SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 27, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Catterson, McGuire, Renwick, JJ.

472 The People of the State of New York, Respondent,

-against-

William Gilman,
Defendant-Appellant.

Ind. 4800/05

- - - - -

473 The People of the State of New York,
Respondent,

-against-

Edward J. McNenney,
Defendant-Appellant.

_____

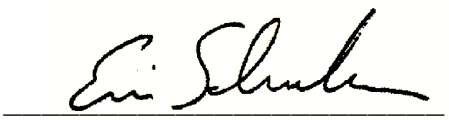
Appeals from judgments, Supreme Court, New York County (James A. Yates, J.), rendered April 17, 2008, convicting defendants, after a nonjury trial, of violation of the Donnelly Act (General Business Law §§ 340, 341), and sentencing each defendant to an intermittent term of imprisonment of 16 weekends concurrent with five years' probation, and 250 hours of community service, unanimously dismissed as moot.

The judgments appealed from have been vacated by an order of

Supreme Court, New York County entered July 2, 2010 (2010 NY Slip Op 51379[U]), and the parties have agreed that the People's appeal from that order is withdrawn.

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

ENTERED: JANUARY 27, 2011



DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4111 Ken Johnson, et al., Index 111162/08
Plaintiffs-Appellants,

- against -

Société Générale S.A.,
Defendant-Respondent.

_____

Ferber Chan Essner & Coller, LLP, New York (Robert M. Kaplan of counsel), for appellants.

Shearman & Sterling LLP, New York (Kirsten Nelson Cunha of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered March 4, 2010, dismissing the amended complaint for failure to state a claim, unanimously affirmed, with costs.

Plaintiffs-investors' factual allegations failed to support a claim that they were entitled to legal recourse against defendant-guarantor based on its guaranty of the non-party debtor's alleged payment obligations owed to plaintiffs (*see generally Robinson v Robinson*, 303 AD2d 234, 235 [2003]; *Kalmanash v Smith*, 291 NY 142, 154 [1943]). The amended complaint essentially acknowledges that there is no definitive sum owed plaintiffs by the debtor, and that a trial on plaintiffs' claims against the debtor would be necessary to determine such sum, if any (*see generally Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 141-142 [1993]; *Midland Steel Warehouse Corp. v Godinger Silver Art*, 276 AD2d 341, 343-

344 [2000]). Plaintiffs' "belie[f]" that the debtor might owe them $1,000,000 in payments on their investments is entirely speculative and unsupported. Accordingly, no obligation can be said to have accrued against the guarantor here.

THIS CONSTITUTES THE DECISION AND ORDER
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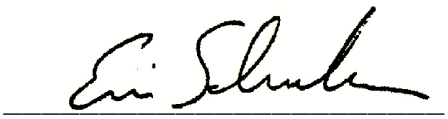

DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4114 In re Rudranu Toolasprashad, Index 109964/06
Petitioner-Respondent,

-against-

Raymond W. Kelly, as Police
Commissioner of the City of New York, et al.,
Respondents-Appellants.

_____

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for appellants.

Thomas Torto, New York, for respondent.

_____

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered July 13, 2007, which granted the petition to annul respondents' determination to terminate petitioner's employment after a hearing held in his absence to the extent of remanding the matter to respondents for a full hearing on proper notice to petitioner, unanimously affirmed, without costs.

The hearing officer's determination that petitioner's failure to appear for the hearing was without good cause was based on his finding that respondents had made diligent efforts to serve petitioner with the charges against him and to notify him of the hearing and that petitioner had not provided proper contact information in Peru, where he was on leave. However, while the transcript of the hearing reflects that certain proof of service was submitted, the sole evidence of respondents'

attempted service in Lima was counsel's hearsay representations. Thus, the determination that petitioner's failure to appear was without good cause lacked the requisite proof (*see People ex rel. Griffin v Walters*, 83 AD2d 618 [1981]). Respondents point out that the technical rules of evidence need not be complied with in disciplinary proceedings before administrative bodies (*see Sander v New York City Dept. of Transp.*, 23 AD3d 156 [2005]). However, the deficiency in the proof of their efforts to effect service in Lima goes beyond the lack of technical compliance.

"[N]otice reasonably calculated . . . to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections" is a fundamental requirement of due process (*Matter of Alvarado v State of N.Y., Dept. of State, Div. of State Athletic Commn.*, 110 AD2d 583, 584 [1985]). Rules of City of New York Police Department (38 RCNY) § 15-03 provides that "[s]ervice of the Charges and Specifications shall be made in a manner reasonably calculated to achieve actual notice to the respondent" and that "[a]ppropriate proof of service shall be required" (subd [b][2]). It further requires service of the notice of the hearing date, time and place (subd [d][1]) and "[a]ppropriate proof of service" thereof (subd [d][2]). Respondents' failure to satisfy their obligation to provide petitioner with notice renders the decision to hold the

hearing in his absence arbitrary and capricious (*see Matter of Blackman v Perales*, 188 AD2d 339 [1992]).

THIS CONSTITUTES THE DECISION AND ORDER
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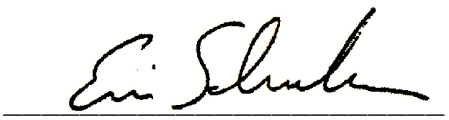


DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4115 Albert Russo, doing business as 401 Broadway Building,
Plaintiff-Respondent,

-against-

Kenneth Heller,
Defendant-Appellant.

Index 110600/09

_____

Sokolski & Zekaria, P.C., New York (Robert E. Sokolski of counsel), for appellant.

Roberts & Roberts, New York (Michael J. Roberts of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered December 8, 2009, which, insofar as appealed from, granted plaintiff's cross motion for leave to amend the complaint and denied defendant's motion to dismiss the first, third through sixth and eighth causes of action of the amended complaint, unanimously modified, on the law, the motion granted to the extent of dismissing the third through sixth causes of action, and otherwise affirmed, without costs.

Defendant executed a 'Good Guy' guaranty personally guaranteeing payment of rent and performance of a lease entered into between plaintiff, as landlord, and Nathelm Corp., as tenant. As a rule, the terms of a guaranty determine its duration and guaranties generally "apply to debts arising during the guaranty period, but not due and payable until after termination" (*Bandag, Inc. v National Acceptance Co. of Am.*, 855

F2d 491, 494 n 2 [1988]). In particular, 'Good Guy' guaranties are commonly understood to apply to obligations which accrue prior to the surrender of the lease premises, and this obligation, once accrued, persists even after surrender of the premises (*see Preamble Props. v Woodard Antiques Corp.*, 293 AD2d 330, 331 [2002]; *L&B 57th St., Inc. v E.M. Blanchard, Inc.*, 143 F3d 88, 91-93 [1998]).

We reject defendant's contention that the Good Guy guaranty terminated upon delivery of possession to plaintiff, and correspondingly caused defendant's obligations under the guaranty to cease on that date. Plaintiff seeks only to recover sums that accrued prior to the surrender of the premises and accordingly, we find that the motion court properly denied defendant's motion to dismiss the amended complaint's first cause of action under the guaranty. Furthermore, the eighth cause of action, for attorney's fees, which is based on the fee provision contained in the guaranty, should also go forward.

The fifth cause of action, wherein plaintiff claims that defendant "created, caused and misused [Nathelm] to defraud plaintiff and, on [information and belief], other creditors," and that defendant "is known to Landlord to be the principal in and owner of and an officer of" Nathelm, is dismissed since these "bare-bones allegations" do not provide the particularity

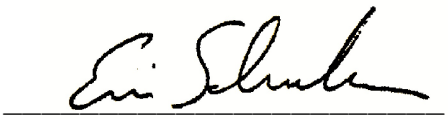
required to support a veil-piercing claim (*Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 211 [2005]).

The third, fourth, and sixth causes of action, which seek to recover for monies due under the lease under theories of unjust enrichment, quantum meruit, and account stated, are also dismissed, as, without veil-piercing, plaintiff has not identified any basis for bypassing Nathelm and asserting these claims directly against defendant. Moreover, as noted, plaintiff has stated a claim against defendant under the guaranty, and "a party may not recover in quantum meruit or unjust enrichment where the parties have entered into a contract that governs the subject matter" (*Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 [2008]). Nor does the amended complaint plead the requisite elements of an account stated, which "exists where a party to a contract receives bills or invoices and does not protest within a reasonable time" (*Bartning v Bartning*, 16 AD3d 249, 250 [2005]).

