SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 21, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

4260 Thomas Cotter, et al., Index 14892/06
Plaintiffs-Appellants,

-against-

Pal & Lee Inc., et al.,
Defendants-Respondents,

2379 8th Corp., et al.,
Defendants.

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Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellants.

Gannon, Lawrence & Rosenfarb, New York (Lisa L. Gokhulsingh of counsel), for Mohammed Faiz, respondent.

Miranda Sambursky Slone Sklarin Verneniotis, LLP, Elmsford (Michael V. Longo of counsel), for Pal & Lee Inc., respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered October 15, 2009, which, to the extent appealed from, granted defendants Pal & Lee Inc.'s and Faiz's motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff Thomas Cotter, a New York City firefighter, injured his knee and thumb on September 15, 2005 while extinguishing a fire at defendant Mohammed Faiz's (Faiz) Kennedy

Fried Chicken restaurant. Defendant Pal & Lee, Inc. owns the five-story building where the restaurant is located.

Plaintiffs commenced this personal injury action against Pal and Faiz on May 4, 2006, alleging that defendants' violation of various sections of the Administrative Code of the City of New York resulted in a hole in the floor, accumulated debris and other unsafe conditions.[1] They claim that these violations directly or indirectly caused plaintiff's injuries and that he is therefore entitled to recover under General Municipal Law (GMA) § 205-a.[2]

Faiz testified at deposition that he leased the premises in 1997, and that both he and the owners have made repairs since then. He testified that when he entered into the lease, there was an "X" inside a square spray-painted on the exterior, but

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[1]Administrative Code § 27-127 *et seq.*, generally imposes a duty to keep the premises safe, and requires that "[a]ll service equipment, means of egress, [and] devices ... shall be maintained in good working condition" (repealed in 2007 and re-codified at Administrative Code § 28-301.1). Other sections require sealing window and/or exterior wall openings; use of "fire-stopping" structure/materials (such as interior doors, ceilings, walls, floors and shafts); and ensuring that access areas, exits, and passageways are visible and free of obstructions.

[2]GML 205-a, the statutory exception to the "firefighter's rule," permits a plaintiff firefighter to bring a cause of action when his injury occurs as a result of a defendant's failure to comply with a safety statute or regulation and the violation increases the risks associated with firefighting (*Meyer v Moreno*, 258 AD2d 315 [1999]; *Scherrer v Time Equities*, 218 AD2d 116, 122 [1995]).

that he did not know what the symbol denoted. Faiz testified that shortly after taking possession he renovated the ground floor, adding new support beams, tile flooring, fire-suppression and exhaust systems, and equipped the premises with fire extinguishers. The floors above the restaurant remained vacant.

Faiz further testified that the restaurant had been cleaned three days before the fire in anticipation of an inspection by the City Health Department. He testified that the restaurant was inspected routinely by the Health Department, twice annually by the FDNY, and intermittently by the Building Department, and that no violations had been issued by the Building Department. Faiz further testified that he did not observe any holes or cracks in the floor when he closed the restaurant at 1:00 A.M. on the night of the fire.

Plaintiff testified at deposition that at approximately 2:00 A.M., his station responded to a report of a fire at Faiz's restaurant. When he arrived at the fire, he observed the spray-painted "X" on the exterior of the building, which he understood to mean that the building had experienced a prior fire, the roof was "open," and that he should be on his "A" game. He testified that he and two other firefighters entered the building carrying a hose spraying "tons of water."

Plaintiff testified that he could not see due to the heavy smoke and had to climb over "debris." He further testified that his foot became lodged in something that "just wasn't part of the floor." Although he characterized the condition as a hole, he admitted that he did not see any holes and did not "know for a fact" what trapped his foot. Plaintiff said he was "sure" that some of the obstacles he encountered were restaurant "fixtures" strewn "all over the place" by the hose water, which had enough velocity to "move a couch" or "blow a hole in a tin roof."

The two firefighters who accompanied plaintiff were deposed and testified that they too could not see due to the heavy smoke, but that there were tables, chairs, and booths knocked down. One of them also fell, but he was uncertain as to what caused him to fall. After approximately 10 minutes in the building, the men were called out due to the heavy fire condition, and efforts to extinguish the fire continued from outside the building.

Post-fire inspection reports were prepared by the FDNY Fire Chief who was on duty the night of the fire, a fire marshal, and the fire inspector hired by Faiz's insurer. The inspectors did not report holes in the area of the restaurant where the firefighters were located. The reports did not agree on the point of origination or cause of the fire.

The FDNY Fire Chief testified that the "X" on the building is one of several symbols used by the fire department to indicate the stability and occupancy of a building. He explained that an "X" indicates that the building is vacant and firefighting operations should be conducted from the exterior. He testified that an owner may make repairs to the premises after the building is marked and that the FDNY does not inspect "marked" buildings to see if repairs have been made. The FDNY Fire Chief testified that although there was an "X" on defendants' building at the time of the fire, such marking was an error since the first floor was occupied.

Following discovery, Pal and Faiz moved for summary judgment dismissing the complaint on grounds that they did not violate any code section or statute with a reasonable connection to Cotter's claimed injuries, and that plaintiffs' section 205-a claim is speculative. In opposition, plaintiffs offered, inter alia, the report of their expert who opined that defendants failed to comply with Administrative Code, Building Code and Housing Maintenance Code provisions, as alleged by the pleadings, and that the violations constituted a "direct cause" of Cotter's injuries. However, the expert relied only on the documents presented to the court and did not personally inspect the premises.

The motion court granted defendants' summary judgment motions, concluding that plaintiffs failed to "make a prima facie case of negligence under GML § 205-a against either defendant." The motion court found that plaintiffs' allegation of holes in the floor and accumulated debris was speculative, and there was no evidence that exacerbation of the intensity or spread of the fire caused plaintiff's injuries.

Plaintiffs appeal on the grounds that the motion court erroneously applied the common-law standard of causation rather than the statutory standard, and that there are material questions of fact as to whether defendants violated provisions of the Administrative Code. For the reasons set forth below, we affirm the motion court's summary judgment dismissal.

General Municipal Law § 205-a provides protection to a firefighter injured as a result of a building code violation that "enlarges the hazard of his task by diminishing fire safety or prevention" (*Meyer*, 258 AD2d at 316). To make out a valid claim, a plaintiff firefighter must identify the statute or ordinance that defendant violated, describe the manner in which he was injured, and set forth relevant facts from which it may be inferred that the defendant's negligence directly or indirectly caused him harm *(Zvinys v Richfield Inv. Co.*, 25 AD3d 358, 359 [2006], *lv denied* 7 NY3d 706 [2006], citing *Zanghi v Niagara*

Frontier Transp. Commn., 85 NY2d 423, 441 [1995] [internal quotation marks omitted]). While a plaintiff need only establish a practical or reasonable connection between the statutory or regulatory violation and the claimed injury (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]), the causation element will not be found where the connection is too speculative to support GML 205-a liability *(see e.g. Downey v Beatrice Epstein Family Partnership, L.P.*, 48 AD3d 616 [2008], *lv denied* 11 NY3d 702 [2008]; *Zvinys*, 25 AD3d at 359, *Kenavan v City of New York*, 267 AD2d 353, 356 [1999], *lv denied* 95 NY2d 756 [2000]).

In this case, defendants met their initial burden by presenting deposition testimony, post-fire inspection reports, and other evidence indicating that there were no violations, specifically holes in the floor and accumulated debris, that directly caused plaintiff's injuries, or that indirectly caused plaintiff's injuries by increasing the inherent dangers of firefighting (*see e.g. Downey*, 48 AD3d at 619; *Zvinys*, 25 AD3d at 359-360). Plaintiff failed to rebut this showing.

Plaintiffs' assertion that a hole in the floor directly caused the injuries is pure conjecture. Plaintiff conceded that he could not see the floor and does not know what trapped his foot. The firefighters who entered the building with him were similarly unable to describe the condition of the floor.

Plaintiffs' allegation that defendants allowed debris to accumulate, causing him to trip and fall, is speculative. By his own admission, plaintiff cannot say that the debris did not consist of those items normally found in a restaurant, which, rather than being negligently placed by defendants, had been knocked down by the force of the spray from the fire hose employed in suppressing the fire.

Plaintiffs' assertion that the "X" marked on the facade is evidence of code violations is wholly unsupported by the record. The FDNY Chief testified that such symbols may not be accurate, the buildings are not reinspected, and indeed that the symbol was incorrect in this case since the building had been occupied for eight years.

There is no record evidence of any violations for unsealed openings, lack of requisite fireproofing, and lack of fire-detection equipment, or lack of extinguishment or suppression systems issued against the building, and plaintiffs' expert did not personally inspect the premises for violations (*see e.g. Zvinys*, 25 AD3d at 359-360 [internal citations omitted]). However, even were we to accept that such violations did exist, plaintiffs' claim that they exacerbated the smoke condition and spread of the fire, indirectly causing plantiff injury, is speculative.

