sublease requiring the sublessor's approval for renovations, alterations or changes costing more than $50,000, and for obtaining a performance bond. Defendant also served Gettinger with a notice to cure for improperly assigning the sublease.

In 2006, Gettinger commenced a *Yellowstone* action against defendant. On or about September 4, 2007, Broadway, asserting seven causes of action, commenced an action for declaratory judgment and damages. The gravamen of the complaint was that defendant had breached the sublease and committed intentional torts against Broadway and its predecessor, Gettinger, in an attempt to wrongfully terminate plaintiffs' leasehold interest. The actions were subsequently consolidated.

On or about May 26, 2009, defendant moved for summary judgment dismissal of the second through seventh causes of action. The court denied the motion as to the fourth, sixth and

seventh causes of action for tortious interference with a prospective sub-sublease, for breach of the covenant of good faith and fair dealing, and for breach of the covenant of quiet enjoyment. For the following reasons, we now reverse and dismiss these causes of action in their entirety.

The fourth cause of action for tortious interference with a prospective sub-sublease must be dismissed since plaintiffs failed to establish that defendant's interference was accomplished by wrongful means or motivated solely by malice (*Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300 [1999]). Contrary to plaintiffs' argument, the sublease did not require defendant to issue a non-disturbance agreement (NDA) at no cost; hence, the failure to do so does not constitute sufficient "wrongful means" to support a claim for tortious interference (*see e.g. Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183 [1980]). Moreover, plaintiffs submitted nothing more than the self-serving affidavit of Gettinger's principal in support of their assertion that their prospective sub-sublessee would not enter into a lease without an NDA or an estoppel certificate. This bare assertion is insufficient to raise an issue of fact as to whether the sub-sublease would have been consummated "but for" defendant's refusal to provide the

document (*see Slatkin v Lancer Litho Packaging Corp.*, 33 AD3d 421 [2006]). In any event, plaintiffs allege that defendant's conduct was motivated by a desire to purchase the leasehold. Thus, defendant's conduct could not be motivated solely by malice.

The sixth cause of action for breach of the covenant of good faith and fair dealing also must be dismissed. It is well established that a covenant of good faith and fair dealing is implicit in all contracts (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). This covenant "is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Jaffe v Paramount Communications*, 222 AD2d 17, 22-23 [1996]).

Here, Gettinger alleged that the covenant was breached essentially by the "issuing [of] repeated but unjustified notices of default," and "intrusive and unreasonable" inspections of the premises. The propriety of the issuance of the July 21, 2006 default notice is heavily disputed by the parties. However, defendant met its burden of establishing that certain defective conditions listed in the default notice existed at the time the

notice was served. These included the windows, which thereafter underwent a $4 million replacement; the electrical system (Broadway's engineers found that the main electric switchboards were "antiquated, obsolete and dangerous"); the elevators, which underwent a modernization program after Broadway's engineers found that certain testing of the elevators provided "very poor" results; the exterior brickwork, which the building manager testified was in the cited defective condition at the time the notice was served; and the roof, which the building manager testified was also in the cited defective condition when the notice was served. Thus, plaintiff cannot show that the July 21, 2006 notice of default was unjustified notwithstanding that evidence in the record creates a triable issue of fact as to some of the other defective conditions listed in the 11-page schedule of defects. Even if incorrectly cited, those alleged defective conditions still could not render the notice of default unjustified or issued in bad faith given that some basis existed for the issuance. Moreover, the fact that certain items may have been corrected before service of the July 21, 2006 notice is not evidence of bad faith in the absence of proof that defendant, an out-of-possession sublessor, knew that the conditions had been cured.

Further, plaintiffs' claim that certain other default notices were based on mere "technical" violations is also unsupported as "[t]he violation of an express covenant not to make any alterations without the landlord's permission is a violation of a substantial obligation of the tenancy" (*Haberman v Hawkins*, 170 AD2d 377, 377-378 [1991][internal quotation marks and citations omitted]). It is undisputed that Gettinger did not provide plans and specifications and obtain approval prior to the performance of the "alterations, rebuildings, replacements, changes, additions, and improvements" listed in certain of the default notices. It is further undisputed that Gettinger did not provide the requisite bonds prior to the issuance of the notices. Hence, defendant properly served notices arising out of the breach of those provisions of the sublease. Plaintiffs' argument that the relevant sublease section exempted mandated regulatory work and "routine" maintenance and repairs is unsupported by the language of the sublease. Similarly, defendant's inspections of the premises, which were allowed by the sublease and which, in a prior action, the court found did not breach the covenant of good faith and fair dealing, cannot serve as the basis for such a claim here.

The seventh cause of action, alleging a breach of the

covenant of quiet enjoyment also must be dismissed given that plaintiffs failed to establish an actual or constructive eviction from the premises (*see Jackson v Westminster House Owners Inc.*, 24 AD3d 249 [2005], *lv denied* 7 NY3d 704 [2006]; *Dinicu v Groff Studios Corp.*, 257 AD2d 218 [1999]).

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

ENTERED: APRIL 5, 2011

CLERK

Tom, J.P., Sweeny, Freedman, Richter, Abdus-Salaam, JJ.

4038- Christopher Chunn, Index 116764/06
4039- Plaintiff-Respondent, 590332/07
4040 590870/07

-against-

New York City Housing Authority,
Defendant-Appellant,

American Security Systems, Inc.,
Defendant.

- - - - - -

New York City Housing Authority,
Third-Party Plaintiff-Respondent,

-against-

American Security Systems, Inc.,
Third-Party Defendant-Appellant.

[And a Second Third-Party Action]

_____

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for appellant/respondent.

Kral, Clerkin, Redmond, Ryan, Perry & Girvan, LLP, New York (Rhonda D. Thompson of counsel), for American Security Systems, Inc., appellant.

Finz & Finz, P.C., Mineola (Jay L. Feigenbaum of counsel), for Christopher Chunn, respondent.

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Orders, Supreme Court, New York County (Louis B. York, J.), entered September 2, 2009, which, to the extent appealed from as limited by the briefs, denied defendant New York City Housing Authority's (NYCHA) motion for summary judgment dismissing the

complaint as against it and denied defendant/third-party defendant American Security Systems, Inc.'s (ASSI) cross motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to grant ASSI's motion, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered April 29, 2010, which granted NYCHA's motion for reargument and adhered to its original determination, unanimously dismissed, without costs, as academic. The Clerk is directed to enter judgment dismissing the third-party complaint against ASSI.

Plaintiff alleges that he sustained injuries as a result of being attacked in an apartment building owned and operated by defendant NYCHA. Plaintiff testified that on the evening of December 31, 2005, he went to visit his sister, who resides in apartment 4F of the building. Upon reaching the building, he noticed several people standing around outside. Plaintiff entered the building through the front entrance without using a key or the intercom, but simply opened the door, which had a broken lock. There was evidence that the front door lock was continually malfunctioning and that it was inoperable for a week before the assault.