Here, the amended complaint contains no allegations which could be understood as establishing an account stated.

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

ENTERED: JANUARY 27, 2011



DEPUTY CLERK

Gonzales, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4116-
4116A Index 600245/09

Compañía de Inversiones
de Engergía S.A.,
Plaintiff-Respondent,

-against-

AEI, etc.,
Defendant-Appellant.

_____

Skadden, Arps, Slate, Meagher & Flom, LLP, New York (Timothy G. Nelson of counsel) for appellant.

Wilk Auslander LLP, New York (Jay S. Auslander of counsel), for respondent.

_____

Order and amended order, Supreme Court, New York County (Richard B. Lowe III, J.), entered April 12, 2010 and April 16, 2010, respectively, which granted plaintiff's motion to renew and reargue the court's prior order, entered August 3, 2009, granting defendant's motion to dismiss the complaint on the grounds of international comity, and upon renewal, vacated the prior order, and denied the motion to dismiss on its alternative grounds of CPLR 3211(1), (2) and (7), unanimously affirmed, with costs.

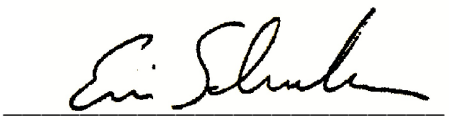
We agree with the motion court that the documentary evidence submitted in support of defendant's motion to dismiss fails to resolve all factual issues concerning whether the parties' restructuring agreement constitutes an "acknowledgment or promise" within the meaning of General Obligations Law § 17-101, and is sufficient to revive defendant's time-barred claim on

certain debts owed by plaintiff under bonds issued in 1997. While the restructuring agreement contains an acknowledgment of plaintiff's debt and prohibits it from taking certain actions unless the debt is paid, it also purports to cancel the existing debt and states that except as provided therein, plaintiff will not pay it. In order to constitute an acknowledgment of a debt under GOL § 17-101, a writing "must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" (*Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521 [1976]).

We reject defendant's contention that a forbearance clause in the restructuring agreement served to toll running of the statute of limitations (*see* GOL § 17-103(1),(3); *Robinson v City of New York*, 24 AD2d 260, 262 [1965]; *Matter of Eberhard v Elmira City School Dist.*, 6 AD3d 971, 973 [2004]).

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

ENTERED: JANUARY 27, 2011



DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4117 The People of the State of New York, Respondent,

-against-

Darryl Harris, Defendant-Appellant.

Ind. 2058/09

Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), for appellant.

Darryl Harris, appellant pro se.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at plea, Marcy L. Kahn, J. at sentence), rendered on or about August 19, 2009, unanimously affirmed.

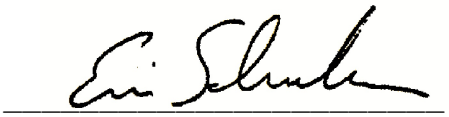
Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.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

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: JANUARY 27, 2011



DEPUTY CLERK

Gonzalez, P.J., Acosta, Freedman, Abdus-Salaam, JJ.

4118 Aquilina Williams, Index 14070/06
Plaintiff-Appellant,

-against-

DRBX Holdings, LLC,
Defendant-Respondent.

_____

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

Kent, Beatty & Gordon, LLP, New York (Joshua B. Katz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about August 3, 2009, which, inter alia, granted defendant's motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, without costs.

In attempting to serve process on defendant, a foreign limited liability company authorized to do business in New York, plaintiff served defendant's attorneys instead of serving the Secretary of State, as required by Limited Liability Company Law § 303. Despite being twice alerted to the error by defense counsel, plaintiff never served the Secretary of State. "Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court" (*Macchia v Russo*, 67 NY2d 592, 595 [1986]). The fact that defendant's attorneys would have received a copy of process from the

Secretary of State does not avail plaintiff (*see Fwu Chyuang Chow v Kenteh Enters. Corp.*, 169 AD2d 572 [1991]).

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

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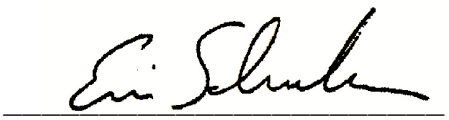


DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4119 The People of the State of New York, Respondent,
-against-
George Melendez, Defendant-Appellant.

Ind. 32162C/05
32403C/05
44560C/05

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

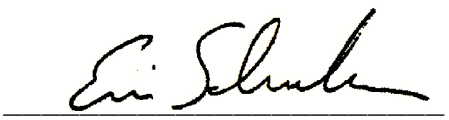
Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered July 15, 2008, convicting defendant, after a jury trial, of murder in the first degree, and sentencing him to a term of life without parole, unanimously affirmed.

There was sufficient nonaccomplice testimony to satisfy the accomplice corroboration requirement (*see* CPL 60.22[1]). Initially, we note that the People's main witness was an accomplice as a matter of law, and that both sides agree that a second witness whose accomplice status was submitted to the jury as a factual issue should be treated as an accomplice for purposes of this appeal. The main witness's description of the crime and the disposal of the victim's body was corroborated in exhaustive detail by forensic and other independent evidence, even though this evidence did not specifically point to defendant. In addition, there was very strong consciousness-of-

guilt evidence, consisting of defendant's participation in a plot to, among other things, suborn perjury. Although the consciousness-of-guilt evidence standing alone does not satisfy the corroboration requirement, when that evidence is coupled with the extensive corroboration regarding details of the crime and its aftermath, the totality of the proof "give[s] strong reason to believe that [the main witness's] description of events was very largely true. It is possible, of course, that [the main witness] told the truth about every other detail, and lied about defendant's involvement; but, on this record, it was for the jury to decide what weight to give that possibility" (*People v Reome*, 15 NY3d 188, 195 [2010]). Likewise, in the exercise of our factual review power, we find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

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

ENTERED: JANUARY 27, 2011



DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4121 Janice A. Donoghue, Index 104684/09
Petitioner-Appellant,

-against-

The New York City Department of Education, etc., et al.,
Respondents-Respondents.

_____

Steven S. Landis, P.C., New York (Steven S. Landis of counsel), for appellant.

Michael Cardozo, Corporation Counsel, New York (Elina Druker of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered October 6, 2009, which granted respondents' cross motion to dismiss this article 78 proceeding seeking, inter alia, to require respondents to grant petitioner tenure as an earth science teacher as of September 1, 2005, unanimously reversed, on the law and in the exercise of discretion, without costs, the petition reinstated, and the matter remanded for further proceedings.

Contrary to respondents' claim, this appeal is not moot, as petitioner has not obtained all of the relief she seeks.

Article 78 is not limited to review of administrative determinations since a court also has subject matter jurisdiction to review a body's or officer's failure to act (*see* CPLR 7801; 7803[1]). On March 6, 2009, petitioner asked respondent New York

City Department of Education (DOE) to retroactively grant her tenure in earth science, but DOE failed to act on her request.

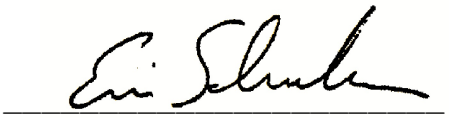
Nor is this proceeding, which was commenced on April 6, 2009, barred by the statute of limitations. "In a proceeding for mandamus relief, it is necessary to make a demand and await a refusal, and the limitations period does not commence until the refusal" (*Adams v City of New York*, 271 AD2d 341, 341-342 [2000]). If there is no refusal, the limitations period does not begin to run (*see id.* at 342). Even if, arguendo, the clock began to run on March 6, 2009, petitioner brought the instant proceeding well within the four-month deadline set forth in CPLR 217(1).

It is true that petitioner's March 6, 2009 request was made more than four months after October 28, 2008. However, we exercise our discretion (*see Matter of Densmore v Altmar-Parish-Williamstown Cent. School Dist.*, 265 AD2d 838, 839 [1999], *lv denied* 94 NY2d 758 [2000]) and determine that this proceeding is not barred by laches. If a petition and answer "can be construed as the necessary demand and refusal" (*Matter of Triana v Board of Educ. of City School Dist. of City of N.Y.*, 47 AD3d 554, 557-558 [2008]), petitioner's pre-petition demand should not be deemed untimely.

