SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 16, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3736-3737 People of the State of New York, Respondent, Ind. 1884/02

-against-

Herbert Long,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Rither Alabre of counsel), for respondent.

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Judgment of resentence, Supreme Court, Bronx County (John P. Collins, J.), rendered August 10, 2009, resentencing defendant to consecutive terms of 25 years and 10 years, with 2½ years' postrelease supervision, unanimously affirmed.

The resentencing proceeding held pursuant to *People v Sparber* (10 NY3d 457 [2008]) to correct an error in failing to impose a term of postrelease supervision was not barred by double jeopardy, since defendant was still serving his prison term at

that time, and therefore had no reasonable expectation of finality in his illegal sentence (*see People v Lingle*, _NY3d_, 2011 NY Slip Op 3308 [2011]). Additionally, the *Lingle* court rejected due process arguments similar to those raised by defendant herein.

The resentencing here only involves PRS, and did not present the sentencing court with an occasion to revisit the original prison sentence. Indeed, *Lingle* specifically prohibits both the resentencing court and this Court from revisiting the original, lawful sentence.

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

ENTERED: JUNE 16, 2011

CLERK

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

3785 Marie Therese Soho, Index 8323/07
Plaintiff-Appellant,

-against-

Ibrahima Konate, et al.,
Defendants-Respondents.

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Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Adam S. Bernstein of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (MaryAnn Brigantti-Hughes, J.), entered July 28, 2009, which granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

On February 4, 2006, plaintiff, then 75 years old, fell as she attempted to enter a taxi driven by defendant Konate. Konate exited the car in an effort to help plaintiff. However, he had mistakenly left the taxi in drive and it subsequently moved forward and struck plaintiff in the leg. Plaintiff commenced this action against defendants alleging that she sustained serious injuries.

Defendants established their prima facie entitlement to judgment as a matter of law by submitting, inter alia, the affirmation of an orthopedic surgeon who concluded that based upon an examination of plaintiff and a review of her medical records, plaintiff was not seriously or permanently injured and that her right knee and right shoulder complaints were not causally related to the accident, but were the results of her weight and pre-existing degenerative conditions consistent with her age (*see Franchini v Palmeri*, 1 NY3d 536 [2003]; *Kerr v Klinger*, 71 AD3d 593 [2010]). Thus, the orthopedist's opinion regarding causation was neither conclusory nor unsupported and was sufficient to establish defendants' prima facie case (*see Lopez v American United Transp., Inc.*, 66 AD3d 407 [2009]; *compare Frias v James*, 69 AD3d 466 [2010]).

In opposition, plaintiff failed to raise a triable issue of fact. While plaintiff's medical records that were relied upon by defendants were properly before the court, plaintiff may not rely upon the unaffirmed medical report of the physician who examined her three years after the accident (*see Bent v Jackson*, 15 AD3d 46, 48 [2005]), and her remaining evidence failed to rebut defendant's prima facie showing. Indeed, plaintiff failed to provide objective evidence of contemporaneous limitations to her

right knee and right shoulder as a result of the accident (*see Jean v Kabaya*, 63 AD3d 509 [2009]; *Valentin v Pomilla*, 59 AD3d 184, 185 [2009]), a prerequisite to establishing serious injury even where the plaintiff has undergone surgery (*Jean,* 63 AD3d at 510). Even though Dr. Nelson noted limitations to plaintiff's knee and shoulder ten days after the accident, the doctor's report is deficient because it does not compare the findings to the standards for normal ranges of motion (*Yang v Alston*, 73 AD3d 562 [2010]). Further, Dr. Bishow's operative report is not contemporaneous because he did not examine plaintiff until five months after the accident (*see Cabrera v Gilpin*, 72 AD3d 552 [2010]; *Toulson v Young Han Pae*, 13 AD3d 317 [2004]). Plaintiff's physicians also failed to address the existence of pre-existing degenerative conditions as the cause of plaintiff's symptoms and failed to explain how the alleged serious injuries of plaintiff's right shoulder and right knee might not have been related to her age or weight (*see Lopez*, 66 AD3d at 407). Further, plaintiff's physicians failed to address the fact that merely because plaintiff had surgery for a meniscal

tear does not establish that the injury was caused by the accident (*see Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 557-558 [2009]).

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

ENTERED: JUNE 16, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ

4326 Jayvaun Stephenson, etc., et al., Index 15580/04
Plaintiffs-Respondents,

-against-

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

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Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for appellant.