Plaintiff proceeded down the hallway, and as he reached the

door to the stairwell, he observed two men enter the building though the front door. Plaintiff did not see a key in either man's hand, nor did he see them use the intercom. As plaintiff walked up the stairs from the first to the second floor, he observed these same two men enter the stairwell and follow him. Neither of the men made any effort to conceal his face. As plaintiff continued up the stairs, he noticed the two men getting closer. Plaintiff never made it to his sister's fourth-floor apartment; he was found unconscious on the third-floor hallway, and the evidence suggests that he was struck on the head with a glass bottle and robbed. As a result of the attack, plaintiff sustained severe head and brain injuries.

In cases alleging negligence based on inadequately secured building entrances, to establish the element of proximate cause, a plaintiff must demonstrate that his or her assailant was an intruder and not a building resident or guest (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550-551 [1998]). To defeat a motion for summary judgment, a plaintiff need not conclusively establish that the assailants were intruders, but must raise triable issues of fact as to whether it was more likely than not that the assailants were intruders who gained access to the

premises through the negligently-maintained entrance (*see Raghu v 24 Realty Co.*, 7 AD3d 455, 456 [2004]).

Here, there is a triable issue of fact as to whether the two men who followed plaintiff into the building and up the stairs were intruders (*see Reynolds v New York City Hous. Auth.*, 271 AD2d 280 [2000]; *see also Perez v New York City Hous. Auth.*, 294 AD2d 279 [2002]). Plaintiff testified that before entering the front door, he saw several individuals standing around outside. A jury could reasonably infer that these individuals, upon seeing plaintiff open the door without using a key or the intercom, took advantage of the faulty security and followed plaintiff inside. Likewise, a jury could conclude that the two men, who made no effort to conceal their identity, were the same individuals who assaulted plaintiff.

ASSI's motion for summary judgment dismissing the third-party complaint should have been granted. NYCHA concedes that ASSI's insurance policies name it as an additional insured, so there is no merit to NYCHA's claim against ASSI for failure to procure insurance. As to its contribution claim, NYCHA failed to raise an inference that ASSI owed it a duty of reasonable care independent of its contractual obligations, or that ASSI owed a duty directly to plaintiff, and that a breach of either duty

contributed to plaintiff's injuries (*see Kearsey v Vestal Park, LLC*, 71 AD3d 1363, 1365 [2010]). In any event, the motion court found that ASSI owed no duty directly to plaintiff, and NYCHA does not challenge this determination. Since NYCHA's liability, if any, will be based on its own negligence, it has no claim for common-law indemnification (*see Corley v Country Squire Apts., Inc.*, 32 AD3d 978, 979 [2006]). As to NYCHA's claim for contractual indemnification, ASSI established prima facie that it fulfilled its contractual obligations by performing quarterly maintenance inspections, about which NYCHA never made any complaint, and made all repairs that NYCHA requested of it in a professional, workmanlike manner. NYCHA, in opposition, failed to raise an issue of fact (*see Kearsey*, 71 AD3d at 1366).

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

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

ENTERED: APRIL 5, 2011

CLERK

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4092 Carmen A. Gonzalez, Index 105681/09
Plaintiff-Appellant,

-against-

ARC Interior Construction, et al.,
Defendants-Respondents.

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

Law Office of James Toomey, New York (Evy L. Kazansky of counsel), for respondents.

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Order, Supreme Court, New York County (George J. Silver, J.), entered June 14, 2010, which, insofar as appealed from as limited by the briefs, upon granting plaintiff's motion for summary judgment on the issue of liability, directed that the trial on damages would encompass the issue of plaintiff's comparative fault, unanimously affirmed, without costs.

Plaintiff alleges that a motor vehicle owned by defendant ARC Interior Corporation and operated by defendant Carmine Mantone struck her as she was walking through an intersection. Plaintiff moved for summary judgment on the issue of liability before any depositions were conducted. Accordingly, the factual record is sparse, consisting only of the bare allegations in the complaint, a certified copy of a police report, a very brief

affidavit by plaintiff and an equally brief affidavit by Mantone. In her affidavit, plaintiff asserts that she was crossing the intersection with the light in her favor, and that she had looked for oncoming traffic before proceeding. The police report states that Mantone noticed plaintiff at the "last minute." In his affidavit in opposition, Mantone stated that he made a left turn into the intersection with the light in his favor, only after looking into the intersection and observing no pedestrians there. He claimed that he did not notice plaintiff until the moment of impact.

The motion court found that plaintiff established her prima facie entitlement to summary judgment by showing that Mantone failed to yield the right of way. The court stated that, even if defendant had raised an issue of fact as to plaintiff's own culpable conduct, this was not a bar to granting plaintiff's motion. The court relied on *Tselebis v Ryder Truck Rental, Inc.* (72 AD3d 198 [2010]), in which this Court held that "it is not plaintiff's burden to establish defendants' negligence as the sole proximate cause of his injuries in order to make out a prima facie case of negligence" and that a plaintiff "must generally show that the defendant's negligence was *a substantial cause* of the events which produced the injury" (72 AD3d at 200 [internal

citation and quotation marks omitted]). The motion court directed that the matter be set down for a trial on damages "which is to encompass the issues of Plaintiff's culpable conduct and the extent to which [her] recovery should be diminished in proportion thereto."

We agree with the court that *Tselebis* controls this case. Plaintiff demonstrated that defendants were liable for her injuries by establishing that she was crossing the street, within the crosswalk, with the light in her favor, when she was struck by the vehicle driven by Mantone (*see Strauss v Billig*, 78 AD3d 415 [2010] *lv dismissed* __ NY3d __, 2011 NY Slip Op 63766 [2011]; *Beamud v Gray*, 45 AD3d 257 [2007]). Because comparative negligence is not a complete bar to recovery (CPLR 1411), plaintiff is entitled to summary judgment on her negligence claim.

However, we reject plaintiff's argument that as part of the award of summary judgment, the court should have, essentially, dismissed the affirmative defense of culpable conduct as a matter of law. The police report and plaintiff's bare-bones affidavit stating that she looked for oncoming traffic before crossing the street were insufficient to eliminate any issue of fact whether plaintiff exercised reasonable care in crossing the intersection

(*see Thoma v Ronai*, 189 AD2d 635 [1993], *affd* 82 NY2d 736 [1993]; *Lopez v Garcia*, 67 AD3d 558 [2009]; *Hernandez v New York City Tr. Auth.*, 52 AD3d 367, 368 [2008]). It is noted again that the motion was made before defendants had an opportunity to depose plaintiff concerning the circumstances surrounding the accident and test her credibility (*see Lopez*, 67 AD3d at 558-559; CPLR 3212[f]; *see also Donato v ELRAC, Inc.*, 18 AD3d 696, 698 [2005]). Thus, dismissal of the defense would have been premature.

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

ENTERED: APRIL 5, 2011

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Manzanet-Daniels, JJ.

4688-4689 The People of the State of New York, Respondent,

-against-

Jose Rodriguez, also known as Juan Rivera Escalante, Defendant-Appellant.