We remand to permit respondents to answer (*see* CPLR 7804[f]; *Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 103 [1984]).

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

ENTERED: JANUARY 27, 2011



DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4122 The People of the State of New York, Ind. 116/09
Respondent,

-against-

Jamel Johnson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered August 19, 2009, convicting defendant, after a jury trial, of attempted murder in the second degree, and sentencing him to a term of 15 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term to 10 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: JANUARY 27, 2011

DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4123 CSSEL Bare Trust, etc., Index 602934/08
Plaintiff-Appellant,

-against-

Phoenix Life Insurance Company,
Defendant-Respondent.

_____

O'Melveny & Myers LLP, Washington, DC (Brian P. Brooks of the District of Columbia Bar, admitted pro hac vice, of counsel), for appellant.

Dorsey & Whitney LLP, New York (Patrick J. Feeley of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 7, 2010, which denied plaintiff's motion to lift a stay of proceedings in this action pending an interlocutory appeal in a federal action titled *Kramer v Lockwood Pension Servs. Inc.* (US Dist Ct, SD NY, 08 Civ 2429, Batts, J.),

unanimously dismissed as moot, without costs.

Inasmuch as the Court of Appeals issued a decision on November 17, 2010 answering the question certified to it by the Second Circuit in connection with the interlocutory appeal in the

federal action (*see Kramer v Phoenix Life Ins. Co.*, ___ NY3d ___, 2010 NY Slip Op 08376 [2010]), the issue whether the motion court improperly declined to lift the stay has been rendered moot.

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

ENTERED: JANUARY 27, 2011

DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4124 The People of the State of New York, Ind. 4203/08
Respondent,

-against-

Gilberto Ramos,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

_____

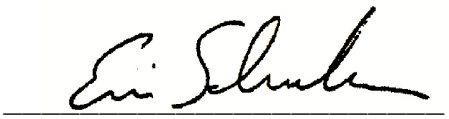
Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered June 18, 2009, convicting defendant, upon his plea of guilty, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court properly denied defendant's suppression motion without a hearing, since his motion papers did not raise an issue of fact as to probable cause for his arrest (*see e.g. People v Burch*, 59 AD3d 266 [2009], *lv denied* 12 NY3d 913 [2009]). Defendant's general and conclusory allegations failed to address the highly specific factual information supplied by the People in the felony complaint and voluntary disclosure form concerning the facts leading up to defendant's arrest for robbery.

The court properly adjudicated defendant a second felony offender based on his federal conspiracy conviction (*see People v Hiladrio*, 291 AD2d 221, 222 [2002], *lv denied* 98 NY2d 676 [2002]). We have considered and rejected defendant's arguments to the contrary.

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

ENTERED: JANUARY 27, 2011



DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4125 Angel Cruzado, an Infant Under the Age of Fourteen Years by His Father and Natural Guardian, Reinaldo Ferreiro, et al., Plaintiffs-Appellants, Index 350230/08

-against-

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

_____

John F. Clennan, Ronkonkoma, for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 6, 2010, which granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiffs' cross motion to amend the complaint, unanimously reversed, on the law, without costs, the cross motion for leave to amend the complaint granted, the motion for summary judgment denied, and the complaint reinstated.

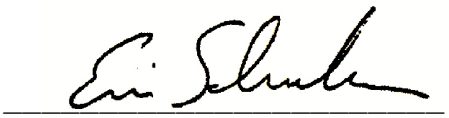
The infant plaintiff was injured when his roller blades allegedly made contact with a steel beam separating bricks from asphalt pavement at a park entranceway. Plaintiffs moved for leave to amend the complaint so as to allege that the City had received prior written notice of the dangerous and defective condition (*see* Administrative Code of City of NY § 7-201[c][2]), in the form of a Big Apple map. The motion should have been

granted (*see* CPLR 3025[b]; *Reyes v City of New York*, 63 AD3d 615, 616 [2009], *lv denied* 13 NY3d 710 [2009]). Defendants argue that prior written notice was a new theory of liability not alleged in the notice of claim. However, plaintiff's notice of claim, their original complaint, and their bill of particulars consistently alleged actual notice. The notice of claim was timely served, and the General Municipal Law § 50-i statute of limitations did not bar an amendment to the complaint (*see Runyan v Board of Educ*, 121 AD2d 708, 709 [1986]). Furthermore, there is no evidence that defendants would be prejudiced by the amendment.

The markings on the Big Apple map were sufficient to raise an issue of fact as to whether the City had prior written notice of the particular defect (*see Reyes v City of New York*, 63 AD3d at 616).

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

ENTERED: JANUARY 27, 2011



DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4126 In re Joshua Jezreel M.,

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

Dennis M.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about October 23, 2009, which, upon a fact-finding of permanent neglect, terminated respondent father's parental rights to the subject child and committed the care and custody of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purposes of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that petitioner exercised diligent efforts to encourage and strengthen the parental relationship between respondent and the child by scheduling visitation and discussing with respondent the service plan and programs he needed to complete to have his child returned to him, and that, these

efforts notwithstanding, between October 2007 and April 2008, respondent did not maintain contact with the agency, visit the child or to send him letters, cards, or gifts, or pay child support (*see* Social Services Law § 384-b[7][a], [f] and § 384-b[3][g][i]; *Matter of Aisha Latisha J.*, 182 AD2d 498 [1992], *lv denied* 80 NY2d 759 [1992]; *Matter of Kimberly Vanessa J.*, 37 AD3d 185, 186 [2007]).

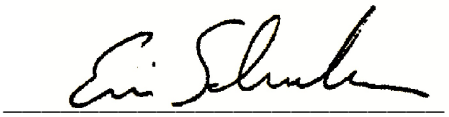
Although the court erred in admitting certain lab reports into evidence without proper foundation, the error was harmless because the record contained other evidence of respondent's continued use of drugs and failure to seek treatment (*see Matter of "Baby Girl" Q.*, 14 AD3d 392 [2005], *lv denied* 5 NY3d 704 [2005]; *Matter of Tiffany V.*, 201 AD2d 324 [1994]).

We reject respondent's argument that, because no evidence was presented at the dispositional hearing, there is no support for the court's determination that it was in the child's best interests to be freed for adoption. Respondent failed to object to the court's determination that no further evidence was required. Indeed, upon being asked whether she wished to present any witnesses or other evidence, counsel responded in the negative (*see Matter of Justina Rose D.*, 28 AD3d 659, 660-661 [2006]). A preponderance of the evidence shows that respondent had no resources with which to care for his child, while the foster parents, with whom the child has resided since he was

three months old, have been trained to meet his extensive medical needs, and he has been thriving in their care (*see Matter of Travis Devon B.*, 295 AD2d 205, 205-206 [2002]).

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

ENTERED: JANUARY 27, 2011



DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4128 Maria Pilar Bustos, et al., Index 107925/04
Plaintiffs-Respondents,

-against-

Lenox Hill Hospital, et al.,
Defendants-Appellants,

Dr. "John" Chan, etc.,
Defendant.

_____

Garson DeCorato & Cohen, LLP, New York (Erin M. Hargis of counsel), for appellants.

Hill & Moin, LLP, New York (Cheryl Eisberg Moin of counsel), for respondents.

_____

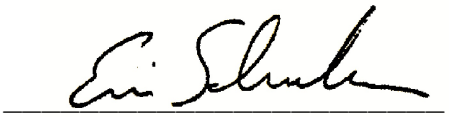
Order, Supreme Court, New York County (Joan B. Lobis, J.), entered October 23, 2009, which granted plaintiffs' motion to renew a prior order, same court and Justice, entered May 14, 2009, inter alia, granting defendants-appellants' motion for summary judgment, and upon renewal, denied the motion, unanimously affirmed, without costs.

Under the particular circumstances presented, the affidavit of plaintiff's expert was properly considered by the court on renewal (*see Mejia v Nanni*, 307 AD2d 870, 871 [2003]; *Garner v Latimer*, 306 AD2d 209 [2003]; *Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376-377 [2001]). The affidavit was sufficient to raise triable issues of fact as to whether defendants' treatment of plaintiff before and during delivery

departed from good and accepted standards of obstetric care (*see Roques v Noble*, 73 AD3d 204 [2010]; *Frye v Montefiore Med. Ctr.*, 70 AD3d 15 [2009]).