Plaintiffs' expert does not provide any explanation linking the alleged sealing and fireproofing violations to plaintiff's injuries, and his bare conclusions that they caused plaintiff's injuries do not raise a triable issue of fact (*id.* at 359-360. Furthermore, the inspection reports do not establish where or how the fire started, and, as the motion court noted, the fire and smoke were "already intense" by the time plaintiff arrived. Thus, there is no evidence, nor can it be logically inferred, that plaintiff's risk of harm was increased by the spread or intensification of fire or smoke resulting from alleged violations (*see e.g. Zvinys*, 25 AD3d at 359; *cf. Foiles v V.L.J. Constr. Corp.*, 17 AD3d 297 [2005]).

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

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

ENTERED: JULY 21, 2011

Elba Iris Castro
DEPUTY CLERK

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4621 Richard Pietrowski, et al., Index 109789/08
Plaintiffs-Respondents,

-against-

Are-East River Science Park, LLC, et al.,
Defendants-Appellants.

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Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellants.

Sacks & Sacks LLP, New York (Scott N. Singer of counsel), for respondents.

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Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered September 8, 2010, which granted plaintiffs' motion for partial summary judgment as to liability on their Labor Law §§ 240(1) and (2) claims and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny the motion for partial summary judgment on the Labor Law §§ 240(1) and (2) claims, grant the cross motion to the extent of dismissing the Labor Law § 241(6) claim, insofar as it is premised upon a violation of Industrial Code (12 NYCRR) § 23-1.7(b)(1), and otherwise affirmed, without costs.

The motion court erred in granting summary judgment to plaintiffs on their Labor Law § 240(1) claim since there are triable issues of fact with respect to what proximately caused

plaintiff Richard Pietrowski's accident.[1] It is well settled that "[l]iability under Labor Law § 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site . . . and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).

Here, while plaintiff's foreman, Jack Sanders, averred that "there were no independent safety cable systems erected" at the location of Pietrowski's fall, the record evidence proffered by defendants suggests the opposite. Specifically, Keith Balvin, a Structural Superintendent employed by defendant Turner Construction Company averred that upon his post-accident inspection of the situs of the accident, which reflected pre-accident conditions, he noted the existence of independent safety cable systems, namely two choker cable slings on a vertical beam. In addition, Ed Hendrickson, a general foreman employed by Pietrowski's employer, averred that on the date of Pietrowski's accident he observed "several choker cables (or 'slings')

[1]Plaintiff was allegedly injured while descending from the fifth floor of a building under construction to a scaffold located approximately 70 inches below.

. . . with retractable lanyards attached to the chokers," in the area from which Pietrowski alleges to have fallen. Hendrickson further stated that Pietrowski was provided with a safety booklet outlining the elevation related safety rules including tie off requirements for iron workers, that employees were told that they were required to tie off, that iron workers were provided with choker cables to attach to vertical/horizontal beams so that they could tie off safely, and that all employees were aware that choker cables were readily available in gang boxes on each floor. Thus, whether defendants failed to provide Pietrowski with choker cables, or whether they were made available and Pietrowski was recalcitrant in failing to use them is a question of fact precluding summary judgment in favor of any of the parties (*Garlow v Chappaqua Cent. School Dist.*, 38 AD3d 712, 714 [2007]).

It was also error to grant summary judgment in plaintiffs' favor with respect to their Labor Law § 240(2) claim. Labor Law § 240(2) is implicated when a worker is injured due to an elevation-related hazard (*Bryant v General Elec. Co.*, 221 AD2d 687, 689 [1995). Moreover, liability under Labor Law § 240(2) is predicated upon the failure to provide safety rails on a scaffold more than twenty feet off the ground (Labor Law § 240[2]; *Gaffney v BFP 300 Madison II, LLC*, 18 AD3d 403, 404 [2005]; *Emmi v Emmi*, 186 AD2d 1025, 1025 [1992]), when such violation is the proximate

cause of plaintiff's accident (*Pulsifer v Eastman Kodak Co.*, 219 AD2d 880, 880 [1995]). Here, the record presents a triable issue of fact with respect to whether plaintiff fell from the scaffold, or while he was descending to it. Accordingly, whether Pietrowski's accident was caused by the independent Labor Law § 240(2) violation, namely the absence of safety rails on the scaffold, or as discussed above, solely by his negligence in failing to use the safety devices available to him, is a question of fact precluding summary judgment on plaintiffs' claim pursuant to Labor Law § 240(2). If Pietrowski fell as he was descending to the scaffold, and merely hit the scaffold on the way down, then the absence of safety rails could not have been the proximate cause of his fall and defendants cannot be liable despite the violation of Labor Law § 240(2).

The motion court properly denied defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim inasmuch as plaintiffs alleged that defendants violated Industrial Code (12 NYCRR) § 23-5.8(h). It is undisputed that the floating scaffold cracked when Pietrowski struck it and defendants presented no evidence as to whether they provided any nails, cleats or other securing devices for this floating scaffold at the time of the accident in accordance with the Code's requirement *(Avila v Ashton Mgt. Co.*, 24 AD3d 273 [2005]).

Nevertheless, the motion court erred when it denied defendants' motion to dismiss plaintiff's Labor Law § 241(6) claim, to the extent premised on a violation of Industrial Code (12 NYCRR) § 23-1.7(b)(1), which applies to hazardous openings of significant depth and size. It is clear that this provision of the Industrial Code is wholly inapplicable to the facts of this accident since plaintiff did not fall through an "opening" as defined by this section of the Industrial Code.

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

ENTERED: JULY 21, 2011

Elba Iris Castro
DEPUTY CLERK

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

4693- UBS Securities LLC, et al., Index 650097/09
4694 Plaintiffs-Respondents-Appellants, 650752/10

-against-

Highland Capital Management, L.P.,
Defendant-Appellant-Respondent,

Highland CDO Opportunity
Master Fund, L.P., et al.,
Defendants,

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UBS Securities LLC, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Highland Capital Management, L.P.,
Defendant-Appellant-Respondent.

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Lackey Hershman, LLP, New York (Paul B. Lackey of counsel), for appellant-respondent.

Cadwalader, Wickersham & Taft LLP, New York (Gregory A. Markel of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered August 9, 2010, which, insofar as appealed from, in this consolidated action arising out of investment losses incurred by plaintiffs, denied defendant Highland Capital Management, L.P.'s motion to dismiss the complaint in the second action as to the first, third and fourth causes of action for fraudulent inducement, breach of the covenant of good faith and fair dealing and fraudulent conveyance, respectively, and granted

the motion as to the fifth cause of action for tortious interference with contractual relations, unanimously modified, on the law, to grant the motion as to the first cause of action and as to those portions of the third and fourth causes of action that rely on conduct pre-dating the commencement of the prior action, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered June 21, 2010, which granted in part and denied in part plaintiffs' motion for leave to file an amended complaint, unanimously dismissed, without costs, as moot.

In April 2007, plaintiff UBS[1] agreed to finance and act as placement agent in connection with the issuance of certain collateral debt obligations by defendant Highland Capital Management, L.P. (Highland). Highland, a Texas-based hedge fund, did not complete the issuance, and the agreement expired. At that point Highland owed UBS as much as $86 million under the arrangement, based on the depreciation of assets that UBS had been required to hold, or "warehouse." However, because Highland still desired to issue the collateral debt obligations with UBS's assistance, UBS agreed to restructure the transaction. The new arrangement, formed in March 2008, consisted of two agreements

[1]There are two affiliated UBS companies named as plaintiffs that are referred to herein collectively as "UBS."

between UBS, on the one hand, and Highland, and certain funds affiliated with Highland, on the other. A third agreement, referred to by the parties as an engagement letter, was entered into by UBS and Highland. The engagement letter provided, inter alia, that UBS would bear no risk in connection with losses in the securities to be held by UBS. It further provided that Highland would hold UBS harmless from any claims against UBS arising out of the breach of the agreements by Highland or its affiliated funds.

The agreements gave UBS the right to make margin calls on the Highland affiliated funds if the market value of the securities it was holding on behalf of those funds declined. During the fall of 2008, UBS made three such margin calls. The affiliated funds provided additional collateral in response to the first two margin calls, but not in response to the third call, made in November 2008. In December 2008, UBS terminated the restructured transaction before Highland could issue the collateral debt obligations, and demanded payment for almost $700 million in losses claimed as a result of the depreciation of the assets it was holding. Highland refused to pay.

In early 2009, UBS commenced an action against Highland and the affiliated funds asserting three causes of action. The first two causes of action alleged breach of contract against the

affiliated funds only. The third claim was asserted against Highland, and was based on the indemnification language contained in the engagement letter. Highland asserted counterclaims for breach of contract and unjust enrichment against UBS arising out of the restructured transaction.

Highland moved to dismiss the complaint as against it, on the basis that the indemnification provision did not apply to the particular losses claimed by UBS. The court denied the motion, finding that UBS's interpretation of the clause was not unreasonable, and that there was at least a question of fact whether it applied. However, on February 18, 2010, this Court unanimously reversed, holding that

> "[d]ismissal of plaintiffs' indemnification claim against Highland is warranted, since the agreements between the parties contain no promise on the part of Highland to undertake liability with respect to the investment losses suffered by plaintiffs, or to ensure or guarantee the performance of defendant off-shore funds' obligations to bear the risk of investment losses. Absent facts alleging that Highland otherwise breached the engagement letter, the indemnification provision contained in said letter was not triggered" (70 AD3d 526).