Ind. 254/98

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

Order, Supreme Court, New York County (Patricia M. Nuñez, J.), entered May 13, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court considered the appropriate factors and properly exercised its discretion in concluding that substantial justice dictated a denial of resentencing. The underlying drug crime involved a large quantity of cocaine. Defendant was indicted for first-degree criminal possession of a controlled substance, but was permitted to plead guilty to third-degree possession and released on bail pending sentencing. Defendant absconded, remained outside this jurisdiction for many years, and was convicted of a new drug felony, all of which was in violation of

his plea agreement. In addition, defendant had absconded while awaiting sentencing on his conviction in Bronx County of criminal possession of a weapon in the third degree. Under the circumstances, evidence of defendant's rehabilitation while incarcerated was outweighed by the factors militating against resentencing (*see People v Marte*, 44 AD3d 442 [2007], *lv dismissed* 9 NY3d 991 [2007]; *see also People v Aguirre*, 47 AD3d 489 [2008], *lv dismissed* 10 NY3d 761 [2008]).

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

ENTERED: APRIL 5, 2011

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Manzanet-Daniels, JJ.

4690 Jack Benishai, et al., Index 105669/10
Petitioners-Respondents,

-against-

David Benishai,
Respondent-Appellant.
- - - - - -
Robert Garson, et al.,
Nonparty-Respondents.

_____

Kent, Beatty & Gordon, LLP, New York (Jack A. Gordon of counsel), for appellant.

Garson, Segal, Steinmetz, Fladgate LLP, New York (Robert Garson of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered September 29, 2010, which, insofar as appealed from, denied respondent's motion for sanctions against petitioners' attorneys non-party Robert Garson, Esq., and the law firm of Garson, Segal, Steinmetz, Fladgate LLP (collectively, Garson), unanimously affirmed, with costs.

The denial of sanctions as against Garson was a provident exercise of the court's discretion. Respondent failed to show that Garson's actions in obtaining the ex parte temporary restraining order "were completely without merit, were made primarily to harass or maliciously injure, or falsely asserted a

material fact" (*Parkchester S. Condominium Inc. v Hernandez*, 71 AD3d 503, 504 [2010]). Nor was the challenged conduct "undertaken primarily to delay or prolong the resolution of the litigation" (22 NYCRR 130-1.1[c][2]; *see Sakow v Columbia Bagel, Inc.*, 32 AD3d 689 [2006]).

The record establishes that pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.7(f), respondent's attorney was notified in advance of the date, time, and place where the application seeking a TRO would be made. Furthermore, there was no evidence that respondent was harmed by the issuance of the TRO. The stipulation that he entered into in which the parties agreed, inter alia, "not to pursue any outstanding demands for arbitration" pending the court's final ruling on the April 2010 petition provided the same relief that petitioners obtained through the TRO.

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

ENTERED: APRIL 5, 2011

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Manzanet-Daniels, JJ.

4691 Barbara Lerner, Index 107347/07
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina and Andrea M. Alonzo of counsel), for appellant.

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

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Order, Supreme Court, New York County (Carol E. Huff, J.), entered December 10, 2009, which, in this action for personal injuries sustained when plaintiff tripped on a broken tile in defendant's subway station and fell, denied defendant's motion to set aside the jury's verdict awarding plaintiff $75,000 for past pain and suffering and $50,000 for future pain and suffering, unanimously affirmed, without costs.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see generally McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]). Plaintiff's testimony demonstrated where she fell on the broken tile and was corroborated by the testimony of the police officer who responded to the scene and easily found the broken tile plaintiff

identified. Moreover, the testimony of an eyewitness to plaintiff's fall established that defendant had constructive notice of the defective condition. Indeed, the eyewitness testified that the area of the station had been littered with broken tiles for years prior to plaintiff's fall (*see Hauptner v Laurel Dev., LLC*, 65 AD3d 900, 902-903 [2009]).

Defendant's argument that the trial court erred in not permitting its counsel to cross-examine plaintiff's medical expert on an injury that was not pleaded in the bills of particulars is not preserved for appellate review (CPLR 4017). In any event, the trial court providently exercised its discretion in declining to permit defense counsel's line of questioning on the unpleaded injury especially since it precluded plaintiff's counsel from the same line of questioning on direct (*see Salm v Moses*, 13 NY3d 816, 817 [2009]).

The trial court did not err in giving the missing witness charge to the jury based on defendant's failure to call its

medical expert. Plaintiff established her entitlement to the charge and defendant failed to show that its expert's testimony would have been cumulative to the testimony of plaintiff's expert (*see O'Brien v Barretta*, 1 AD3d 330 [2003]).

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

ENTERED: APRIL 5, 2011

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Manzanet-Daniels, JJ.

4692 The People of the State of New York, SCI 30043/07
Respondent,

-against-

Brian McGarghan,
Defendant-Appellant.

_____

Treyvus & Konoski, P.C., New York (Bryan Konoski of counsel), for appellant.

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

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Order, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), entered on or about December 7, 2007, which directed defendant to register as a level-one sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C) for 20 years with credit for time already registered, and bringing up for review a prior order, same court and Justice, entered on or about September 5, 2007, which determined that, absent an article 78 proceeding, the Supreme Court did not have jurisdiction to review the determination of the Board of Examiners of Sex Offenders that defendant is required to register as a sex offender on the basis of an out-of-state conviction, unanimously affirmed, without costs.

The court correctly determined that an article 78 proceeding

against the Board of Examiners is the only means by which defendant could have sought review of the Board's determination that his Vermont conviction subjects him to the requirement of registration in New York (*see People v Linden*, 79 AD3d 598 [2010]). This conclusion is consistent with the Court of Appeals decision in *North v Board of Examiners* (8 NY3d 745 [2007]), which held that "SORA is not a penal statute and the regulation requirement is not a criminal sentence" (*id.* at 752). Defendant raises several constitutional challenges to Correction Law § 168-a(2)(d)(ii), which subjects a sex offender to registration requirements if he or she was convicted of "a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred." To the extent defendant is claiming it is unconstitutional to require him to register in New York at all, his arguments in that regard are not properly before this Court, because "a person seeking review of the Board's determination that he or she is obligated to register in the first place is required to bring an article 78 proceeding" (*Linden*, 79 AD3d at 598).

Defendant also challenges the length of his required registration period. He claims it is unconstitutional for New

York to require him to register for the 20-year mandatory period for level-one offenders such as himself, inasmuch as the State of Vermont, where he formerly resided and where the underlying sex crime occurred, only required him to register for 10 years. He cites the Full Faith and Credit Clause, the Equal Protection Clause, the Privileges and Immunities Clause and the constitutional right to travel. None of these claims has any merit.

"The administrative manner in which a state chooses to exercise the registration requirements for a sex offender who moves into its jurisdiction falls squarely within the power of that state and is not governed by the procedures in effect in the state where the offender previously resided" (*People v Arotin*, 19 AD3d 845, 846-847 [2005]). "The purpose of the Full Faith and Credit Clause is to avoid conflicts between States in adjudicating the same matters . . ." (*Matter of Luna v Dobson*, 97 NY2d 178, 182 [2001]). Accordingly, a different state's registration requirement is not the same matter, and New York is not required to impose varying periods of registration for sex offenders depending on the laws of the states where the offenders previously resided or where the offenses were committed.