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

ENTERED: JANUARY 27, 2011



DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4129 The People of the State of New York, Ind. 465/03
Respondent,

-against-

Carlos Hernandez,
Defendant-Appellant.

_____

Jorge Guttlein & Associates, New York (Jorge Guttlein of counsel), for appellant.

Carlos Hernandez, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Hannah E.C. Moore of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Harold Silverman, J. at hearing; Denis J. Boyle, J. at jury trial and sentence), rendered April 6, 2005, convicting defendant of murder in the second degree, and sentencing him to a term of 20 years to life, unanimously affirmed.

At a pretrial hearing, the People established that a witness had a sufficient familiarity with defendant to make a confirmatory identification (*see People v Rodriguez*, 79 NY2d 445 [1992]). As to another eyewitness, no such inquiry was necessary because he never made a pretrial identification of defendant.

Defendant expressly waived any claim that the court should have submitted manslaughter in the second degree as a lesser included offense (*see* CPL 300.50[1]). As an alternative holding, we also reject it on the merits, since there is no reasonable

view of the evidence that defendant recklessly caused his victim's death.

The court's adverse inference charge was a sufficient remedy that prevented defendant from being prejudiced by the loss of certain police interview notes (*see People v Martinez*, 71 NY2d 937, 940 [1988]). Defendant's arguments, including any constitutional claims, regarding the alleged nondisclosure of federal transcripts relating to a prosecution witness are without merit.

The court properly exercised its discretion in denying defendant's mistrial motion, which was based on a particular summation remark by the prosecutor. The court struck that remark and issued curative instructions that were sufficient to prevent any prejudice. Defendant's remaining claims of prosecutorial misconduct are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

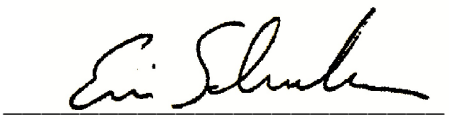
The ineffective assistance of counsel claims contained in defendant's main and pro se supplemental briefs are unreviewable on direct appeal because they involve matters outside the record concerning counsel's strategic decisions (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the

existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

We reject the claims made in both the main and pro se briefs relating to allegedly missing or unavailable transcripts of jury selection. Defendant's remaining pro se claims are likewise without merit.

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

ENTERED: JANUARY 27, 2011



DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4130N Hee Jun Cheon Lee, et al., Index 300838/07
Plaintiffs,

-against-

Jonathan R. Garcia, et al.,
Defendants.
- - - - -
Sim & Park, LLP,
Nonparty Appellant,

-against-

Fein & Jakab,
Nonparty Respondent.

_____

Sim & Park, LLP, New York (Sang J. Sim of counsel), for appellant.

Fein & Jakab, New York (Peter Jakab of counsel), for respondent.

_____

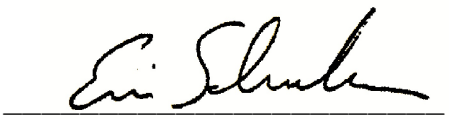
Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about October 19, 2009, which granted respondent Fein & Jakab's motion seeking a determination that appellant Sim & Park was not entitled to share in the attorneys' fee resulting from the settlement of this action, unanimously reversed, on the law, without costs, the motion denied, and the matter remanded for a hearing to determine the issue of whether or not appellant was discharged by plaintiffs for cause.

It appears that plaintiffs discharged appellants less than five months after the action was commenced. Whether or not appellant was investigating and conducting discovery as to other potential defendants, as appellant claims, cannot be discerned

from the record. The parties submitted starkly contrasting versions of the events which led to appellant's discharge. The general rule is that a hearing is required to determine if an attorney was discharged for cause or without cause before the completion of his services *(see Hawkins v Lenox Hill Hosp.*, 138 AD2d 572 [1988]). It is not clear from the record whether or not the motion court ever provided appellant with the opportunity to present and cross-examine witnesses. Accordingly, the matter is remanded for a hearing before the motion court to determine the issue of whether or not appellant was discharged for cause.

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

ENTERED: JANUARY 27, 2011



DEPUTY CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4131 In re Alvin Peterson, Ind. 5295/99
[M-6059] Petitioner,

-against-

Hon. Ronald A. Zweibel, et al.,
Respondents.

_____

Alvin Peterson, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Ronald A. Zweibel, respondent.

Bridget G. Brennan, Special Narcotics Prosecutor for the City of New York, New York (Brian A. Kudon of counsel), for Catherine Christian, respondent.

_____

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

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

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

ENTERED: JANUARY 27, 2011

DEPUTY CLERK

Andrias, J.P., Saxe, Moskowitz, Acosta, Freedman, JJ.

3934 The People of the State of New York, Respondent, SCI 9665/94

-against-

Luis Grueso Camacho, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

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

_____

Judgment of resentence, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered June 10, 2008, resentencing defendant to an aggregate term of 28 years, unanimously modified, as a matter of discretion in the interest of justice, to further reduce the sentences on counts two and three of the indictment to 14 years, resulting in a new aggregate term of 22 years, and otherwise affirmed.

By judgment, same court and Justice, rendered April 1, 1996, defendant was convicted, after a jury trial, of three counts of criminal possession of a controlled substance in the first degree and one count of conspiracy in the second degree. Defendant was sentenced to 20 years to life on one possession count, to be served consecutively to two concurrent terms of 15 years to life

on the other two possession counts and a concurrent term of 8 1/3 to 25 years on the conspiracy count. The judgment was unanimously affirmed (262 AD2d 238 [1999], *lv denied* 93 NY2d 1015 [1999]).

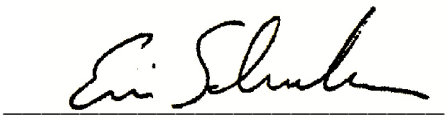
Pursuant to The Drug Law Reform Act of 2004 (L 2004, ch 738) (the 2004 DLRA), Supreme Court resentenced defendant to concurrent determinate terms of 20 years on two of the possession counts, to run consecutively to a determinate term of 8 years on the third possession count, for a total of 28 years, all to run concurrently with the term of 8 1/3 to 25 years on the conspiracy count.

The 2004 DLRA provides that, in reviewing an application for resentencing, a court may consider any facts or circumstances relevant to the imposition of a new sentence that are submitted by a defendant or the People and may, in addition, consider the defendant's institutional record of confinement (L 2004, ch 738, § 23). Notwithstanding our determination on defendant's interlocutory appeal (50 AD3d 426 [2008]), upon further consideration of the particular circumstances before us, including the fact that this was defendant's first conviction, the strong statements in support of defendant's application,

including submissions by Department of Correctional Services employees, and defendant's continuing flawless disciplinary history and stellar record of post-incarceration achievement, we reduce defendant's sentence to a new aggregate term of 22 years.

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

ENTERED: JANUARY 27, 2011



DEPUTY CLERK

Sweeny, J.P., Acosta, Freedman, Abdus-Salaam, JJ.

4127 Beatrice A. Perez, etc., Index 113582/06
Plaintiff-Appellant,

-against-

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

_____

Alexander J. Wulwick, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered February 2, 2010, which granted defendants' motion for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Defendants established their prima facie entitlement to judgment as a matter of law in this action where plaintiff's decedent was struck and killed by a police patrol car driven by defendant Officer Duran as he was responding to a radio call of an officer in need of assistance. "[A] police officer's conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured bystander unless the officer acted in reckless disregard for the safety of others" (*Saarinen v Kerr*, 84 NY2d 494, 501 [1994]; *see* Vehicle and Traffic Law § 1104).

Defendants established that Duran did not act with reckless disregard for the safety of others by submitting, inter alia, the testimony of both Duran and his partner, who provided consistent

accounts that the officers were on patrol when they received a radio call from an officer in need of assistance. Duran immediately activated the patrol car's emergency lights and siren, and proceeded to the location by traveling north in the northbound lane on Eighth Avenue. After passing through an intersection, where they had a green light in their favor, the patrol car struck the decedent. Duran's failure to see the decedent prior to impact is not the type of conduct that has been found to be reckless (*see Szczerbiak v Pilat*, 90 NY2d 553 [1997]; *Turini v County of Suffolk*, 8 AD3d 260 [2004], *lv denied* 3 NY3d 611 [2004]; *cf. Baines v City of New York*, 269 AD2d 309 [2000], *lv denied* 95 NY2d 757 [2000]).