The Clerk was directed to enter judgment against Highland dismissing the complaint.

Only two days before this Court issued its ruling, UBS had written a letter to the motion court, as required by the rules of the Commercial Part. It sought permission to move to amend its complaint to assert against Highland, and others, "a variety of new allegations that further support the indemnification and breach of contract claims that UBS already has alleged in the original Complaint." UBS also stated in the letter that "the new causes of action arise out of the same or related circumstances and events as UBS's pending claims."

Knowing that this Court had dismissed the complaint against Highland, the court granted the request, and UBS made its motion.

In support of the motion, UBS submitted an attorney's affirmation that summarized documents produced by Highland the month before. UBS claimed that the documents, primarily minutes of meetings of Highland's board of directors, formed the basis of the proposed new claims. Those documents, it was explained, revealed that Highland disregarded corporate formalities vis-a-vis the affiliated funds, that it knew that its methodology for pricing the assets held by UBS was unreasonable and inaccurate, and that it caused improper asset transfers and payments to the affiliated funds' creditors in the fall of 2008 and in 2009, when those funds were insolvent or nearly insolvent.

UBS also submitted the affidavit of Timothy Leroux, a former employee who was involved in the Highland transaction. According to Leroux, in November 2008, after UBS made the third margin call and Highland's affiliated funds were unable to immediately comply, Highland permitted UBS representatives to make several due diligence trips to its offices to evaluate the affiliated funds' finances, assets and business practices. Leroux attested:

> "Among other things, the information that Highland Capital provided to UBS *in November 2008* revealed the following:
>
> > (a) The Fund Counterparties[] did not satisfy their Initial Restructuring Collateral obligation by the Agreements using their own assets;
> >
> > (b) CDO Fund had pledged and encumbered a substantial portion of its assets prior to entering the Agreements, and additional assets immediately thereafter;
> >
> > (c) While Highland Capital was negotiating the Restructured Transaction, it did not tell UBS that it was planning to encumber more of the Fund Counterparties' assets, including immediately after March 14, 2008;
> >
> > (d) Highland Capital assigned unreasonable valuations to the Fund Counterparties' assets;
> >
> > (e) Highland Capital was willing to ignore corporate formalities and commingle assets between and among various entities related to Highland

> Capital and the Fund Counterparties to satisfy debts and liquidity needs; and
>
> (f) Highland Capital was willing to manage the Fund Counterparties without regard for the corporate form to achieve its goals" (emphasis added).

The proposed amended complaint included the following claims against Highland: (1) fraudulent inducement arising out of, inter alia, the misrepresentation of information and omissions to UBS concerning defendants' financial ability and commingling of assets; (2) breach of the covenant of good faith and fair dealing implied in the agreements underlying the restructured transaction; (3) fraudulent conveyance arising out of the transfer of cash and assets from the affiliated funds, impairing the funds' ability to satisfy their obligations to UBS, including transfers of assets made in March 2009 (after commencement of the original action); and (4) tortious interference with contract based on the allegation that Highland caused the affiliated funds to breach the agreements by fraudulently transferring assets and money.

In opposition, Highland asserted that UBS's complaint against it had been dismissed and could not be amended. Highland further argued that res judicata barred the proposed claims because they arose out of the same transaction or series of transactions as the original action. Highland maintained that

the preclusive effect of this Court's decision dismissing the original action as against Highland was not diminished by the fact that UBS' claims against the affiliated funds and Highland's counterclaims were still pending. Highland also challenged the sufficiency of the claims and asserted that it could not have tortiously interfered with a contract to which it was a party.

The motion court denied that portion of UBS's motion that sought leave to add new claims against Highland, agreeing with Highland's position that a party cannot amend a pleading that has already been dismissed. However, the court expressly rejected Highland's res judicata argument, stating that "the evidence that UBS needs to prove the new claims is entirely different from the evidence that it needed to prove the contract claim that was dismissed." The court also found that it would be unfair to bar relief on res judicata grounds because, pursuant to the Commercial Part's rules, UBS sought permission to make the motion and, before permission was granted, this Court issued its decision dismissing the original complaint as against Highland. The Court also found it would be unfair to apply res judicata here because the dismissal of the original complaint took place in the context of the same action, to which Highland remained a party, having asserted counterclaims.

The court next found that the claims of fraudulent inducement (as to misrepresentations about the funds' ownership of assets and creditworthiness, but not as to the failure to disclose), fraudulent conveyance and breach of covenant of good faith and fair dealing had been adequately pleaded. However, the court found that UBS had not asserted a claim for tortious interference with contract, because economic justification was a defense and "Highland Capital's alleged acts were evidently taken in its own economic interests."

UBS commenced a new action against Highland, in which it asserted the causes of action it had unsuccessfully proposed to add to the original complaint. That action was consolidated with the original action. Highland moved to dismiss the action, based on the substantive arguments it had made in opposition to the motion to amend. The court granted the motion to the extent of dismissing one of the fraudulent conveyance claims and the tortious interference claim. However, based on the reasoning in its previous order, the court denied the motion with respect to UBS's other claim for fraudulent conveyance, its claim for fraudulent inducement, and its claim for breach of the implied covenant of good faith and fear dealing.

The parties appealed, presenting us with the question whether and to what extent the doctrine of res judicata applies

to these circumstances. The doctrine dictates that, "as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action" (*Gramatan Home Inv. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). It used to be the rule that, even if the two actions arose out of an identical course of dealing, the second was not barred by res judicata if "the requisite elements of proof and hence the evidence necessary to sustain recovery var[ied] materially" (*Smith v Kirkpatrick*, 305 NY 66, 72 [1953]). However, the Court of Appeals expressly rejected that method of analysis in *O'Brien v City of Syracuse* (54 NY2d 353 [1981]). There it held that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (54 NY2d at 357). The Court further stated:

> "[w]hen alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single 'factual grouping' (Restatement, Judgments 2d, § 61 [Tent Draft No. 5]), the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions" (*id.* at 357-358).

Notably, regarding this point, the Court stated in a footnote that, insofar as *Smith* (305 NY at 66) "may be to the contrary, it is overruled" (*id.*). Whether facts are deemed to constitute a single factual grouping for res judicata purposes "depends on how the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether . . . their treatment as a unit conforms to the parties' expectations or business understanding or usage" (*Smith v Russell Sage Coll.*, 54 NY2d 185, 192-193 [1981] [internal quotation marks and citations omitted]).

Here, to the extent the claims against Highland in the new complaint implicate events alleged to have taken place before the filing of the original complaint, res judicata applies. That is because UBS's claims against Highland in the original action and in this action all arise out of the restructured warehousing transaction. While the claim against Highland in the original action was based on Highland's alleged obligation to indemnify UBS for actions taken by the affiliated funds, and the claims against Highland in the second action arose out of Highland's alleged manipulation of those funds, they form a single factual grouping. Both are related to the same business deal and to the diminution in the value of the securities placed with UBS as a result of that deal. Thus, the claims form a convenient trial

unit. Moreover, it can hardly be said that the claims in the two actions are so unrelated that reasonable business people, not to mention the parties themselves, would have expected them to be tried separately (*see Smith*, 54 NY2d at 192-193). Also, we note that, when seeking permission to amend the complaint, UBS itself asserted that "the new causes of action arise out of the same or related circumstances and events as UBS's pending claims."

Further, the Court of Appeals' holding in *Xiao Yang Chen v Fischer* (6 NY3d 94 [2005]) does not support UBS's position. Nor does it represent a shift in res judicata jurisprudence, as UBS argues. The circumstances of this case bear no resemblance to those in *Xiao Yang Chen*, which involved a woman who, in a previously filed separate action, was granted a divorce on the ground of cruel and inhuman treatment. In the divorce action, the plaintiff supported her cruel and inhuman treatment claim with an allegation that her husband had slapped her, causing injury. While the divorce action was pending, the plaintiff commenced a separate personal injury action seeking damages for the intentional infliction of emotional distress and injuries arising out of the alleged assault. In finding that res judicata did not bar the personal injury action, the Court of Appeals noted that the two actions sought different types of relief and did not constitute a convenient trial unit. The Court of Appeals

also noted other significant distinctions, such as the facts that divorce actions are typically decided by a judge and that attorneys in personal injury actions may be compensated by a contingency fee, and the policy consideration of expediting divorce proceedings. None of those considerations applies here, where the action seeks money damages arising only in connection with a commercial transaction.

While we have concluded that res judicata bars the claims in this action, we still must address UBS's assertion that it would be fundamentally unfair to apply res judicata under the circumstances of this case. UBS bases this argument primarily on the contention that it would have moved to amend the complaint in the original action while that action was still in existence (i.e., before this Court dismissed it), but for the necessity that it comply with the Commercial Part rules requiring that it first seek permission in a letter. However, this argument fails because, even had they made such a motion, the ultimate result would have been the same. As evidenced by the affidavit of its former employee, UBS was aware of the facts that support the claims in this action as long ago as November 2008. That was before UBS filed the *original* action.