Defendant's other constitutional challenges to the length of

his registration period are likewise meritless. New York is treating defendant exactly the same way it would treat a lifelong New York resident who committed the same sex crime while visiting Vermont. Finally, we note that the court gave defendant full credit toward the 20-year period for all the time that he had been registered in Vermont, as well as the time in which he had registered in New York while these proceedings were pending.

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

ENTERED: APRIL 5, 2011

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Manzanet-Daniels, JJ.

4695 Uday C. Naval, Index 101164/10
Petitioner-Appellant,

-against-

American Arbitration Association,
Respondent.
- - - - - - - -
City University of New York, et al.,
Nonparty-Respondents.

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Uday C. Naval, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for City University of New York and Herbert H. Lehman College, respondents.

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Appeal from order, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 1, 2010, which declined to sign an order to show cause, unanimously dismissed, without costs, as taken from a nonappealable paper.

"No appeal lies from an order declining to sign an order to show cause" (*Nova v Jerome Cluster 3, LLC*, 46 AD3d 292, 293 [2007]). In any event, the court properly declined to sign the order to show cause on the ground that the petition is untimely, having been filed more than 90 days after delivery of the arbitration award to petitioner (*see* CPLR 7511[a]). Petitioner has failed to show a basis for tolling under CPLR 208 (see

Karczewicz v New York City Tr. Auth., 244 AD2d 285, 285 [1997]). Petitioner's failure to name the City University of New York as a respondent is also fatal to his claim (*see* CPLR 1001[a]).

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: APRIL 5, 2011

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

4696 Christine O'Sullivan, Index 109638/05
Plaintiff-Appellant,

-against-

Armando Velez, et al.,
Defendants-Respondents.

_____

Asta & Associates, P.C., New York (Eliot S. Bickoff of counsel), for appellant.

Brand Glick & Brand, Garden City (Peter M. Khrinenko of counsel), for Armando Velez and Elrac, Inc., respondents.

Baker, McEvoy, Morressey & Moskovitz, P.C., New York (Stacy R. Seldin of counsel), for Mahmoud R. Hassan, respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered January 7, 2010, which, to the extent appealed from, as limited by the briefs, in an action for personal injuries arising from a motor vehicle accident, granted defendant Mahmoud R. Hassan's motion and defendants Armando Velez and Elrac, Inc.s' cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny the motion and cross motion with respect to the "permanent consequential limitation" and "significant limitation" categories and otherwise affirmed, without costs.

With respect to the "permanent consequential limitation" and

"significant limitation" serious injury categories (Insurance Law § 5102[d]), as related to plaintiff's right wrist injury, defendants' papers failed to eliminate issues of fact as to whether plaintiff suffered a "serious injury" to the wrist and as to the cause of the injury and thus failed to meet their prima facie burden of demonstrating entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320, 324 [1986]).

In any event, regarding the wrist, plaintiff's opposition raised triable issues of fact. Specifically, plaintiff's treating physician submitted an affirmation setting forth findings based on objective tests and opinions conflicting with those of defendants' experts (see *Grill v Keith*, 286 AD2d 247, 248 [2001]). Because we find that plaintiff is entitled to present her claim involving her wrist to a jury, she is also entitled to seek damages for injuries to her neck, even if those injuries themselves did not meet the threshold (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [2010]).

With respect to the 90/180 day category, defendants made a prima facie showing of entitlement to summary judgment, as their respective moving papers included plaintiff's deposition testimony in which she testified that she was not confined to her

home for any period nor did she miss work on account of the injuries allegedly sustained in the accident (see *Byong Yol Yi v Canela*, 70 AD3d 584, 584-85 [2010]). Plaintiff failed to create an issue of fact with respect to the 90/180 day category.

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

ENTERED: APRIL 5, 2011

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Manzanet-Daniels, JJ.

4702 In re Joseph M.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elina Druker of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about March 9, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the second and third degrees and criminal possession of a weapon in the fourth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning identification and credibility. Although the victim did not identify appellant,

he was identified by a bystander who had an ample opportunity to observe the incident. Furthermore, appellant was arrested immediately after the attack, while still in the company of other participants.

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

ENTERED: APRIL 5, 2011

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Manzanet-Daniels, JJ.

4703-
4703A Children's Day Treatment Center and School, Inc., etc., Plaintiff-Respondent,

-against-

Martha Dorn, Defendant-Appellant.

Index 600488/08
600484/08

_____

Levy Davis & Maher, LLP, New York (Jonathan A. Bernstein of counsel), for appellant.

The Stolper Group LLP, New York (Michael Stolper of counsel), for respondent.

_____

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered on or about December 28, 2009, which, after a nonjury trial, awarded defendant the sum of $6,603.70, unanimously affirmed, without costs. Appeal from decision, same court and Justice, rendered October 23, 2009, unanimously dismissed, without costs, as taken from a nonappealable paper.

No seven-member board of directors of plaintiff manifested to defendant that the five members who purported to enter into the separation agreement that defendant seeks to enforce had the authority to do so (*see Hallock v State of New York*, 64 NY2d 224, 231 [1984]). Those five members "[could] not by [their] own acts imbue [themselves] with apparent authority" (*see id.*). Moreover,

to the extent defendant relied on an appearance of authority arising from the board president's or plaintiff's counsel's actions in negotiating and drafting the agreement, her reliance was unreasonable, since she was familiar with the by-laws requiring that the board be composed of a minimum of seven members, she was aware that there were only five members when the agreement was entered into, and she had her own counsel (*see Meyerson v Contracting Plumbers Assn. of Brooklyn & Queens, Inc.*, 606 F Supp 282, 289-290 [SD NY 1985]).

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

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

ENTERED: APRIL 5, 2011

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Manzanet-Daniels, JJ.

4704 The People of the State of New York, Ind. 5361/09
Respondent,

-against-

Dwinel Monroe,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Robert Stolz, J.), rendered on or about October 21, 2009, 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: APRIL 5, 2011

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Manzanet-Daniels, JJ.

4706 NYP Holdings, Inc., Index 601404/04
Plaintiff, 591080/04

-against-

McClier Corporation, et al.,
Defendants.
- - - - - -
McClier Corporation,
Third-Party Plaintiff-
Respondent-Appellant,

Leonard J. Skiba, et al.,
Third-Party Plaintiffs,

-against-

Ruttura & Sons Construction Company, Inc.,
Third-Party Defendant-
Appellant-Respondent,

Botto Mechanical Corporation, et al.,
Third-Party Defendants.

_____

Peckar & Abramson, P.C., New York (Alvin Goldstein of counsel), for appellant-respondent.

Zetlin & De Chiara LLP, New York (Raymond T. Mellon of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 13, 2010, which, insofar as appealed from as limited by the briefs, granted third-party defendant Ruttura & Sons Construction Company, Inc.'s motion pursuant to CPLR 3211(a)(7) and 3212 to dismiss the second and fourth causes of

action of the third-party complaint (for contractual indemnification and contribution, respectively) but denied the motion as to the first and third causes of action (for breach of contract and common-law indemnification, respectively), unanimously affirmed, without costs.

The motion that resulted in the order appealed from was Ruttura's second motion; it had previously made a motion for summary judgment dismissing the third-party complaint based on the volunteer doctrine (*see* 65 AD3d 186 [2009]).