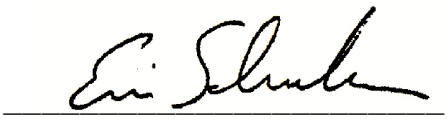
In opposition, plaintiff failed to raise a triable issue of fact. The discrepancies cited by plaintiff surrounding the happening of the accident, i.e. that Duran was going 60 mph instead of 40 mph and that he was traveling north in a southbound lane, would not constitute evidence of recklessness on the part of officers responding to an emergency as set forth in Vehicle and Traffic Law § 1104 (*see Turini* at 262). Furthermore, the affidavit of plaintiff's accident investigation specialist lacked probative value since it consists of speculative assertions unsupported by adequate foundational facts and accepted industry standards, and fails to identify any reckless

conduct on the part of Duran (*see Salzano v Korba*, 296 AD2d 393 [2002]).

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

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

ENTERED: JANUARY 27, 2011



DEPUTY CLERK

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

2294- Index 116971/03
2295- 590748/04
2295A- 590502/05
2295B

Jimmy Auriemma, et al.,
Plaintiffs-Respondents,

-against-

Biltmore Theatre, LLC, et al.,
Defendants-Appellants.

- - - - -

Sweet Construction Corp., et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

Mass Electric Construction Company,
Third-Party Defendant-Respondent/
Appellant-Respondent,

St. Paul Fire and Marine Insurance Company,
Third-Party Defendant-Appellant-Respondent,

John Civetta & Sons, Inc., et al.,
Third-Party Defendants-Appellants-
Respondents/Respondents.

- - - - -

Sweet Construction of Long Island, LLC, et al.,
Second Third-Party
Plaintiffs-Respondents-Appellants,

-against-

Mass Electric Construction Company,
Second Third-Party Defendant-Respondent/
Appellant-Respondent,

St. Paul Fire and Marine Insurance
Company,
Second Third-Party Defendant-
Appellant-Respondent,

John Civetta & Sons, Inc., et al.,
Second Third-Party
Defendants-Appellants-Respondents/Respondents,

United National Group,
Second Third-Party Defendant.

Nicoletti Gonson Spinner & Owen LLP, New York (Laura M. Mattera of counsel), for John Civetta & Sons, Inc. and Diamond State Insurance Company, appellants-respondents/respondents.

Devereaux Baumgarten, New York (Michael J. Devereaux of counsel), for respondents-appellants.

London Fischer LLP, New York (Brian A. Kalman of counsel), for Mass Electric Construction Company, respondent/respondent-appellant.

Lazare Potter & Giacovas LLP, New York (Jeremy M. Sokop and Andrew Premisler of counsel), for St. Paul Fire and Marine Insurance Company, appellant-respondent.

Alexander J. Wulwick, New York, for Auriemma respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered April 25, 2008, modified, on the law, to grant the motion of Biltmore Theatre, LLC, et al., to the extent of declaring that Civetta & Sons, Inc., and Diamond State Insurance Company must defend Sweet Construction Corp., and Sweet Construction of Long Island, LLC up to the limits of coverage or until the disputed facts are resolved at trial, and otherwise affirmed, without costs. Order, same court and Justice, entered April 2, 2009, affirmed, without costs. Order, same court and Justice, entered April 2, 2009, modified, on the law, to the extent of granting the plaintiff partial summary judgment on his Labor Law § 240(1) claim, and otherwise affirmed, without costs. Order, same court and Justice, entered April 2, 2009, modified, on the law, to grant the motion of Biltmore et al., to the extent of declaring that the coverage provided by St. Paul is excess, and that Mass Electric Construction Company and St. Paul Fire and Marine Insurance Company must defend Sweet Construction of Long Island, LLC if Diamond State Insurance's coverage is exhausted and if the disputed facts have not yet been resolved, and otherwise affirmed, without costs.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
James M. Catterson
Leland G. DeGrasse
Sallie Manzanet-Daniels, JJ.

2294-2295-2295A-2295B
Index 116971/03-590748/04-590502/05

_____x

Jimmy Auriemma, et al.,
Plaintiffs-Respondents,

-against-

Biltmore Theatre, LLC, et al.,
Defendants-Appellants.
- - - - -
Sweet Construction Corp., et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

Mass Electric Construction Company,
Third-Party Defendant-Respondent/
Appellant-Respondent,

St. Paul Fire and Marine Insurance Company,
Third-Party Defendant-Appellant-Respondent,

John Civetta & Sons, Inc., et al.,
Third-Party Defendants-Appellants-
Respondents/Respondents.
- - - - -
Sweet Construction of Long Island, LLC, et al.,
Second Third-Party
Plaintiffs-Respondents-Appellants,

-against-

Mass Electric Construction Company,
Second Third-Party Defendant-Respondent/
Appellant-Respondent,

St. Paul Fire and Marine Insurance
Company,
Second Third-Party Defendant-
Appellant-Respondent,

John Civetta & Sons, Inc., et al.,
Second Third-Party
Defendants-Appellants-Respondents/Respondents,

United National Group,
Second Third-Party Defendant.
_____x

Cross appeals from the order of the Supreme Court, New York County (Debra A. James, J.), entered April 25, 2008, which, inter alia, denied the motion of third-party defendants and second third-party defendants Civetta and Sons Inc. and Diamond State Insurance Company for summary judgment dismissing the third-party actions as against them, and denied the motion of defendants, third-party plaintiffs and second third-party plaintiffs Biltmore Theatre, LLC, Biltmore Tower, LLC, Manhattan Theatre Club, Inc., Sweet Construction of Long Island, LLC, Sweet Construction Corp., and Liberty International Underwriters for summary judgment declaring that Civetta and Sons, Inc. and Diamond State Insurance Company are obligated to defend and indemnify Sweet Construction of Long Island LLC and Sweet Construction Corp.; from the order, same court and Justice, entered April 2, 2009, which denied the motion of third-party defendant and second third-party defendant Mass Electric Construction Company for summary judgment dismissing the third-party action as against it; from the order, same court and Justice, entered April 2, 2009, which denied the motion of Biltmore Theatre LLC, Biltmore Tower LLC, Manhattan Theatre

Club, Inc., Sweet Construction of Long Island, LLC, Sweet Construction Corp., and Liberty International Underwriters for summary judgment dismissing the complaint; and from the order, same court and Justice, entered April 2, 2009, which denied the motion of Biltmore Theatre LLC, Biltmore Tower LLC, Manhattan, Theatre Club, Inc., Sweet Construction of Long Island, LLC, Sweet Construction Corp., and Liberty International Underwriters for summary judgment declaring that Mass Electric Construction Company and third-party defendant and second third-party defendant St. Paul Fire and Marine Insurance Company owe them defense and indemnification, and denied St. Paul's motion for summary judgment seeking a declaration that the policy it issued is excess to any other coverage for Sweet Construction of Long Island, LLC.

Nicoletti Gonson Spinner & Owen LLP, New York (Laura M. Mattera of counsel), for John Civetta & Sons, Inc. and Diamond State Insurance Company, appellants-respondents/respondents.

Devereaux Baumgarten, New York (Michael J. Devereaux of counsel), for respondents-appellants.

London Fischer LLP, New York (Brian A. Kalman and Anthony F. Tagliagambe of counsel), for Mass Electric Construction Company, respondent/respondent-appellant.

Lazare Potter & Giacovas LLP, New York (Jeremy M. Sokop and Andrew Premisler of counsel), for St. Paul Fire and Marine Insurance Company, appellant-respondent.

Alexander J. Wulwick, New York, for Auriemma respondents.

Catterson, J.

In this personal injury action, the plaintiff asserts that a four-foot-deep open pit at his worksite was an elevation-related hazard for which the defendants failed to provide a safety device as required by Labor Law § 240(1). Because the defendants have not raised an issue of fact with regard to a violation of the statute or whether the plaintiff was the sole proximate cause of his own injuries, partial summary judgment is granted in favor of the plaintiff.

Jimmy Auriemma, the plaintiff in this case, is an electrician who was employed by Mass Electric Construction Company (hereinafter referred to as "Mass"), a subcontractor of Sweet Construction of Long Island, LLC (together with Sweet Construction Corp. collectively hereinafter referred to as "Sweet of LI"), for electrical work in connection with a renovation of the Biltmore Theater. His responsibilities included the installation of conduit pipes for electrical lines throughout the building. John Civetta & Sons, Inc. (hereinafter referred to as "Civetta") was hired by Sweet of LI for masonry and excavation work on the project.