Indeed, the evidence that the former employee admits had been gathered by UBS at that time supports all the claims

asserted against Highland in this action. That UBS received additional evidence in the document production that Highland made shortly before UBS sought to amend its complaint is irrelevant. The proper inquiry for res judicata purposes is when UBS could have *raised* a cause of action, not when it had enough evidence to prove the claim at trial (*see Castellano v City of New York*, 251 AD2d 194, 195 [1998], *lv denied* 92 NY2d 817 [1998], *cert denied* 526 US 1131 [1999]). In this regard, we note that, based on what it admits it knew in November 2008, UBS could have pleaded its fraud claim with the requisite particularity at that time, since the facts available would have permitted a "reasonable inference of the alleged conduct" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). Because UBS could have asserted the instant claims in the original complaint or moved to amend well before that complaint was dismissed by this Court, we are not persuaded that the Rules of the Commercial Part affected the eventual result. Nevertheless, to the extent that the third and fourth causes of action, alleging breach of the covenant of good faith and fair dealing and fraudulent conveyance, respectively, rely on conduct alleged to have occurred after the commencement of the prior action, such claims should be allowed.

Nor do we share the motion court's concern that it is unfair to apply res judicata where Highland remains a party to the

action by dint of its counterclaims. It would likewise be unjust to hold that a defendant that chooses to assert a counterclaim forfeits its right to assert the defense of res judicata with respect to the main claims. Indeed, to so hold would deal a blow to judicial economy since counterclaims are not compulsory in New York (*67-25 Dartmouth St. Corp. v Syllman*, 29 AD3d 888, 889 [2006]), and defendants would merely assert their own claims in separate actions to avoid the application of res judicata.

Finally, to the extent the fifth cause of action, alleging tortious interference with contractual relations, is based on events that occurred after the original complaint was filed, it was properly dismissed, since Highland was a party to the contracts with which it is alleged to have interfered. While some courts have held that a party to a multilateral agreement can be found liable for tortious interference with the agreement (*see e.g. Rosecliff, Inc. v C3, Inc.*, 1995 WL 276156, *3, 1995 US Dist LEXIS 6281, *9 [SDNY 1995]), that has generally been where the alleged tortfeasor has rights and duties that are separate from those of the breaching party (*see Aljassim v S.S. South Star*, 323 F Supp 918, 925 [SDNY 1971]). Here, the complaint is thoroughly suffused with allegations that Highland was essentially the alter ego of the parties it induced to breach the agreements. Under such circumstances, Highland cannot be

considered a "stranger" to the contractual relationship between UBS and the affiliated funds, and there can be no claim for tortious interference with contract (*see Koret, Inc. v Christian Dior, S.A.*, 161 AD2d 156, 157 [1990], *lv denied* 76 NY2d 714 [1990]).

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

ENTERED: JULY 21, 2011

Elba Iris Castro
DEPUTY CLERK

Andrias, J.P., Saxe, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

4808-
4808A Collegiate Asset Management Corp., Plaintiff-Appellant, Index 602971/09

-against-

45 John Mezzanine, LLC, et al., Defendants-Respondents.

_____

Carter Ledyard & Milburn LLP, New York (Jeffrey S. Boxer of counsel), for appellant.

Nixon Peabody LLP, New York (Abigail T. Reardon of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered June 7, 2010, dismissing the complaint, unanimously reversed, on the law, the judgment vacated, and plaintiff awarded summary judgment on its claims for breach of contract and contractual indemnification in the principal sum of $1,325,000, against defendants jointly. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered May 27, 2010, which denied plaintiff's motion for summary judgment and granted defendants' cross motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The parties' agreement provided for defendant purchaser 45 John Mezzanine, LLC to make an "Additional In Kind Payment Following Closing" to plaintiff seller of either two condominium units or cash. The agreement stated that the parties "shall"

enter into contracts of sale for the purchase of the condominium units by a certain date. Although similar mandatory language requiring the execution of further agreements, coupled with a deadline, has been held to constitute a condition precedent requiring strict compliance before a further obligation would arise (*see IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209 [2009]), it is evident that defendant's obligation to make the cash payments that were due if the two units were not transferred was not contingent on execution of the contracts for sale of those units. Rather, the agreement evinces an intent that plaintiff was to be further compensated after the closing by either conveyance of the two units or payment of additional money.

In view of the foregoing, it is unnecessary to address the parties' contentions regarding frustration of the condition and waiver. We find their other contentions unavailing.

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

ENTERED: JULY 21, 2011

Elba Iris Castro
DEPUTY CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Román, JJ.

4988 The People of the State of New York, Respondent, Ind. 43611C/04 61822C/04

-against-

Christopher Milton, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (William Pollak of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John P. Collins, J.), entered on or about June 28, 2010, denying defendant's CPL 440.46 motion for resentencing, unanimously reversed, as a matter of discretion in the interest of justice, the motion granted, the order replaced by an order specifying and informing defendant of a proposed sentence of five years plus three years' postrelease supervision, and the matter remanded for further proceedings.

By judgment, same court and Justice, rendered December 13, 2004, defendant was convicted, on his guilty plea, of two counts of criminal sale of a controlled substance in the third degree, a class B felony (Penal Law § 220.16). In accordance with the plea agreement, defendant was placed under the supervision of Treatment Accountability for Safe Communities and directed to complete a drug treatment program. Despite being afforded

several opportunities, defendant failed to comply with the terms of the program and on September 21, 2006 was sentenced as a second felony offender, same court and Justice, to concurrent terms of 4½ to 9 years.

Defendant brought this motion seeking to be resentenced under the Drug Law Reform Act of 2009 (L 2009, ch 56) (DLRA). While finding defendant eligible for resentencing, Supreme Court, in its discretion, denied the motion on the ground that defendant had failed to avail himself of the alternative of drug treatment.

Although defendant failed to complete the drug treatment program and has not been a model prisoner, we note that his family has promised to provide him with substantial assistance upon release, including employment, help in finding housing and emotional support. Resentencing promotes the purpose of the 2009 DLRA to ameliorate harsh sentences, and the requisite period of postrelease supervision affords protection to the community (*see People v Goss*, 286 AD2d 180, 183 [2001]). We therefore exercise our discretion to grant the motion and to specify and inform

defendant of an appropriate proposed sentence, and we remit for further proceedings (CPL 440.46[3]; L 2004, ch 738, § 23).

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

ENTERED: JULY 21, 2011

Elba Iris Castro
DEPUTY CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5041 Lance International, Inc., Index 570717/09
Plaintiff-Respondent,

-against-

First National City Bank,
Defendant-Appellant.

_____

Freshfields Bruckhaus Deringer US LLP, New York (Marshall H. Fishman of counsel), for appellant.

The Roth Law Firm, PLLC, New York (Richard A. Roth of counsel), for respondent.

_____

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered on or about February 19, 2010, which reversed an order of Civil Court, New York County (Arthur F. Engoron, J.), entered on or about April 13, 2009, granting defendant's supplemental motion for summary judgment, denied that motion and reinstated the complaint, and affirmed an order, same court, Judge, and date of entry, denying defendant's underlying motion for summary judgment as moot, unanimously modified, on the law, to reverse the order denying the supplemental motion for summary judgment and grant the motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Contrary to defendant's contention, its defense is that plaintiff lacks capacity to sue, not that the court lacks subject

matter jurisdiction (*see Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279-280 [2006], *appeal dismissed* 8 NY3d 837 [2007]). Contrary to plaintiff's contention, Civil Court did not raise the issue of lack of capacity sua sponte.

While a defense that a party lacks capacity to sue (*see* CPLR 3211[a][3]) is waived if not raised in a pre-answer motion or in a responsive pleading (*see* CPLR 3211[e]), plaintiff's lack of capacity did not arise until after joinder of issue, and therefore, defendant did not waive that defense (*see George Strokes Elec. & Plumbing v Dye*, 240 AD2d 919, 920 [1997]).

A defendant may move for summary judgment based on an unpleaded defense (*see e.g. Rogoff v San Juan Racing Assn.*, 54 NY2d 883, 885 [1981]). Plaintiff can hardly claim prejudice or surprise from defendant's assertion that it lacked capacity to sue. In 1995, it moved to substitute its president as the plaintiff, arguing that he was "the real party in interest by virtue of the dissolution of the corporation."

Defendant's underlying motion for summary judgment was timely (*see* CPLR 3212[a]). Plaintiff has supplied no proof in the record that Civil Court required defendant to file its summary judgment motion by July 21, 2008. Even if, arguendo, one judge of the Civil Court ordered defendant to file its motion by

July 21, 2008, this order was superseded by the parties' October 16, 2008 stipulation, which set a briefing schedule for the motion and was so-ordered by another judge of the Civil Court.

Plaintiff's original note of issue, which was filed on October 19, 2007, "was, in effect, nullifed" (*Negron v Helmsley Spear, Inc.*, 280 AD2d 305 [2001]) when the action was removed from the trial calendar. Therefore, the operative note of issue is the one filed on April 25, 2008 (*see Williams v Peralta*, 37 AD3d 712, 713 [2007]), and the motion was timely.