As a general rule, "[p]arties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment" (*Phoenix Four v Albertini*, 245 AD2d 166, 167 [1997] [internal quotation marks and citation omitted]). However, there are exceptions to this rule (*see e.g. Varsity Tr. v Board of Educ. of City of N.Y.*, 300 AD2d 38, 39 [2002]).

Ruttura made its previous motion on behalf of all third-party defendants, and not every third-party defendant had the same subcontract with third-party plaintiff McClier Corporation that Ruttura did; for example, third-party defendant Stallone Testing Laboratories, Inc.'s subcontract was oral. Therefore, Ruttura was not barred from making the instant motion with

respect to the cause of action for contractual indemnification. However, the arguments that Ruttura now raises with respect to common-law or implied indemnification (McClier's participation in the wrongdoing alleged by plaintiff), contribution (the lack of tort damages), and breach of contract (McClier's failure to allege damages other than indemnification damages) could have been made on behalf of all the third-party defendants; hence, they should have been raised on the prior motion (*see Phoenix*, 245 AD2d at 167).

In addition, third-party defendants Stallone, Fred Geller Electrical, Inc., and First Women's Fire Systems Corp. had previously moved to dismiss the third-party complaint; the court (Herman Cahn, J.) granted the motion in part and denied it in part (*see* 2007 NY Slip Op 34111[U]). To the extent these third-party defendants' interests were identical to Ruttura's, they were in privity (*see Matter of Midland Ins. Co.*, 71 AD3d 221, 226 [2010]), and to the extent an issue was actually decided on the Stallone motion, law of the case applies (*see id.* at 225-226). Thus, law of the case bars McClier's contribution claim against Ruttura and permits the common-law indemnification and breach of contract claims to survive. However, it does not prevent Ruttura from moving against the contractual indemnification claim, as

Justice Cahn did not decide this issue.

Because neither the rule against successive summary judgment motions nor law of the case barred Ruttura from moving against the contractual indemnification claim, we consider it on the merits. The indemnification provision in the McClier-Ruttura subcontract states, in pertinent part, "[T]he Subcontractor shall indemnify . . . the . . . Contractor . . . from and against all claims . . . arising out of or resulting from performance of the Subcontractor's Work . . ., provided that any such claim . . . is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (*other than the Work itself*)" (emphasis added).

One paragraph of the complaint alleges, in conclusory fashion, that "the Post has been damaged and continues to suffer damages to itself *and to other property*" (emphasis added). However, conclusory allegations are insufficient (*see Celnick v Freitag*, 242 AD2d 436, 437 [1997]; *Pitcock v Kasowitz, Benson, Torres & Friedman LLP*, 74 AD3d 613, 615 [2010]). Read as a whole, the complaint's factual allegations show that the only property damage suffered by plaintiff was damage to its printing plant – for example, cracked concrete slabs and the fact that repair work will result in physical damage to the plant.

Therefore, by submitting the complaint with its moving papers, Ruttura made a prima facie showing of entitlement to judgment as a matter of law on the contractual indemnification claim.

In opposition to this part of Ruttura's motion, McClier merely relied on the complaint. However, "[t]he burden upon a party opposing a motion for summary judgment is not met merely by a repetition or incorporation by reference of the allegations contained in pleadings or bills of particulars, verified or unverified" (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 343 [1974] [internal quotation marks and citation omitted]). "Bald conclusory assertions are insufficient to defeat summary judgment" (*Spaulding v Benenati*, 57 NY2d 418, 425 [1982]).

Because the economic losses claimed by plaintiff do not fall within the scope of the contractual indemnification clause, the motion court properly dismissed the second cause of action (*see e.g. Dormitory Auth. of State of N.Y. v Caudill Rowlett Scott*, 160 AD2d 179, 180-181 [1990], *lv denied* 76 NY2d 706 [1990]).

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

ENTERED: APRIL 5, 2011

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Manzanet-Daniels, JJ.

4707 Ricky Cardona, et al., Index 16042/05
Plaintiffs-Respondents,

-against-

Ho-Ro Trucking Company, Inc.,
Defendant-Appellant.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for appellant.

Sandra Janin, Long Beach, for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about July 8, 2010, which, to the extent appealed from as limited by the briefs, denied that portion of defendant's motion seeking summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, an employee of nonparty AZM Trucking, was operating a cab owned by AZM and hauling a trailer owned by defendant Ho-Ro Trucking Company, Inc., when the cab and trailer overturned on the ramp to the Van Wyck Expressway. AZM had subcontracted with Ho-Ro to haul and deliver trailers on Ho-Ro's behalf.

The court properly denied that branch of Ho-Ro's motion seeking summary judgment dismissing the complaint. Ho-Ro failed

to meet its prima facie burden of establishing, as a matter of law, that plaintiff was its "special employee" so as to render the action barred by Workers' Compensation Law §§ 11 and 29. In particular, Ho-Ro's evidence does not demonstrate a "working relationship" with plaintiff "sufficient in kind and degree" to justify deeming Ho-Ro plaintiff's employer (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 359 [2007]; *see Bellamy v Columbia Univ.*, 50 AD3d 160, 162-163 [2008]). Indeed, Ho-Ro's dispatcher testified that all drivers, whether they were Ho-Ro's direct hires, independent owner operators, or subcontractors, were required to fill out an application before they could deliver trailers on Ho-Ro's behalf, that AZM owned the cab that plaintiff operated and was responsible for the maintenance of the cab, and that AZM, not Ho-Ro, determined how plaintiff got paid. Ho-Ro does not dispute that an AZM employee administered plaintiff's road test and trained plaintiff before he began hauling loads on Ho-Ro's behalf. In addition, plaintiff's Workers' Compensation application ambiguously lists both Ho-Ro and the owner of AZM as plaintiff's employer.

The court properly determined that the parties' expert

affidavits raise triable issues of fact as to whether Ho-Ro exercised reasonable care in maintaining the trailer's brakes, and as to the proximate cause of the accident (*see Hores v Sargent*, 230 AD2d 713, 714 [1996]).

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

ENTERED: APRIL 5, 2011

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Manzanet-Daniels, JJ.

4708 Balance Return Fund Limited, et al., Index 600949/09
Plaintiffs-Respondents,

-against-

Royal Bank of Canada, et al.,
Defendants-Appellants.

_____

Seward & Kissel LLP, New York (Jack Yoskowitz of counsel), for appellants.

Squitieri & Fearon, LLP, New York (Lee Squitieri of counsel), for respondents.

_____

Order, Supreme Court, New York County (James A. Yates, J.), entered on or about September 27, 2010, which, to the extent appealed from, as limited by the briefs, denied defendants' motion to dismiss the amended complaint on forum non conveniens grounds, and denied the dismissal of plaintiffs' causes of action for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, aiding and abetting fraud, and unjust enrichment, unanimously affirmed, with costs.

The motion court did not abuse its discretion when it denied defendant's motion to dismiss the complaint on the ground of forum non conveniens (see CPLR 327; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-480 [1984], *cert denied* 469 US 1108 [1985]).