Under their respective purchase order agreements, Mass and Civetta agreed to defend actions brought against the owner/net lessee, Manhattan Theater Club, Inc. (hereinafter referred to as

"Manhattan"), and the purchaser/general contractor, Sweet of LI. Both subcontractors were also required to obtain insurance policies naming the owner Biltmore Theatre LLC (hereinafter referred to as "Biltmore") and Sweet of LI as additional insureds. The agreements also included indemnification clauses.

Civetta's policy, issued by Diamond State Insurance Company, covers additional insureds with respect to liability arising out of Civetta's acts or omissions. Mass's policy, issued by St. Paul Fire and Marine Insurance Company, covers additional insureds for injury resulting from Mass's work or the insureds' general supervision of Mass's work. It does not cover bodily injury resulting from any act or failure to act of an additional insured, other than general supervision of Mass's work. The policy also states that it is excess over the insureds' primary or other available insurance.

The plaintiff was on the site for about a month before he was injured in the accident at issue. On the morning of October 1, 2002, the plaintiff's foreman directed him to go downstairs to the mechanical room to unlock tools and set up equipment for the day. The plaintiff testified that the staircase he would normally have used was blocked with debris and/or materials and the only route to the mechanical room was to go down into an excavated pit about four to six feet deep and climb out the other

side. There was no way around the pit, and the only ladder he saw was at the bottom resting against the opposite wall.

In order to get into the pit, the plaintiff used a 10-foot-long wooden plank that had been placed with one edge at the top and the other at the bottom of the pit. He tested the plank by pushing down with one foot, and then, since it appeared stable, he started down. The plank, which was resting on dirt, shifted and he fell to the bottom of the pit, suffering injuries to his neck, back, and right shoulder.

The plaintiff's personal injury actions brought in September 2003 and October 2004 against Biltmore, Biltmore Tower LLC, Biltmore 47 Associates, LLC,[1] Manhattan, and Sweet of LI alleged that defendants were negligent and, inter alia, violated Labor Law §§ 200, 240(1), and § 241(6) and regulations promulgated thereunder.

In July 2004, Sweet of LI and its insurer, Liberty International Underwriters (hereinafter referred to as "Liberty"), brought a third party action against Mass, St. Paul, Civetta, and Diamond. Approximately a year later, Sweet of LI and Liberty brought a second third-party action against Mass, St.

[1] Biltmore 47 Associates was dismissed from this action pursuant to order dated April 10, 2006.

Paul, Civetta, Diamond, and United National Group.[2]

After the parties answered, Civetta and Diamond moved for summary judgment dismissing the third-party actions against them, which was opposed by Biltmore, Sweet of LI, Liberty, Manhattan, and Mass. Biltmore, Sweet of LI, Liberty, and Manhattan cross-moved for an order declaring, inter alia, that Civetta and Diamond had to defend and indemnify Sweet of LI.

On April 25, 2008, the motion court denied Civetta's motion for summary judgment dismissing the third-party action, on the grounds that there was a triable issue of fact with regard to Civetta's alleged negligence in placing the plank in the pit. The court also denied Biltmore, Sweet of LI, Liberty, and Manhattan's cross motion for summary judgment requesting a declaration that Civetta and Diamond were required to provide defense and contractual indemnification to Sweet of LI, as premature since there were outstanding issues of fact regarding Sweet of LI's negligence.

Biltmore, Manhattan, and Sweet of LI also moved for a declaration that, inter alia, Mass and St. Paul had to defend and indemnify them and reimburse them for attorneys' fees and costs. In opposition, Mass argued that the indemnification clause was

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[2] The second third-party complaint against United National Group was dismissed in an order entered April 25, 2008.

unenforceable pursuant to General Obligations Law § 5-322.1, and that overall site safety was Sweet of LI's responsibility. St. Paul also opposed, arguing that its insurance was excess, that Biltmore and Manhattan were not entitled to seek summary judgment on unpleaded claims, and in any event, the motion was premature since Sweet of LI's liability had not yet been determined. In its order entered April 2, 2009, the court agreed, denying the motion.

Mass moved for summary judgment dismissing the third party claims against it on the grounds that § 240(1) did not apply and the plaintiff was the sole proximate cause of his own injuries, and that Mass was not negligent. On similar grounds, Sweet of LI, Biltmore, and Manhattan moved for summary judgment to dismiss the plaintiff's claims and all cross claims against them, and as to the Labor Law § 200 and negligence claims, that they did not control his work performance. In its order entered April 2, 2009, the court denied these motions, citing issues of fact.

St. Paul moved for summary judgment dismissing the first third-party action on the grounds that it provides only excess insurance coverage with respect to Sweet of LI and severing non-insurance claims from insurance coverage claims. The court granted St. Paul's motion to dismiss the first third-party action and to sever noninsurance issues, but in its order entered April

2, 2009, denied St. Paul's motion for a declaration that its coverage was excess, reasoning that there must first be a finding of negligence and primary coverage by Diamond.

Defendants Civetta and Diamond appeal the denial of their motion for summary judgment dismissing the third-party actions against them. Defendants Biltmore, Manhattan, Sweet of LI, and Liberty cross-appeal the denial of their cross motions for summary judgment declaring that Civetta and Diamond are obligated to defend and indemnify Sweet of LI.

Defendants Biltmore, Manhattan, Sweet of LI and Liberty appeal the denial of their motions for summary judgment declaring that Mass and St. Paul are obligated to defend and indemnify them, and requesting dismissal of plaintiff's claims against them. Mass appeals the denial of its motion for summary judgment dismissing the third-party claims against it, and St. Paul appeals the denial of its motion for summary judgment seeking a declaration that the policy it issued is excess to any other coverage of Sweet of LI.

I. Labor Law § 240(1)

On appeal, defendants Biltmore, Manhattan, Sweet of LI, Liberty, and Mass assert that the plaintiff's Labor Law § 240(1) claim should be dismissed on the grounds that there is no recovery under § 240(1) when a plank is used as stairs or a

passageway. Alternatively, they argue that even if § 240(1) is applicable, they are not liable because the plaintiff is the sole proximate cause of his own injury.

Although he did not dispute the motion court's earlier determination that issues of fact preclude summary disposition of his § 240(1) claim, on appeal the plaintiff requests partial summary judgment on the grounds that defendants have not raised an issue of fact with regard to a § 240(1) violation. For the reasons set forth below, we find in favor of the plaintiff.

It is well established that contractors and owners have a statutory duty to provide adequate safety devices for their workers. The failure to provide a safety device is a per se violation of the statute for which an owner/contractor is strictly liable. See Zimmer v. Chemung County Performing Arts, 65 N.Y.2d 513, 523-524, 493 N.Y.S.2d 102, 106-107, 482 N.E.2d 898, 902-903 (1985); Cherry v. Time Warner, Inc., 66 A.D.3d 233, 885 N.Y.S.2d 28 (1st Dept. 2009). Moreover, the public policy protecting workers requires that the statute be liberally construed. Cherry, 66 A.D.3d at 235-236, 885 N.Y.S.2d at 30.

The defendants assert that because the plank was used as the equivalent of stairs or a passageway, as opposed to one of the safety devices enumerated in the statute, the plaintiff's claim is not within the purview of § 240(1). See Paul v. Ryan Homes, 5

A.D.3d 58, 61, 774 N.Y.S.2d 225, 227 (4th Dept. 2004) (recovery under § 240(1) was not available where the plank served as a passageway and not a tool used in the performance of plaintiff's work). This argument is unpersuasive. The plaintiff may recover under § 240(1) if he was engaged in an activity covered by the statute and exposed to an elevation-related hazard for which no safety device was provided or the device provided was inadequate. Jones v. 414 Equities LLC, 57 A.D.3d 65, 69, 866 N.Y.S.2d 165, 169 (1st Dept. 2008).