This action for breach of contract was commenced in 1966. In 1975 plaintiff was dissolved by the Secretary of State for failure to pay taxes. Although the dissolved plaintiff was "properly permitted to pursue th[e breach of contract] claim in the course of winding up its affairs" (*J. Sackaris & Sons, Inc. v Onekey, LLC*, 60 AD3d 733, 734 [2009]; *see* Business Corporation Law (BCL) § 1006), the winding up of affairs cannot continue indefinitely. BCL § 1006 does not include any time limit for winding up the dissolved corporation's affairs. When a statute is silent, the courts will imply a reasonable period of time (*see e.g. Spiegelberg v Gomez*, 44 NY2d 920, 921 [1978]; *Matter of*

Jonathan Neil Corp. v State Liq. Auth., 112 AD2d 70, 72 [1985]).[1] Under these circumstances, as was noted by the Civil Court, where plaintiff only conducted business between 1959 and 1965; filed for bankruptcy in 1965 and never did business again; and was dissolved by the Secretary of State in 1975, plaintiff was not "winding up its affairs" in 2008 when defendant moved for summary judgment. Furthermore, that plaintiff assigned away its interest in this litigation in or about 1995 and moved to substitute its assignee, arguing that its assignee was the real party in interest, demonstrates that plaintiff was no longer winding up its affairs in 2008.

While we note that the delays in prosecuting this action are partially attributable to defendant's failure to comply with discovery demands, some of those delays occurred prior to dissolution and the last court order directing defendant to comply with discovery was issued in 1996. And, although defendant could have moved to dismiss for failure to prosecute after its second motion for summary judgment was denied in 1996,

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[1]"Where a state's business corporation laws do not provided [*sic*] an express time limitation for the winding up of corporate affairs, a dissolved corporation must finish liquidating its business and complete the winding up process within a reasonable time. What constitutes a reasonable time for a dissolved corporation to wind up its affairs before ceasing to exist altogether is generally a question of law for the court " (16A Fletcher Cyclopedia of Corporations § 8173 [2011] [footnote omitted]).

rather than permitting this action to languish from 1996 to 2008,[2] and/or could "have moved to dismiss or amend the pleadings to raise lack of capacity in a more timely manner" (*George Strokes Elec. & Plumbing v Dye*, 240 AD2d 919, 920 [1997], *supra*), ultimately it was plaintiff's duty to prosecute its case and it failed to do so. Accordingly, summary judgment dismissing the complaint was warranted.

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

ENTERED: JULY 21, 2011

Elba Iris Castro
DEPUTY CLERK

[2]Defendant served a 90-day notice but later withdrew it in January 1991.

Andrias, J.P., Sweeny, Moskowitz, Renwick, Richter, JJ.

5253N Betsy Harris, Index 111955/08
Plaintiff-Respondent,

-against-

Thomas Sculco, M.D., et al.,
Defendants-Appellants.

John Does 1-10,
Defendants.

_____

Peltz & Walker, New York (Bhalinder L. Rikhye of counsel), for appellants.

The Law Office of Tamara M. Harris, PLLC, New York (Tamara M. Harris of counsel), for respondent.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered September 17, 2010, which denied defendants' motion to disqualify plaintiff's attorney, unanimously affirmed, without costs.

Rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.01) generally prohibits an attorney from acting as an advocate before a tribunal where it is likely that the attorney will be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client, or where the attorney knows he or she is likely to be a witness on a significant issue of fact on the client's behalf, unless the testimony relates to enumerated

subjects, not here relevant (*see Goldberger v Eisner*, 21 AD3d 401 [2005]; *Broadwhite Assoc. v Truong*, 237 AD2d 162, [1997]).

In determining whether to disqualify an attorney on the ground that he or she will likely be a witness, the court is guided, but not bound by, the standards set forth in Rule 3.7 (*see S & S Hotel Ventures LTD. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 445 [1987]), and whether to disqualify an attorney rests in the sound discretion of the Court (*see Gulino v Gulino*, 35 AD3d 812 [2006]). While discovery may establish the substance and necessity of plaintiff's attorney's testimony so as to permit disqualification under Rule 3.7, the court exercised its discretion in denying defendants' motion on the ground that it was premature at this early stage of the proceedings (*see Kirshon, Shron, Cornell & Teitelbaum v Savarese*, 182 AD2d 911 [1992]).

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

ENTERED: JULY 21, 2011

Elva Iris Castro
DEPUTY CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5321-
5322 Kvest LLC, Index 110098/07
Plaintiff-Appellant,

-against-

Mitchell Cohen, et al.,
Defendants-Respondents.

_____

Litman & Jacobs, New York (Betty Jane Jacobs of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, White Plains (Nancy Quinn Koba of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered September 8, 2010, dismissing the complaint, and bringing up for review an order, same court and Justice, entered July 1, 2010, which granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment as to liability, and an amended order, same court and Justice, entered August 23, 2010, which directed the Clerk to enter judgment accordingly, unanimously modified, on the law, to reinstate the first, second and third causes of action and, as so modified, affirmed, without costs. Appeal from the August 23, 2010 order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff alleges that its insurance carrier disclaimed coverage because defendants, plaintiff's insurance brokers,

failed to timely forward to the carrier an April 26, 2004 claim letter from an injured party's attorney. We reject defendants' contentions that the disclaimer was ineffective and that plaintiff's claims are moot. According to trial testimony in the carrier's declaratory judgment action, the carrier never received the claim letter from defendants. If this is true, the carrier would not have had any knowledge of the existence, let alone the late notification, of the claim letter when it disclaimed coverage. Therefore, its failure to assert that defense was not a waiver thereof (*see Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 AD3d 33, 35 [2009]).

Plaintiff is not barred by the doctrine of judicial estoppel from asserting that the disclaimer is valid because it did not prevail in the declaratory judgment action (*see Rothstein & Hoffman Elec. Serv., Inc. v Gong Park Realty Corp.*, 37 AD3d 206, 207 [2007], *lv denied* 8 NY3d 812 [2007]; *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 [1998], *lv dismissed* 92 NY2d 962 [1998]). However, contrary to plaintiff's argument, the doctrine of collateral estoppel does not bind defendants to the declaratory judgment court's determination that defendants did not timely notify the carrier of the claim letter. Defendants were not parties to that action. The doctrine of collateral estoppel is binding only upon parties or their privies

who have had a full and fair opportunity to litigate issues determined in prior proceedings (*see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485-486 [1979]).

Defendants state in their affidavit that they mailed a copy of the claim letter to the carrier on May 6, 2004, two days after they received it from plaintiff. However, a notice of occurrence/claim form prepared by defendants on October 2, 2004 indicates that the claim had not previously been reported. This raises a triable issue of fact as to whether defendants timely notified the carrier of the claim letter.

Contrary to defendants' assertion, the damages recoverable in this action can include plaintiff's reasonable attorneys' fees incurred in defending the carrier's declaratory judgment action in its effort to mitigate its damages (*see Martini v Lafayette Studio Corp.*, 273 AD2d 112, 114 [2000]). On the other hand, the breach of fiduciary duty cause of action was properly dismissed as the facts establish that the parties had nothing more than a

typical insurance broker-customer relationship (*see e.g. Murphy v Kuhn*, 90 NY2d 266, 270-271 [1997]).

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

ENTERED: JULY 21, 2011

Elva Iris Castro
DEPUTY CLERK

Tom, J.P., Catterson, Moskowitz, Freedman, Richter, JJ.

5347 Humberto Montolio, Index 15129/07
Plaintiff-Respondent,

-against-

Negev LLC,
Defendant-Appellant,

2120 Mapes Avenue Housing Development Fund Corporation, et al.,
Defendants.

_____

Shafer Glazer, LLP, New York (David A. Glazer of counsel), for appellant.

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered June 30, 2010, which denied defendant Negev LLC's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff testified that he was injured when he tripped and fell in a depression in the street adjacent to the sidewalk in front of property owned by defendant Negev LLC. Plaintiff explained that he was forced into the street because the sidewalk abutting the property was blocked by a barricade. The record shows that Con Edison was doing gas-related work for Negev's property, which was under development at the time.

Negev called a witness who had virtually no knowledge of the work being done on the date of the accident. He was not employed by Negev at the time of construction, did not visit construction sites generally, and had no familiarity with the construction permits that might have been issued for this job. Thus, Negev failed to meet its burden of proof that it did not make special use of the sidewalk (*see Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447 [2008]; *McKenzie v Columbus Ctr., LLC*, 40 AD3d 312 [2007]; *Sheehy v City of New York*, 43 AD3d 336 [2007]) and the motion correctly was denied.

Furthermore, although Negev's answer is contained in the record, it is verified only by counsel. The motion also is supported only by counsel's affirmation; no submission was made by anyone with personal knowledge (*Lopez v Crotona Ave. Assoc., LP*, 39 AD3d 388, 390 [2007]).

Because there has not yet been a finding of negligence against Negev, summary judgment on its claim for indemnification

against Con Edison would be premature (*see e.g. Pueng Fung v 20 W. 37th St. Owners, LLC*, 74 AD3d 635, 636 [2010]).

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

ENTERED: JULY 21, 2011

Elva Iris Castro
DEPUTY CLERK

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

4043-
4044-
4045

In re Metropolitan Transit Authority, etc.,

Index 401185/08
401188/08
401192/08

- - - - -

Collegiate Church Corporation, etc.,
Claimant-Respondent,

-against-

Metropolitan Transit Authority,
Condemnor-Appellant.