Plaintiffs' allegations that defendants exercised control over the subject "fund of funds" scheme of alternative investments, including the ability to control assets in the fund, sufficiently pled a cause of action for breach of fiduciary duty based on defendants' alleged discretionary trading authority (*see Guerrand-Hermýs v J.P. Morgan & Co.*, 2 AD3d 235, 237 [2003], *lv denied* 2 NY3d 707 [2004]). The documentary evidence does not "utterly refute[]" plaintiffs' allegations (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch*, 80 AD3d 448, 450 [2011], quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]), as the record evidence established defendants' ability to releverage and deleverage fund assets and exercise control over portfolio managers. Plaintiffs' allegations that, among other things, defendants helped develop the structure of the subject fund in connection with a nonparty investment entity, conducted due diligence, and approved certain transactions designed to mask the fund's financial problems, were sufficient to plead the requisite knowledge and substantial assistance necessary to state a cause of action for aiding and abetting breach of fiduciary duty (*see Kaufman v Cohen*, 307 AD2d 113, 125 [2003]).

These very allegations - that defendants misrepresented

material qualities of the fund, while knowing that the true value of the assets were overstated and highly leveraged -- were also sufficient to establish a cause of action based on fraudulent concealment (*see Swersky v Dreyer & Traub*, 219 AD2d 321, 326 [1996], *appeal withdrawn* 89 NY2d 983 [1997]). Moreover, "a plaintiff alleging an aiding-and-abetting fraud claim may plead actual knowledge generally, particularly at the prediscovery stage, so long as such intent may be inferred from the surrounding circumstances" (*see DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [2010] [citation omitted]); thus, plaintiffs' allegations that defendants had the authority to track fund performance, which allowed them to know that the net asset value of the fund was overstated, sufficiently plead "actual knowledge of the fraud as discerned from the surrounding circumstances" (*Oster v Kirschner*, 77 AD3d 51, 56 [2010]).

Plaintiffs sufficiently pled a claim for unjust enrichment based on their allegations that defendants received more than $60 million through the fund at plaintiffs' expense (*see Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 117 [1990], *lv denied* 77 NY2d 803 [1991]). Defendants' argument that they ultimately distributed the proceeds pursuant to a

series of court orders presents a disputed question of fact going to the measurement of damages. Although defendants argue for the first time on appeal that the payment of any fees was covered by valid contracts, even considering this argument, such payment was based on alleged wrongdoing not covered by the contract (*see EBC I, Inc. v Goldman Sachs & Co.*, 7 AD3d 418, 420 [2004], *affd as modified* 5 NY3d 11 [2005]).

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

ENTERED: APRIL 5, 2011

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Manzanet-Daniels, JJ.

4709 The People of the State of New York, Ind. 56/05
Respondent,

-against-

Reynaldo Quinones,
Defendant-Appellant.

_____

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

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

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Judgment of resentence, Supreme Court, New York County (Roger S. Hayes, J.), rendered December 1, 2009, resentencing defendant, as a second felony offender, to a term of 5 years, with 3 years' postrelease supervision, unanimously affirmed.

After granting defendant's CPL 440.46 resentencing motion, the court sufficiently reduced the sentence. Since defendant has completed his prison term, the only material issue before us is whether he should receive a shorter period of postrelease supervision. Given defendant's criminal and prison disciplinary

history, we find that the public interest would not be served by reducing the portion of his sentence that is designed to "ensure that such offenders are appropriately monitored upon their reintroduction into society" (*People v Sparber*, 10 NY3d 457 [2008]).

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

ENTERED: APRIL 5, 2011

CLERK

Sweeny, J.P., Renwick, Richter, Manzanet-Daniels, JJ.

4710N Application of L&M Bus Corp., et al., Index 104001/08
Petitioners-Respondents,

-against-

The New York City Department
of Education, et al.,
Respondents-Appellants.
- - - - - -
Local 1181-1061, Amalgamated Transit Union,
AFL-CIO,
Intervenor-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for New York City Department of Education, The Board of Education of the City of New York and David N. Ross, appellants.

Meyer, Suozzi, English & Klein, P.C., New York (Richard A. Brook of counsel), for Local 1181-1061, Amalgamated Transit Union, AFL-CIO, appellant.

Wasserman Grubin & Rogers, LLP, New York (John F. Grubin of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 13, 2009, insofar as it granted petitioners' motion for reasonable costs and attorneys' fees as against respondents and intervenor, unanimously reversed, on the facts, without costs, and the motion denied.

Petitioners brought this CPLR article 78 proceeding to challenge, inter alia, two bid specifications in the request for

bids to transport "Pre-K and Early Intervention Program Participants" issued by respondent Department of Education (DOE). The two specifications are: (1) that the vendor hire, and assume all the prior payroll costs of, transportation workers named on two "Master Seniority Lists" of workers employed under previous transportation contracts with DOE ("Employee Protection Provisions" [EPP]), and (2) that the vendor procure insurance covering sexual molestation, harassment, assault or similar acts. The court granted petitioners' motion as against respondents for costs and attorneys' fees incurred in responding to their opposition to the challenge to the insurance requirement and as against respondents and intervenor for reasonable costs and attorneys' fees incurred in responding to their opposition to the challenge to the EPP.

In its December 2008 decision on the petition, the court found, inter alia, that the EPP were not shown to be rationally related to the purposes of competitive bidding or essential to the public interest. The following month, petitioners brought the instant motion for costs and attorneys' fees on the ground of frivolous conduct. On appeal from the decision on the petition, this Court, inter alia, affirmed the striking of the EPP (71 AD3d 127, 133-134 [2009]). However, we denied petitioners' motion for

costs and attorneys' fees. The Court of Appeals has granted leave to appeal (15 NY3d 889 [2010]).

Having denied petitioners' previous motion for costs and attorneys' fees in connection with the EPP issue, we find that the instant award of costs and attorneys' fees on the ground of frivolous conduct was unwarranted. Respondents' and intervenor's arguments were not "completely without merit in law" (*see* 22 NYCRR 130-1.1[c][1]); petitioners cite no existing law that addresses, let alone precludes, EPP in public bidding contracts (*see* General Municipal Law § 103; *cf. Cattani v Marfuggi*, 74 AD3d 553, 555 [2010], *lv dismissed* 15 NY3d 900 [2010]). Indeed, respondents' and intervenor's arguments persuaded the Court of Appeals to grant leave to appeal. The arguments that the experienced workers on the MSL would work more efficiently, be better qualified and be less likely to engage in costly labor disruptions were predicated on facts asserted in respondents' answer to the petition and were at least "somewhat colorable" (*see e.g. Kremen v Benedict P. Morelli & Assoc., P.C.*, 80 AD3d 521, 23 [2011]). They were not shown to have been made in bad faith or for improper purposes (*see Matter of Gordon v Marrone*, 202 AD2d 104 [1994], *lv denied* 84 NY2d 813 [1995]; *Ofman v Campos*, 12 AD3d 581, 582 [2004], *lv dismissed* 4 NY3d 846 [2005]).

Intervenor's challenge to the timeliness of petitioners' motion for costs on the ground that it was brought after the final determination on the petition is unavailing (*see e.g. TAG 380, LLC v Estate of Ronson*, 69 AD3d 471 [2010]).