There is no bright-line minimum height differential that determines whether an elevation hazard exists. Thompson v. St. Charles Condominiums, 303 A.D.2d 152, 154, 756 N.Y.S.2d 530, 532 (1st Dept. 2003), lv. dismissed, 100 N.Y.2d 556, 763 N.Y.S.2d 814, 795 N.E.2d 40 (2003); see e.g. Arrasti v. HRH Constr., LLC, 60 A.D.3d 582, 583, 876 N.Y.S.2d 373, 375 (1st Dept. 2009) (finding that 18 inches was sufficient to create an elevation hazard); Lelek v. Verizon N.Y., Inc., 54 A.D.3d 583, 584, 863 N.Y.S.2d 429, 431 (1st Dept. 2008) (noting that defendants were not relieved of liability under Labor Law § 240(1) despite that the fall was only two and a half to three feet). Rather, the relevant inquiry is whether the hazard is one "directly flowing from the application of the force of gravity to an object or person." Prekulaj v. Terano Realty, 235 A.D.2d 201, 202, 652

N.Y.S.2d 10, 11 (1997), citing Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 601 N.Y.S.2d 49, 618 N.E.2d 82 (1993).

Here, the plaintiff was injured while descending approximately four-to-six feet from one elevation at the top of the pit to another elevation at the bottom in order to retrieve his equipment as directed by his foreman. The possibility of injury from a fall from that height constituted exposure to an elevation-related risk. See Carpio v. Tishman Constr. Corp. of N.Y., 240 A.D.2d 234, 235, 658 N.Y.S.2d 919, 921 (1st Dept. 1997) (noting that common sense dictates that a fall is gravity related when the risk exists due to a difference in elevation); see also e.g. Salazar v. Novalex Contr. Corp., 72 A.D.3d 418, 421, 897 N.Y.S.2d 423, 426 (1st Dept. 2010) (finding that the four-foot drop from the basement floor to the bottom of a trench constituted a gravity-related hazard). Whether the plank served as a functional substitute for a staircase or passageway, as opposed to a safety device, is irrelevant since the defendants had a statutory duty to provide a safety device adequate to protect the plaintiff from an elevation-related hazard, and failed to do so.

Furthermore, the plaintiff established a prima facie case that defendants violated Labor Law § 240(1). To prevail on a motion for partial summary judgment on his cause of action under

§ 240(1), the plaintiff must show both that the statute was violated and that the violation was a proximate cause of his injuries. Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 39, 790 N.Y.S. 2d 74, 76, 823 N.E.2d 439, 441 (2004); Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 287, 771 N.Y.S.2d 484, 488, 803 N.E.2d 757, 761 (2003).

The plaintiff testified that the only access to his equipment was through the pit because the stairs he normally used were blocked. His foreman testified that blocked stairways were a constant, "hourly" problem, and could not confirm whether any staircase was unblocked at the time of the accident. The plaintiff further testified, and defendants do not dispute, that there was no ladder available in the immediate vicinity of the pit. Since it is uncontroverted that the plaintiff's injuries were sustained in his fall from an unstable wooden plank while attempting to get to the bottom of the pit, he has satisfied the burden of showing that the defendants' failure to provide him with an adequate safety device was the proximate cause of his injuries.

In opposition, the defendants assert that the plaintiff's own negligence was the sole proximate cause of his injury. However, to defeat the plaintiff's motion for partial summary judgment, the defendants must raise an issue of fact as to

whether the plaintiff "had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured." Cahill, 4 N.Y.3d at 40, 790 N.Y.S.2d at 76, 823 N.E.2d at 441; see Gallagher v. New York Post, 14 N.Y.3d 83, 88, 896 N.Y.S.2d 732, 734, 923 N.E.2d 1120, 1123 (2010). Even viewed in the light most favorable to the defendants, there is no evidence in the record that the plaintiff had a safety device available, knew that he was expected to use it, and unreasonably chose not to do so.

The burden of providing a safety device is squarely on contractors and owners and their agents. Cherry, 66 A.D.3d at 235, 885 N.Y.S.2d at 31, citing Zimmer, 65 N.Y.2d at 520, 493 N.Y.S.2d at 107. Section 240(1) of the Labor Law has unequivocally placed the duty on "[a]ll contractors and owners" to "'furnish or erect or cause to be furnished or erected' safety devices which 'shall be so constructed, placed and operated as to give proper protection.'" See Cherry, 66 A.D.3d at 255, 885 N.Y.S.2d at 31.

Thus, a worker is expected, as a "'normal and logical response,'" to obtain a safety device himself (rather than having one provided to him) only when he either knows exactly where a

safety device is located, and there is a practice of obtaining the safety device himself because it is easily done. Cherry, 66 A.D.3d at 238, 885 N.Y.S.2d at 32, quoting Montgomery v. Federal Express Corp., 307 A.D.2d 865, 866, 763 N.Y.S.2d 600, 601 (1st Dept. 2003), affd, 4 N.Y.3d 805, 795 N.Y.S.2d 490, 828 N.E.2d 592 (2005). The general availability of safety equipment at a work site does not relieve the defendants of liability. Cherry, 66 A.D.3d at 236, 885 N.Y.S.2d at 31 ("'[t]he mere presence of ladders or safety belts somewhere at the worksite does not establish 'proper protection''"), quoting Zimmer, 65 N.Y.2d at 524, 493 N.Y.S.2d at 107; see also Garcia v. 1122 E. 180th St. Corp., 250 A.D.2d 550, 551-552, 675 N.Y.S.2d 2, 4 (1st Dept. 1998); McLean v. Vahue & Son Bldrs., 210 A.D.2d 999, 620 N.Y.S.2d 634 (4th Dept. 1994).

The plaintiff testified that the only ladder in the area was inaccessible because it was located at the bottom of the pit propped against the opposite wall to facilitate exit from the pit on that side. Although the foreman testified that ladders were generally available at the construction site, he observed that no ladder was available in the vicinity of the pit when he arrived at the scene shortly after the accident. The defendants have not asserted, nor is there any evidence in the record, that the plaintiff either knew where a ladder was located or that it was

his habit to get one for himself.

Moreover, a standing order to use safety devices does not raise a question of fact that the plaintiff knew that safety devices were available and unreasonably chose not to use them. Gallagher, 14 N.Y.3d at 88-89, 896 N.Y.S.2d at 734, 923 N.E.2d at 1123. Similarly, the announcement made to Mass workers at the weekly safety meeting directing them to use ladders or stairs does not raise a question of fact as to whether the plaintiff knew that a safety device was available, that he was expected to use it, and unreasonably chose not to do so.

Even if we accept the defendants' assertion that the plaintiff was told to use only ladders or stairs and not planks, his decision to use a plank can only be considered unreasonable if ladders or stairs were in fact readily available. See e.g. Rivera v. Ambassador Fuel & Oil Burner Corp., 45 A.D.3d 275, 276, 845 N.Y.S.2d 25, 27 (1st Dept. 2007) ("[a] worker does not become recalcitrant merely by disobeying a general instruction not to use certain equipment if safer alternatives are not supplied"), citing Stolt v. General Foods Corp., 81 N.Y.2d 918, 920, 597 N.Y.S.2d 650, 651, 613 N.E.2d 556, 557 (1993), and Balthazar v. Full Circle Constr. Corp., 268 A.D.2d 96, 99, 707 N.Y.S.2d 70, 72-73 (1st Dept. 2000). Here, the defendants have not established that the plaintiff had a choice much less that he

explicitly refused to use an available safety device and unreasonably opted to use the wooden plank.

Because the defendants have not raised any issue of fact with regard to a violation of § 240(1) or as to whether the plaintiff was the sole proximate cause of his own injury, partial summary judgment is granted to the plaintiff. Furthermore, having prevailed on his § 240(1) claim, we need not address plaintiff's Labor Law § 200 or negligence claims. The plaintiff's damages are the same under any of the theories of liability and he can only recover once, rendering such a discussion academic. See Torino v. KLM Constr., 257 A.D.2d 541, 542, 685 N.Y.S.2d 24, 25 (1st Dept. 1999).

II. Defense and Indemnification

Biltmore, Manhattan, Sweet of LI, and Liberty argue on appeal that Mass, St. Paul, Civetta, and Diamond are obligated to provide Sweet of LI with a defense and indemnification. As a threshold matter, finding in favor of the plaintiff on his § 240(1) claim does not constitute a finding of negligence on the part of the defendant general contractor for purposes of barring indemnification. Brown v. Two Exch. Plaza Partners, 76 N.Y.2d 172, 179, 556 N.Y.S.2d 991, 994, 556 N.E.2d 430, 433 (1990) (finding that liability for a violation of § 240(1) "is not the equivalent of negligence and does not give rise to an inference

of negligence").