- - - - -

200 Broadway Joint Venture Co., LLC., etc.,
Claimant-Respondent,

-against-

Metropolitan Transportation Authority,
Condemnor-Appellant.

- - - - -

In re Metropolitan Transit Authority, etc.,

- - - - -

DLR Properties, LLC, etc.,
Claimant-Respondent,

-against-

Metropolitan Transit Authority,
Condemnor-Appellant.

- - - - -

In re Metropolitan Transit Authority, etc.,

- - - - -

DLR Properties, LLC, etc.,
Claimant-Respondent,

-against-

Metropolitan Transportation Authority,
Condemnor-Appellant.

_____

Berger & Webb, LLP, New York (Charles S. Webb III of counsel), for appellant.

Goldstein, Rikon & Rikon, P.C., New York (M. Robert Goldstein of counsel), for Collegiate Church Corporation, respondent.

Kramer Levin Naftalis & Frankel LLP, New York James G. Greilsheimer of counsel), for 200 Broadway Joint Venture Co. LLC, respondent.

Rosenberg & Estis, P.C., New York (Michael E. Feinstein of counsel), for DLR Properties, LLC, respondent.

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Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered December 1, 2009, affirmed, without costs. Judgment, same court and Justice, entered December 3, 2009, affirmed, without costs. Order, same court and Justice, entered December 17, 2009, modified, on the law, to direct that Supreme Court conduct the hearing, and otherwise affirmed, without costs.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.,
Helen E. Freedman
Rosalyn H. Richter
Sheila Abdus-Salaam, JJ.

4043-4044-4045
Index 401185/08
401188/08
401192/08

_____x

In re Metropolitan Transit Authority, etc.,

- - - - -

Collegiate Church Corporation, etc.,
Claimant-Respondent,

-against-

Metropolitan Transit Authority,
Condemnor-Appellant.

- - - - -

200 Broadway Joint Venture Co., LLC., etc.,
Claimant-Respondent,

-against-

Metropolitan Transit Authority,
Condemnor-Appellant.

- - - - -

In re Metropolitan Transit Authority, etc.,

- - - - -

DLR Properties, LLC, etc.,
Claimant-Respondent,

-against-

Metropolitan Transit Authority,
Condemnor-Appellant.

- - - - -

In re Metropolitan Transit Authority, etc.,

- - - - -

DLR Properties, LLC, etc.,
Claimant-Respondent,

-against-

Metropolitan Transportation Authority,
Condemnor-Appellant.

_____x

Condemnor Metropolitan Transportation Authority appeals from judgment of the Supreme Court, New York County (Walter B. Tolub, J.), entered December 1, 2009, in the total sum of $11,480,370.98, including interest at the rate of 9% per year, the judgment, same court and Justice, entered December 3, 2009, in the total sum of $44,158,004.44, including interest at the rate of 9% per year, and the order, same court and Justice, entered December 17, 2009, which granted DLR Properties, LLC's motion for an additional allowance pursuant to Eminent Domain Procedural Law § 701 and referred to a special referee the appropriate amount of the additional allowance.

Berger & Webb, LLP, New York (Charles S. Webb III, Kenneth J. Applebaum, Judith Z. Katz and Adam H. Brodsky of counsel), for appellant.

Goldstein, Rikon & Rikon, P.C., New York (M. Robert Goldstein of counsel), for Collegiate Church Corporation, respondent.

Kramer Levin Naftalis & Frankel LLP, New York James G. Greilsheimer of counsel), for 200 Broadway Joint Venture Co. LLC, respondent.

Rosenberg & Estis, P.C., New York (Michael E. Feinstein of counsel), for DLR Properties, LLC, respondent.

RICHTER, J.

On March 29, 2006 (the vesting date), condemnor-appellant Metropolitan Transportation Authority (the MTA) acquired five properties in lower Manhattan through eminent domain. The properties, which make up the entire block front on the east side of Broadway between Fulton and John Streets, were acquired in connection with the construction of the Fulton Street Transit Center Project, a new public transit facility currently under construction. On the vesting date, the properties were owned by the three claimants-respondents: DLR Properties, LLC (Riese), Collegiate Church Corporation (Collegiate), the real estate owning entity of the Minister, Elders and Deacons of the Reformed Protestant Dutch Church of the City of New York, and 200 Broadway Joint Venture Co. LLC (Joint Venture), an entity in which Collegiate had a 49.9% interest and nonparty Brookfield Properties Corporation (Brookfield) had a 50.1% interest.

The northernmost property, 204 Broadway, a two-story retail and office building, was owned by Collegiate. The next property south, 200 Broadway, was a one-story retail building owned by Joint Venture. The property below that, 198 Broadway, a 12-story office building, was owned by Collegiate. The next property south, 194 Broadway, a three-story retail building, was owned by Riese. Finally, the southernmost property, 192 Broadway, was a

nine-story office building owned by Collegiate.

After the condemnation, in accordance with the Eminent Domain Procedural Law (EDPL), the MTA made advance payments to Collegiate/Joint Venture and Riese. Claimants filed notices of claim and a joint trial was held to determine whether they were entitled to any additional compensation. Prior to trial, the MTA and Collegiate reached a settlement as to the value of the building at 192 Broadway. However, the settlement left open for trial the issue of whether 192 Broadway's unused development rights, totaling approximately 25,000 square feet, had additional value.

Unused development rights, also known as air rights, represent the difference between the maximum permissible floor area and the actual built floor area on a zoning lot (Department of City Planning, Zoning Handbook, at 146 [2011]). With certain exceptions not applicable here, unused development rights may be sold or transferred as-of-right from one lot to an adjacent lot through a zoning lot merger, which is the joining of two or more adjacent zoning lots into one new zoning lot (*id.*).

At trial, the parties introduced appraisal evidence of the value of the properties on the vesting date. The MTA argued that each of the properties should be valued separately. The MTA appraiser valued the Collegiate properties at $37,000,000 (204

Broadway) and $15,500,000 (198 Broadway), and the Joint Venture Property (200 Broadway) at $21,950,000, for a total of $74,450,000. He also concluded that the air rights to Collegiate's 192 Broadway could not be transferred because, as of the vesting date, there was no zoning lot merger between the Riese property (194 Broadway) and the Collegiate/Joint Venture properties. In contrast, Collegiate and Joint Venture maintained that the highest and best use for their properties was a residential condominium building to be constructed on an assemblage consisting of the three northern properties (198, 200 and 204 Broadway) along with the air rights from 192 and 194 Broadway. The Collegiate/Joint Venture appraiser found that Collegiate/Joint Venture's interest in that assemblage had a value of $112,000,000 as of the vesting date.

As for the Riese property (194 Broadway), the MTA appraiser found that the highest and best use was to demolish the building and construct a mixed-use retail and residential building on the site; he set the property's value on the vesting date at $27,440,000. Riese's appraiser, on the other hand, assumed that the building would remain and that the air rights could be sold to a neighboring property. He determined that the total value of the building plus its air rights was $60,630,000.

In a decision dated September 11, 2009, the trial court

found that the three northern properties were, for all intents and purposes, under common ownership and control, and there was a reasonable probability that Collegiate and Joint Venture would have assembled these properties. The court further found that it was reasonably probable that Collegiate/Joint Venture would have acquired Riese's property as part of the assemblage, which would then allow through a zoning lot merger for the inclusion of 192 Broadway's air rights. Using the comparable sales approach, and adjusting for various factors, the court determined that the unit price for the assemblage was $311.35 per square foot. Applying this figure to the total square footage of the three northern properties and 192 Broadway's air rights and adjusting for the cost of demolition, the court concluded that Collegiate/Joint Venture's properties had a value of $106,510,521.80. Using the same formula, the court found that Riese's property had a value of $35,224,396.25. Because both of these amounts were higher than the advance payments already made, the court entered judgments directing the MTA to pay claimants the difference along with interest at 9%. The MTA now appeals from those judgments.

It is well settled that the measure of damages in a condemnation case is the fair market value of the condemned property in its highest and best use on the date of taking (*Matter of City of New York [Franklin Record Ctr.]*, 59 NY2d 57,

61 [1983]). This is true even though the owner may not have been utilizing the property to its fullest potential at the time of condemnation (*Matter of Town of Islip [Mascioli]*, 49 NY2d 354, 360 [1980]). Although an owner is not required to show either that the property had been used at its projected highest and best use, or that there had been an ante litem plan for such use, the owner must establish that there is a reasonable probability that the asserted use "could or would have been made within the reasonably near future" (*Matter of City of New York [Broadway Cary Corp.]*, 34 NY2d 535, 536 [1974]).

"The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value" (*Olson v United States*, 292 US 246, 256 [1934]). Thus, a claimant is entitled to the fair market value of its property for its highest and best available use even though that use is in connection with adjoining properties, provided there is a reasonable probability that the condemned property would be combined with other tracts in the reasonably near future (*United States ex rel. TVA v Powelson*, 319 US 266, 275-276 [1943]; *see also Commissioner of Transp. v Towpath Assoc.*, 255 Conn 529, 540, 767 A2d 1169, 1177 [2001]; 4-13 Nichols on Eminent Domain

§ 13.01 [20] [2010]). Contrary to the MTA's contention, courts in New York have recognized that the reasonable probability standard applies to potential assemblages (*see e.g. Yaphank Dev. Co. v County of Suffolk*, 203 AD2d 280, 281-282 [1994]; *New York State Urban Dev. Corp. v Wanger*, 58 AD2d 955, 956 [1977]; *Matter of City of Rochester v Iman*, 51 AD2d 651, 652 [1976]).