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

ENTERED: APRIL 5, 2011

CLERK

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3494 Kendall Harris, Index 25569/03
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent.

_____

Sacks and Sacks, LLP, New York (Scott Singer of counsel), for appellant.

Wade Clark Mulcahy, New York (Nicole Y. Brown of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered June 26, 2009, reversed, on the law, without costs, defendant's motion denied, plaintiff's Labor Law § 240(1) and § 241(6) claims reinstated, plaintiff granted leave to amend the bill of particulars and granted summary judgment as to liability on his Labor Law § 240(1) and § 241(6) claims, and the matter remanded for the determination of damages.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
James M. Catterson
Dianne T. Renwick
Sallie Manzanet-Daniels, JJ.

3494
Index 25569/03

_____x

Kendall Harris,
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent.
_____x

Plaintiff appeals from an order of the Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered June 26, 2009, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissal of the complaint insofar as it alleged violations of Labor Law § 240(1) and § 241(6), and denied plaintiff's cross motions seeking leave to amend the bill of particulars and summary judgment on the issue of liability.

Sacks and Sacks, LLP, New York (Scott Singer of counsel), for appellant.

Wade Clark Mulcahy, New York (Nicole Y. Brown and John Mulcahy of counsel), for respondent.

CATTERSON, J.

In this personal injury action, the plaintiff's Labor Law claims arise out of an accident that occurred while the plaintiff was employed as an ironworker on the Macombs Dam Bridge which spans the Harlem River between Manhattan and the Bronx. The bridge is owned by the defendant, City of New York.

The project on which the plaintiff was employed entailed the removal of the bridge's deck, a steel grid filled with concrete. The deck was first divided into sections by workers using saws. Then the sections were removed by attaching each segment to cables and chokers which in turn were attached to the hook of a crane that hoisted each section vertically, and then away from the bridge.

The facts relating to the plaintiff's accident are undisputed. By affidavit, the plaintiff's foreman stated that, on the day of the accident workers were attempting to lift from the bridge road deck a 10' by 20' slab which weighed approximately one ton. As the crane raised the slab from the surface, the foreman saw that one corner of the slab lifted three or four feet in the air while the opposite corner remained attached to the roadbed. In order to separate the slab entirely from the surface, the foreman directed that the slab be lifted until the cables were taut, then told the plaintiff to wedge a

piece of four-by-four lumber into the spot where the slab remained attached to the roadbed. Then, the crane was to slowly lower the slab to place pressure on the four-by-four wedge in order to pry loose the attached portion of the slab. After several unsuccessful attempts, the plaintiff took a piece of four-by-four lumber that was approximately six to eight feet long and wedged one end of it into the place where the slab remained attached. He then stood on the other end to keep it in place. The four-by-four was at an angle, with the low end wedged between the slab and the roadbed, and the high end (upon which the plaintiff stood) three to four feet off the ground. The plaintiff then motioned to the signalman asking him to direct the crane operator to slowly lower the slab. Instead, the slab descended quickly, causing the four-by-four upon which the plaintiff was perched to shatter. The plaintiff was thrown to the ground, whereupon he struck a barrier. In a second affidavit, the foreman acknowledged that he had directed the plaintiff to stand on the end of the four-by-four. The plaintiff's deposition testimony is entirely consistent with the foreman's affidavits.

By summons and complaint dated September 22, 2003, the plaintiff sought damages for, inter alia, the defendant's violation of Labor Law § 240(1) and § 241(6). The plaintiff

alleged that he was injured when defendant failed to ensure that hoisting operations were performed in a safe and orderly manner, failed to prevent the sudden acceleration or deceleration of loads, as well as failing to transmit proper signals from the signalman to the crane operator.

By notice of motion dated December 19, 2008, the defendant sought summary judgment dismissing the complaint in its entirety. The defendant argued that the plaintiff's Labor Law § 240(1) claim should be dismissed because the alleged accident did not involve an elevation-related risk, and because the plaintiff was the sole proximate cause of his own injuries. The defendant further argued as to the § 241(6) claim that the plaintiff had failed to cite to specific and applicable Industrial Code sections, requiring dismissal.

By order dated June 26, 2009, the motion court granted the defendant's request for summary judgment dismissing the complaint on the grounds that "the alleged injury was not a result from a difference in the elevation level of the required work and that this was an ordinary peril of a crane lifting operation which does not implicate Labor Law § 240(1)." The court further dismissed the plaintiff's Labor Law § 241(6) claims because he failed to plead specific sections of the Industrial Code.

On appeal, the plaintiff asserts that Labor Law § 240(1) is

implicated in situations where workers fall or where they are injured as a result of falling objects, and further that the evidence in his case demonstrates liability under both categories. For the reasons set forth below, we agree that liability in this case arises at a minimum under the principles applicable to falling-object situations, and find that the motion court erred in denying plaintiff's motion for summary judgment on his Labor Law claims.

Labor Law § 240(1) provides that

> "[a]ll contractors and owners and their agents ... in the erection, demolition, repairing, altering ... of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

To establish liability under Labor Law § 240(1), a plaintiff must demonstrate both that the statute was violated and that the violation was a proximate cause of injury; the mere occurrence of an accident does not establish a statutory violation. See Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 771 N.Y.S.2d 484, 803 N.E.2d 757 (2003).

Once again, we are called upon to reiterate that section 240(1) must be "construed as liberally as may be for the

accomplishment of the purpose for which it was ... framed." Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 500, 601 N.Y.S.2d 49, 52, 618 N.E.2d 82, 85 (1993) (internal quotation marks and citations omitted). In Ross, the Court of Appeals instructed that Labor Law § 240(1) applies to both 'falling worker' and 'falling object' cases. The Court held that:

> "Labor Law § 240(1) ... evinces a clear legislative intent to provide 'exceptional protection' for workers against the 'special hazards' that arise when the work site either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured.'" Ross, 81 N.Y.2d at 500-501, 601 N.Y.S.2d at 52, 618 N.E.2d at 85, quoting Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 514, 577 N.Y.S.2d 219, 222, 583 N.E.2d 932, 934 (1991); see also Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 727 N.Y.S.2d 37, 750 N.E.2d 1085 (2001).

More recently the Court held that courts have historically read Labor Law § 240(1) too narrowly. The Court observed that "[t]he breadth of the statute's protection has ... been construed to be less wide than its text would indicate." Runner v. New York Stock Exch., Inc., 13 N.Y.3d 599, 603, 895 N.Y.S.2d 279, 281, 922 N.E.2d 865, 867 (2009). In Runner, the Court specifically found that liability under the statute is not limited to instances in which the worker is actually struck by a falling object but, "[t]he relevant inquiry ...is rather whether the harm flows directly from the application of the force of

gravity to the object." Runner, 13 N.Y.3d at 604, 895 N.Y.S.2d at 282.

Runner involved circumstances that are markedly similar to those of the instant case. In that case, the plaintiff and two co-workers attempted to move an 800 pound reel of wire down a flight of just four stairs by tying one end of a length of rope to the reel, looping the rope around a metal bar placed horizontally across a door jamb, and then holding the rope in their hands (essentially acting as counterweights) while two other coworkers pushed the reel down the stairs. As the reel descended, it pulled the plaintiff into the metal bar, injuring his hands. Id. The Court observed that there was no indication that the makeshift pulley being used at the time of injury malfunctioned; it simply was not adequate to allow the reel's descent to be properly regulated. Runner, 13 N.Y.3d at 602, 895 N.Y.S.2d at 280.