Mass's contention that the indemnification provisions of the contracts signed by Civetta and Mass are unenforceable pursuant to General Obligations Law § 5-322.1, is unavailing. Where, as here, the provision provides for full indemnification, GOL 5-322.1's proscription of indemnification is only applicable if the indemnitee is found negligent to any extent. Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 786, 795, 658 N.Y.S.2d 903, 908, 680 N.E.2d 1200, 1205 (1997); Pardo v. Bialystoker Ctr. & Bikur Cholim, Inc., 10 A.D.3d 298, 301, 781 N.Y.S.2d 339, 342 (1st Dept. 2004); See also Brown, 76 N.Y.2d at 179, 556 N.Y.S.2d at 994 (where the general contractor was not found to be negligent after a full trial, GOL 5-322.1 did not bar indemnification even though the contractor was strictly liable under § 240(1)).

Moreover, where the contractor's negligence has not been litigated and a triable issue of fact is raised, the contractor's request for summary judgment for contractual indemnification must be denied. Pardo, 10 A.D.3d at 301, 781 N.Y.S.2d at 342. Because the record raises questions of fact as to Mass, Civetta, and Sweet of LI's negligence, the enforceability of the contractual indemnification provision cannot be decided at this time; therefore, the motions of Mass, Biltmore, Manhattan, and

Sweet of LI requesting a declaration as to the duties of Civetta, Mass, Diamond, and St. Paul to indemnify Sweet of LI were appropriately denied.

An insurer's duty to defend, on the other hand, is broader than its duty to indemnify and arises "whenever the allegations of the complaint 'suggest [. . .] a reasonable possibility of coverage'" (Automobile Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131, 137, 818 N.Y.S.2d 176, 179, 850 N.E.2d 1152, 1155 (2006), quoting Continental Cas. Co. v. Rapid-American Corp., 80 N.Y.2d 640, 648, 593 N.Y.S.2d 966, 969, 609 N.E.2d 506, 509 (1993)) or where "the insurer 'has actual knowledge of facts establishing a reasonable possibility of coverage'" (Frontier Insulation Contrs. v. Merchants Mut. Ins. Co., 91 N.Y.2d 169, 175, 667 N.Y.S.2d 982, 984, 690 N.E.2d 866, 868 (1997), quoting Fitzpatrick v. American Honda Motor Co., 78 N.Y.2d 61, 67, 571 N.Y.S.2d 672, 675, 575 N.E.2d 90, 93 (1991)). Thus, the duty to provide a defense may arise before indemnification has been decided. See New Hampshire Ins. Co. v. Jefferson Ins. Co. of N.Y., 213 A.D.2d 325, 326-327, 624 N.Y.S.2d 392, 393-394 (1st Dept. 1995) (noting that the contractual obligation to defend is triggered by facts alleged in the complaint and liability for indemnification is based on negligence).

The agreements executed by Civetta and Mass require them to

defend "any and all legal actions" brought against Sweet of LI in connection with the purchase order agreements. The Diamond policy covers additional insureds for liability arising out of Civetta's alleged acts or omissions. The policy further states that it is primary with an exception not relevant here. Although the first-party complaints contain no allegations against Civetta, they refer to excavation. By the time Diamond moved for summary judgment dismissing the third-party complaints on the ground that it had no duty to defend, it had actual knowledge that Civetta was responsible for excavation. Moreover, the contract between Civetta and Sweet of LI and deposition testimony describing Civetta's responsibilities at the site provided Diamond with knowledge of facts establishing a reasonable possibility of coverage. See e.g. Staten Is. Molesi Social Club, Inc. v. Nautilus Ins. Co., 39 A.D.3d 843, 844, 835 N.Y.S.2d 303, 305 (2d Dept. 2007).

Mass, whose policy covers additional insureds for injury resulting from Mass's work for them or "their general supervision of that work," also has a duty to defend because it had actual notice of the possibility of coverage from Sweet of LI's answers to the complaints alleging Mass's culpability, and its deposition testimony. Although the motion court declined to rule on the status of St. Paul's coverage, the record indicates that St.

Paul's coverage is excess. The St. Paul policy covers additional insureds for injury in "excess over any other valid and collectible insurance available to the additional [insured], whether primary, excess contingent, or on any other basis."

Therefore, the motions of Biltmore, Manhattan, and Sweet of LI and Liberty should be granted to the extent of declaring that Diamond must defend Sweet of LI up to the limits of its coverage or until the disputed facts are resolved at trial. See e.g. Sport Rock Intl., Inc., v. American Cas. Co. of Reading, Pa., 65 A.D.3d 12, 13, 878 N.Y.S.2d 339, 341 (1st Dept. 2009); Staten Is. Molesi Social Club, 39 A.D.3d at 844-845, 835 N.Y.S.2d at 305; Graphic Arts Mut. Ins. Co. v. Abrams, 1 A.D.3d 890, 891, 767 N.Y.S.2d 733, 733-734 (4th Dept. 2003).

An insurance carrier that provides excess coverage becomes obligated to defend the insured when the limit of the primary carrier's coverage has been reached. Sport Rock Intl., Inc., 65 A.D.3d at 13, 878 N.Y.S.2d at 341. Therefore, if Diamond's coverage is exhausted before the disputed factual allegations are resolved at trial, then St. Paul has a duty to assume the defense of Sweet of LI. We have considered the parties' remaining arguments and find them unavailing.

Accordingly, the order of the Supreme Court, New York County (Debra A. James, J.), entered April 25, 2008, which, inter alia, denied the motion of third-party defendants and second third-party defendants Civetta and Sons Inc. and Diamond State Insurance Company for summary judgment dismissing the third-party actions as against them, and denied the motion of defendants, third-party plaintiffs and second third-party plaintiffs Biltmore Theatre, LLC, Biltmore Tower, LLC, Manhattan Theatre Club, Inc., Sweet Construction of Long Island, LLC, Sweet Construction Corp., and Liberty International Underwriters for summary judgment declaring that Civetta and Sons, Inc. and Diamond State Insurance Company are obligated to defend and indemnify Sweet Construction of Long Island LLC and Sweet Construction Corp., should be modified, on the law, to grant the motion of Biltmore Theatre, LLC, et al. to the extent of declaring that Civetta & Sons, Inc. and Diamond State Insurance Company must defend Sweet Construction Corp. and Sweet Construction of Long Island, LLC up to the limits of coverage or until the disputed facts are resolved at trial, and otherwise affirmed, without costs. The order of the same court and Justice, entered April 2, 2009, which denied the motion of third-party defendant and second third-party defendant Mass Electric Construction Company for summary judgment dismissing the third-party action as against it, should be

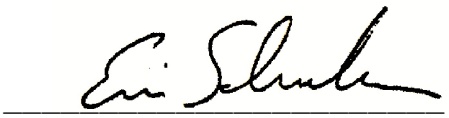
affirmed, without costs. The order of the same court and Justice, entered April 2, 2009, which denied the motion of Biltmore Theatre LLC, Biltmore Tower LLC, Manhattan Theatre Club, Inc., Sweet Construction of Long Island, LLC, Sweet Construction Corp., and Liberty International Underwriters for summary judgment dismissing the complaint, should be modified, on the law, to grant, upon a search of the record, the plaintiff summary judgment as to liability on his Labor Law § 240(1) claim, and otherwise affirmed, without costs. The order of the same court and Justice, entered April 2, 2009, which denied the motion of Biltmore Theatre LLC, Biltmore Tower LLC, Manhattan Theatre Club, Inc., Sweet Construction of Long Island, LLC, Sweet Construction Corp., and Liberty International Underwriters for summary judgment declaring that Mass Electric Construction Company and third-party defendant and second third-party defendant St. Paul Fire and Marine Insurance Company owe them defense and indemnification, and denied St. Paul's motion for summary judgment seeking a declaration that the policy it issued is excess to any other coverage for Sweet Construction of Long Island, LLC, should be modified, on the law, to grant the motion of Biltmore et al. to the extent of declaring that the coverage provided by St. Paul is excess, and that Mass Electric Construction Company and St. Paul Fire and Marine Insurance

Company must defend Sweet Construction of Long Island, LLC if Diamond State Insurance's coverage is exhausted and if the disputed facts have not yet been resolved, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JANUARY 27, 2011



DEPUTY CLERK