Whether there was a reasonable probability of an assemblage is a question of fact (*see Rodman v State of New York*, 109 AD2d 737, 737 [1985]; *see also Matter of Consolidated Edison Co. of N.Y., Inc. v City of New York*, 8 NY3d 591, 595-596 [2007] [valuation of property presents a question of fact]). On appellate review of a nonjury trial, "the findings of fact should be viewed in a light most favorable to sustain the judgment, due deference should be accorded Trial Term in matters of credibility, and the findings of fact should not be disturbed unless such determination could not have been reached under any fair interpretation of the evidence" (*Richstone v Q-Med, Inc.*, 186 AD2d 354, 354 [1992]; *see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]; *Horsford v Bacott*, 32 AD3d 310, 312 [2006]). These standards are applicable to condemnation cases (*see e.g. Matter of Board of Commr. of Great Neck Park Dist. of Town of N. Hempstead v Kings Point Hgts., LLC*, 74 AD3d 804, 806 [2010],

appeal dismissed, lv denied 16 NY3d 848 [2011]; *Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170 [2005]; *Matter of New York City Tr. Auth. [Estate of Donner] v City of New York*, 166 AD2d 336 [1990], *lv denied* 79 NY2d 756 [1992]).

Here, there was sufficient evidence to support the trial court's findings. The evidence showed that Collegiate's interest in pursuing an assemblage of the entire Broadway block front started long before any condemnation was contemplated. In 1997, Collegiate hired Casey Kemper to manage its real estate portfolio. At that time, Collegiate owned three of the five properties on the block (204, 198 and 192 Broadway). In 1998, Collegiate retained a broker, Cushman & Wakefield, to explore the possibility of assembling the block front by acquiring the other two properties (200 and 194 Broadway). Cushman & Wakefield prepared projections of outlays and returns and explored financing alternatives in connection with the proposed acquisition. Collegiate's counsel, Carter Ledyard & Milburn, also was brought on board to assist in the planning, and a real estate consultant was hired. According to Kemper, pursuit of the Broadway assemblage was a top priority for Collegiate.

By the beginning of 2001, Collegiate had embarked upon partnership discussions with Brookfield, a major North American

developer. Brookfield had commissioned a brokerage firm, Massey Knakal Realty Services, to prepare a strategy for acquiring and developing the entire square block, including the Broadway properties. The report laid out a road map for acquiring the properties in stages and was based on the premise that Brookfield and Collegiate would enter a joint venture and that Collegiate's properties would be part of the assemblage. The report indicated that the three Collegiate properties were the "key element" of the plan and the remaining two properties on the block front (200 and 194 Broadway) were the "most valuable pieces" of the project. Lawrence Graham, Brookfield's executive vice president, shared and discussed this report with Kemper.

From March through May 2001, Brookfield and Collegiate exchanged draft letters of intent outlining the terms of a proposed joint venture to develop the block. Although it was nonbinding, both parties indicated that this was a common practice, subject to final negotiation of joint venture documents. Numerous meetings were held between Brookfield and Collegiate to discuss the terms of the letter. Although no formal agreement was signed, both Kemper and Graham, who had a long-standing professional relationship, testified that the parties were in basic agreement. The structure of the deal was that Collegiate would contribute its properties to the project

and Brookfield would provide capital and development expertise. With a general agreement reached in principle, Brookfield retained an architect, Skidmore, Owings & Merrill LLP, to prepare drawings for the potential development.

Meanwhile, Riese too was interested in being part of the development of the Broadway block front. Dennis Riese, Riese's chief executive officer, testified that his interest went as far back as 1985, when he entered into "serious discussions" with Collegiate's then executive director of real estate; the two men discussed their mutual interest in developing the block. Since Riese was not in the business of developing properties, Mr. Riese met with five different developers. Mr. Riese explained that nothing concrete came of these early discussions because his father and uncle, who controlled Riese at the time, had a different vision for the property. Development plans were further halted when Riese encountered severe financial difficulties in the late 1980s and the company went into bankruptcy.

After Riese emerged from bankruptcy in August 2000, Mr. Riese again turned his attention to the development of the block front. In 2001 - again, before the MTA announced any condemnation plan - Kemper began discussions with Mr. Riese about acquiring 194 Broadway as part of the assemblage. Kemper

informed Mr. Riese that Collegiate was interested in the Riese property, or its air rights, as part of the development. Mr. Riese told Kemper that he was willing to sell Collegiate either the air rights or the fee itself. Collegiate also retained a consultant, Robert Von Ancken, to appraise the property and meet with Mr. Riese to negotiate a deal.

Plans for the assemblage were temporarily halted by the events of September 11, 2001, as claimants focused on repairing and cleaning their properties located near the former World Trade Center. In 2002, Brookfield decided to scale down its plans to develop the entire square block and instead began to explore developing just the Broadway block front. Von Ancken prepared an appraisal of the Riese property dated August 2, 2002 for the purpose of negotiating a price with Mr. Riese. Further architectural drawings and massing studies were prepared on the possible assemblage of the Broadway block front properties.

In September 2002, Collegiate and Brookfield learned of possible condemnation plans for the site; Riese found out about the potential plan several months later. Nevertheless, claimants continued their pursuit of an assemblage. In fact, Collegiate approached the MTA about joining forces to jointly develop the area and proposed a commercial or residential development to be built above the transit center. Minutes from a February 2003

board meeting confirm that Collegiate was still interested in the assemblage and that it viewed the condemnation only as a "possible scenario." In May 2003, Collegiate sent Brookfield an outline of the key terms of a transaction to develop the five buildings comprising the Broadway block front. There was basic agreement between the parties as to these terms.

In October 2003, Brookfield purchased the 200 Broadway property in connection with the proposed assemblage with the Collegiate properties. In March 2004, Joint Venture was formed between Collegiate and Brookfield and title to 200 Broadway was transferred to the new entity. Collegiate's interest in Joint Venture was 49.9% and Brookfield's was 50.1%. Despite the fact that Collegiate had a slightly smaller ownership interest, the Joint Venture Agreement provided that Collegiate would manage the property and that Collegiate's consent was required for any action taken on major matters. Furthermore, the evidence established that the reason Joint Venture was not set up as an exact 50/50 partnership was so that Brookfield could avoid paying transfer taxes. Thus, the record supports the trial court's finding that the three northern properties were, for all intents and purposes, under common ownership and control (*see e.g. Johnson v State of New York*, 10 AD3d 596, 598 [2004] [joint control over subject parcels was enough to establish unity of

ownership for valuation purposes]).

The acquisition of 200 Broadway meant that Collegiate and Joint Venture now together controlled four of the five properties on the block front. The parties then focused their attention on 194 Broadway, the remaining property owned by Riese. In 2004, at Brookfield's request, Costas Kondylis and Partners LLP, an architectural firm, prepared a series of drawings of various residential projects to be built on the three northern lots. One of the drawings contemplated a zoning lot merger of the five properties on the block front, including Riese's property, which would also allow for inclusion of the air rights from 192 Broadway, the southernmost property.

In a November 12, 2004 letter, Collegiate offered to buy Riese's air rights. Although the letter stated that the Collegiate's offering price was undecided, it suggested $60 per square foot. Collegiate explained that this price was deliberately low and was intended to jump-start negotiations. Mr. Riese testified that he was "encouraged" by Collegiate's letter and that he had an "ardent desire" to complete a deal, but that he was not satisfied with the initial offer. The parties met a few weeks later to continue negotiations. In a letter to Collegiate dated December 9, 2004, Mr. Riese wrote that "we both now agree that . . . a joint development is currently possible

and should be done." The letter also suggested that the parties continue their discussions. Shortly thereafter, a public hearing on the condemnation was held. On March 31, 2005, Determinations and Findings were issued, and title to the property vested in the MTA on March 29, 2006.

We conclude that a fair interpretation of the evidence supports the trial court's findings on the assemblage. The MTA's claim that Collegiate and Brookfield never had an interest in pursuing a joint development project but were merely building up their condemnation claims is belied by the history between the parties, which began long before any hint of condemnation. Starting as early as 1998 and continuing up until the condemnation, Collegiate took concrete steps in furtherance of the assemblage including hiring architects, law firms and consultants, partnering with a major developer, acquiring 200 Broadway and negotiating to take control of the Riese property.

Likewise, the trial court had a basis in the record for rejecting the MTA's claim that Riese had no true intention of selling its property. Mr. Riese testified that his interest in a potential development started in 1985 when he initiated discussions with Collegiate. Those early talks were put on hold due to the fact that Mr. Riese's father and uncle, who controlled Riese at the time, were not interested in developing the

property. Riese subsequently entered into bankruptcy, which further delayed the development plans. But after Riese came out of bankruptcy and Mr. Riese's father and uncle were no longer in control of the company, Mr. Riese again began to take steps to sell the property to Collegiate.