The Court concluded that the specific task being performed at the time of the plaintiff's injury was moving a heavy reel from a higher to a lower elevation, that the danger to be guarded against arose from the reel's insufficiently checked descent, and that the plaintiff's injury flowed directly from the effect of gravity on the reel as it descended. Runner, 13 N.Y.3d at 603-604, 895 N.Y.S.2d at 281-282. The Court found section 240(1)

liability, stating that "a device precisely of the sort enumerated by the statute was not 'placed and operated as to give proper protection' to plaintiff." 13 N.Y.3d at 603, 895 N.Y.S.2d at 281.

Although Runner was decided after the motion court's ruling in the instant case, the Court made it clear that it was not establishing any new principles, merely expounding on the governing principle enunciated almost 20 years previously. Runner, 13 N.Y.3d at 604, 895 N.Y.S.2d at 281, citing Ross, 81 N.Y.2d at 501, 601 N.Y.S.2d at 53. In Ross, the Court held unequivocally that "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*." Id.

In the instant case, the task being performed involved removing a one-ton slab of concrete and steel which was partially attached to a roadbed surface, using a piece of wood as a wedge to extricate the slab from the road deck. The portion of slab attached to the crane by steel cables and chokers was lowered from a higher to a lower elevation in order to exert pressure on the wedge and dislodge the attached portion. The uncontroverted evidence shows that the slab descended too quickly, causing the

wedge upon which plaintiff stood to shatter, and in turn causing plaintiff to fall and sustain injury.

As in Runner, "the danger to be guarded against plainly arose from the force of the very heavy [slab's] unchecked, or insufficiently checked, descent," and the plaintiff's injury flowed directly from the effect of gravity on the slab as it descended. Runner, 13 N.Y.3d at 603, 895 N.Y.S.2d at 281. Hence, as in Runner, it may be observed here that the injury suffered by the plaintiff "was every bit as direct a consequence of the descent of the [slab] as would have been an injury to a worker positioned in the descending [slab's] path." 13 N.Y.3d at 604, 895 N.Y.S.2d at 2828; see also Apel v. City of New York, 73 A.D.3d 406, 407, 901 N.Y.S.2d 183, 184 (1st Dept. 2010).

Although there is precedent indicating that section 240(1) liability may not attach where a falling object descends a de minimis distance (see e.g., Melo v. Consolidated Edison Co. of N.Y., 92 N.Y.2d 909, 680 N.Y.S.2d 47, 702 N.E.2d 832 (1998)) the Runner decision makes clear that the weight of the falling object "and the amount of force it was capable of generating, even over the course of a relatively short descent" must be taken into account. Runner, 13 N.Y.3d at 605, 895 N.Y.S.2d at 282. Here, the record does not specify the height from which the slab was abruptly lowered though the facts suggest a distance of three to

four feet - the height to which one end of the slab was initially raised. However, the slab weighed more than one ton, and therefore in this case, as in Runner, a rapid descent of just three feet was capable of generating a significant amount of force.

The defendant's argument attempting to circumvent the plain meaning of, and the strict liability imposed by, the statute is without merit. Acknowledging that the only acceptable defense to a section 240(1) claim is that a plaintiff's actions are the sole proximate cause of his injuries, the defendant argues as follows: protection was provided, and was not inadequate because none of the safety devices provided -- neither the shackles nor the chokers, nor the cables attaching the slab to the crane -- broke; hence in the absence of evident malfunction, the plaintiff's injuries must necessarily and solely result from his own actions. The defendant cites no legal authority for this novel default position. Nor do the facts of the case support such a position.

This is not a situation where a plaintiff, on his own initiative, took a foolhardy risk which resulted in injury. See e.g. Montgomery v. Federal Express Corp., 4 N.Y.3d 805, 795 N.Y.S.2d 490, 828 N.E.2d 592 (2005). To the contrary, the uncontroverted evidence shows that the plaintiff's foreman directed him to stand on top of the piece of wood in order to

keep it in place. Hence, as a matter of fact and law the plaintiff cannot be the sole proximate cause of his injuries. See Pichardo v. Aurora Contrs., Inc., 29 A.D.3d 879, 815 N.Y.S.2d 263 (2nd Dept. 2006) (plaintiff was not sole proximate cause of his injury where the evidence showed that at the time of injury, he was acting pursuant to the directions of his supervisor).

More significantly, a Labor Law section 240(1) inquiry cannot focus simply on whether the provided safety devices malfunctioned, but must also examine whether the safety devices that were provided "operated [so] as to give *proper* protection." Labor Law § 240(1) (emphasis added). In this case, the defendant's assistant civil engineer assigned to the project testified that safety concerns require heavy loads such as the subject roadway slab to be hoisted and lowered slowly. Thus, the question is whether there were safety devices "placed and operated" to guard the plaintiff against the risk of the slab's unregulated speedy descent. We find here, as did the Court in Runner, that there was no safety device to guard against such a risk and further, that the unregulated descent of the slab resulted in the plaintiff's injuries.

Although the defendant argues that it exercised no control over its contractor's work on the Macombs Dam Bridge project, it is well established that the duties imposed by section 240(1) are

non-delegable, and, consequently, an owner who breaches them "may be held liable in damages regardless of whether it has actually exercised supervision or control over the work." See Ross, 81 N.Y.2d at 500, 601 N.Y.S.2d at 52.

Finally, the evidence demonstrated violations of the additional Industrial Code sections alleged in the plaintiff's proposed amended bill of particulars, namely, 12 NYCRR 23-8.1 (f)(1)(iv) and 23-8.1(f)(2)(i). The plaintiff's belated identification of these sections entails no new factual allegations, raises no new theories of liability, and results in no prejudice to the defendant. Hence, leave to amend the bill of particulars should have been granted. See Latchuk v. Port Auth. of N.Y. & N.J., 71 A.D.3d 560, 896 N.Y.S.2d 356 (2010). As the evidence of violations of 12 NYCRR 23-8.1(f)(1)(iv) and 23-8.1(f)(2)(i) is undisputed, the plaintiff is entitled to summary judgment as to Labor Law § 241(6) liability. See Hayden v. 845 UN Ltd. Partnership, 304 A.D.2d 499, 758 N.Y.S.2d 647 (2003).

Accordingly, the order of the Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered June 26, 2009, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissal of the complaint insofar as it alleged violations of Labor Law § 240(1) and § 241(6), and denied plaintiff's cross motions seeking leave

to amend the bill of particulars and summary judgment on the issue of liability, should be reversed, on the law, without costs, defendant's motion denied, plaintiff's Labor Law § 240(1) and § 241(6) claims reinstated, plaintiff granted leave to amend the bill of particulars and granted summary judgment as to liability on his Labor Law § 240(1) and § 241(6) claims, and the matter remanded for the determination of damages.

All concur.

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

ENTERED: APRIL 5, 2011

CLERK