Mr. Riese testified that he wanted to complete a deal and that he believed the parties were "closer than ever." Collegiate's negotiator, Robert Von Ancken, also believed a deal would be reached between Riese and Collegiate because it made "economic sense to both parties." Brookfield's executive vice president, Lawrence Graham, testified that he too believed that the parties would reach an agreement. Indeed, even the MTA appraiser testified that it was in the economic interest of Collegiate to reach an agreement with Riese. The trial court's conclusion that a deal was reasonably probable necessarily reflected a finding that these witnesses were credible. Such credibility determinations are entitled to deference (*Campbell v Campbell*, 72 AD3d 556, 556-557 [2010]).

It is of no legal consequence that claimants took some steps in furtherance of the assemblage after the condemnation was announced (*see e.g. Matter of City of New York*, 94 AD2d 724, 724 [1983], *affd* 61 NY2d 843 [1984]). There is no question that Brookfield and Collegiate had plans to acquire 200 Broadway long

before they had any knowledge of a possible condemnation. As the trial court found, it would make little sense that Brookfield, a major developer, would have any interest in purchasing 200 Broadway, a simple one-story retail building, without plans for some sort of major assemblage.

When asked why the property was purchased even though a condemnation was announced, Kemper explained that MTA's announcement did not foreclose the possibility that an assemblage would still occur. The MTA's own appraiser acknowledged that development plans can still proceed after a condemnation is proposed because no one can predict when in the future an actual taking might occur. Indeed, here, the actual taking took place more than three years after the condemnation was announced. Despite the fact that, at the time of the purchase, Collegiate and Brookfield knew of the potential condemnation, "such knowledge, without more, was insufficient to establish that [their actions were taken] in bad faith" (*Matter of Town of E. Hampton [Windmill II Affordable Hous. Project (9 Parcels)]*, 44 AD3d 963, 964 [2007]; *see also Vitale v State of New York*, 33 AD2d 977 [1970], *lv dismissed* 26 NY2d 611 [1970]).

"In determining an award to an owner of condemned property, the findings must either be within the range of the expert testimony or be supported by other evidence and adequately

explained by the court" (*Matter of City of New York (Reiss)*, 55 NY2d 885, 886 [1982]). The court here sufficiently explained its method of valuing claimants' properties, which was, in large part, based on the Collegiate/Joint Venture appraisal. The evidence at trial supports the court's inclusion of the Riese building in the assemblage. Mr. Riese testified that he was willing to sell the entire property and the 2002 appraisal prepared by Collegiate's consultant was for the whole property, not just the air rights. Furthermore, Collegiate/Joint Venture's appraiser testified that he met with Mr. Riese for the purpose of buying both the land and air rights.

Although the MTA argues that the trial court should have applied a discount based on the possibility that the properties might not be assembled, there is no evidence in the record as to what, if any, that discount factor should have been. The MTA appraiser, in his rebuttal report to the Collegiate/Joint Venture appraisal, proposed an alternative value for the assemblage but did not apply any such discount. Nor, in his rebuttal report to the Riese appraisal, did he argue that a discount should be applied to the potential sale of air rights.

The land unit value (price per square foot) found by the court was within the range of expert testimony and adequately supported by the record. The court's choice of comparable sales,

which is entitled to deference, was proper (*see 627 Smith St. Corp. v Bureau of Waste Disposal of Dept. of Sanitation of City of N.Y.*, 289 AD2d 472, 473-474 [2001], *appeal dismissed, lv denied* 98 NY2d 611 [2002]; *Matter of Caldor, Inc. v Board of Assessors*, 227 AD2d 400 [1996]). The court did not err in averaging the adjusted comparable sales (*see Matter of Town of Islip v Sikora*, 220 AD2d 434, 436 [1995]). *Latham Holding Co. v State of New York* (16 NY2d 41 [1965]) is distinguishable because that case involved *unadjusted* comparables. We note that the MTA appraiser also averaged adjusted comparable sales. The trial court's decision to use $20 per square foot as the cost of demolition is supported by the testimony of the MTA appraiser, who stated that he had used this figure on other projects. Furthermore, as the court observed, the record was devoid of any certified appraisals from demolition contractors.

The court properly applied a 9% rate for postjudgment interest pursuant to McKinney's Unconsolidated Laws of NY § 2501 (L 1939, ch 585, as amended by L 1982, ch 681, § 4) ("The rate of interest to be paid by a public corporation upon any judgment or accrued claim against the public corporation shall not exceed nine per centum per annum"). Public Authorities Law § 1276(5) is not applicable to condemnation claims (*Matter of Metropolitan Transp. Auth. v American Pen Corp.*, 94 NY2d 154, 159 [1999]).

The MTA also appeals from a December 17, 2009 order which granted Riese's motion for an additional allowance pursuant to EDPL 701. On December 1, 2005, prior to the vesting date, the MTA offered Riese $15,800,000 for 194 Broadway. Riese rejected the offer as payment in full but accepted it as an advance payment. Several months later, on March 14, 2006, the MTA increased its offer to $24,400,000. Riese again rejected the offer as payment in full but accepted it as an advance payment. In or about December 2007, after the vesting date, the MTA offered Riese an additional $2,200,000, bringing the total advance payments to $26,600,000. Again, Riese rejected the offer as payment in full but accepted it as an additional advance payment.

After trial, Riese moved pursuant to EDPL 701 for an additional allowance for attorneys' fees, disbursements and appraisal fees. The MTA argued that Riese was not entitled to any additional compensation. The court concluded that some award was warranted but was not persuaded that the amounts sought were appropriate. The court referred to a special referee "the appropriate amount of . . . fees and expenses . . . incurred by the necessity of bringing this matter to trial."

EDPL 701 provides that a court "may in its discretion" award the condemnee an additional allowance for fees and expenses where

the condemnation award is "substantially in excess of the amount of the condemnor's proof and where deemed necessary . . . for the condemnee to achieve just and adequate compensation." "The statute assures that a condemnee receives a fair recovery by providing an opportunity for condemnees whose property has been substantially undervalued to recover the costs of litigation establishing the inadequacy of the condemnor's offer" (*Hakes v State of New York*, 81 NY2d 392, 397 [1993]).

Contrary to the MTA's claim, the court's $35,224,396.25 valuation of Riese's property was "substantially in excess" of both the initial $15,800,000 offer (a 122.9% difference) as well as the supplemental offer of $24,400,000 (a 44.4% difference) (EDPL 701; *see Matter of Metropolitan Transp. Auth. v Ausnit*, 306 AD2d 190 [2003] [award that is 35.3% more than the offer is substantially in excess of it]; *Matter of Gelsomino v City of New Rochelle*, 25 AD3d 554, 555 [2006] [additional allowance granted where award was 35.5% above the offer]).[1]

We find no abuse of discretion in the court's ordering a hearing to determine the amount necessary for Riese to achieve just and adequate compensation. The MTA's argument that a fee

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[1] The MTA does not contend that the award should be compared to the $26,600,000 postvesting offer made in December 2007.

award is not warranted because Riese expended fees in support of a valuation method that the court purportedly rejected and because the valuation that Riese advocated for its property was much higher than the court's valuation is premature. The parties can address at the hearing how much of the fees were necessary.

Riese's failure to include affidavits from its attorney and appraiser in its opening papers is not fatal to its application. The statute requires that "[t]he application . . . include affidavits of the condemnee and all parties that have incurred expenses on the condemnee's behalf, setting forth inter alia the amount of the expenses incurred" (EDPL 701). Riese's initial motion papers satisfied this requirement. In this context, appraisers and attorneys do not incur expenses. Rather, they bill the condemnee, which is the party that incurs the expenses. In any event, in its reply papers, Riese included an affidavit and affirmation from its appraiser and attorney respectively, and the MTA will have an opportunity to challenge those documents at the hearing.

There is no merit to the MTA's claim that the trial court mistakenly believed that it lacked the discretion to deny an additional allowance. A fair reading of the decision shows that the court understood its obligation and applied the correct standard. Even if the MTA is correct, we would, in the exercise

of our own discretion, reach the same result.

Because EDPL 501(B) requires that Supreme Court "hear . . . all claims arising from the acquisition of real property . . . without referral to a referee," the hearing should be conducted by the court, not a referee.

Accordingly, the judgment of the Supreme Court, New York County (Walter B. Tolub, J.), entered December 1, 2009, against condemnor MTA and in favor of claimant DLR Properties, LLC, in the total sum of $11,480,370.98, including interest at the rate of 9% per year, should be affirmed, without costs. The judgment of the same court and Justice, entered December 3, 2009, against condemnor MTA and in favor of claimants The Minister, Elders and Deacons of the Reformed Protestant Dutch Church of the City of New York and Joint Venture, in the total sum of $44,158,004.44, including interest at the rate of 9% per year, should be affirmed, without costs. The order of the same court and Justice, entered December 17, 2009, which granted Riese's motion

for an additional allowance pursuant to EDPL 701 and referred to a special referee the appropriate amount of the additional allowance should be modified, on the law, to direct that Supreme Court conduct the hearing, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JULY 21, 2011

Elba Iris Castro
DEPUTY CLERK