Law Offices of Jonathan M. Cooper, Cedarhurst (Jonathan M. Cooper of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 11, 2009, which denied defendants' motion for summary judgment dismissing the complaint and granted plaintiffs' cross motion for summary judgment on the issue of liability, reversed, on the law, without costs, defendants' motion granted and plaintiffs' denied. The Clerk is directed to enter judgment dismissing the complaint.

The issue before us is whether defendants, who are deemed to have had prior notice of an assault on the almost 14-year-old plaintiff Jayvaun Stephenson, are liable for negligently failing to prevent the assault. On October 22, 2003, Stephenson, a student at Middle School 113 in the Bronx, and Lorenzo McDonald,

a fellow student, had a fistfight on the school grounds, during which McDonald punched Stephenson once in the face and Stephenson punched McDonald twice. Neither boy was significantly injured. School authorities punished Stephenson with a one-day, in-school suspension, and McDonald, who was found to have started the incident, received a one- to two-week suspension. The school also dismissed Stephenson that day and directed him to go straight home so that he would not encounter McDonald again that day. Upon arriving at home, Stephenson did not tell his mother or grandmother, with whom he lived, about the fight with McDonald. The next day, October 23, Stephenson served his one-day suspension and was still on school grounds when he encountered McDonald, who told Stephenson he was "going to get [Stephenson] jumped." Again, Stephenson did not tell his mother or grandmother about this threat; nor did he report it to school authorities.

Before school began on the morning of October 24, Stephenson exited a subway station approximately two blocks from the school and saw McDonald across the street. Stephenson entered a store, from which three accomplices of McDonald pulled Stephenson outside to the street where McDonald was waiting. While two accomplices held Stephenson's hands behind his back, McDonald and

the third accomplice repeatedly punched Stephenson in the face for several minutes and fractured his jaw in two places.

Plaintiffs commenced this personal injury action in April 2004, alleging that the October 24 assault was a continuation of the October 22 fistfight and that defendants were negligent in failing to take action to prevent the assault by notifying Stephenson's mother about the fistfight. In an affidavit, the mother stated that, if the school had notified her about the fight, she would have asked to meet with the school and McDonald's parents to iron out the differences between the two boys, and would have either kept Stephenson at home or had him escorted to school until "the problem had apparently been resolved."

After a series of discovery disputes between the parties, plaintiffs moved for an order striking the answer for defendants' repeated failure to comply with orders directing them to produce school records about the October 22 incident. In a December 2008 order that was not appealed, the motion court granted plaintiffs' motion to the extent of sanctioning defendants by ruling that "the issue of prior notice to the defendants of the October 24, 2003 incident is resolved in [plaintiffs'] favor and defendants are precluded from raising any issue with respect thereto."

In the order on appeal, the motion court premised its grant of partial summary judgment to plaintiffs on its sanction in the December 2008 order. As the court viewed the matter, since its prior ruling meant that "defendants were on notice of the previous [October 22] assault [and] the threat to [Stephenson], as well as [ ] [McDonald's] history of violence," the school was on notice of the October 24 assault and, contrary to defendants' position, the assault was foreseeable. The court acknowledged that a school normally has no duty of care to a student injured off school grounds (*see e.g. Norton v Canandaigua City School Dist.*, 208 AD2d 282, 285 [1995], *lv denied* 85 NY2d 812 [1995]), but found that, while Stephenson was in the school's custody on October 22, the school breached its duty to notify his mother about the fistfight. By breaching this duty, the court concluded, the school "failed to prevent a further escalation of the incident" and accordingly was liable for Stephenson's injuries.

We find no liability on defendants' part, despite the motion court's sanction ruling. Contrary to the dissent's contention, the mother's claim that she could have prevented the assault is entirely speculative. McDonald could have attacked Stephenson at any time, possibly weeks later, or at any place, and the mother's

presence would not necessarily have been a deterrent to what after all was a targeted attack. The suggestion that McDonald's planned criminal assault upon Stephenson would have been prevented by his mother's accompanying her almost 14-year-old son to school every day does not rise above speculation. Nor does the notion that the attack would have been prevented by the juvenile authorities if the mother had known of the fight seem any more realistic. Fights among middle school students occur frequently, the school did not see a basis to contact the juvenile authorities based on what happened on October 22, and it is not reasonable to believe that the juvenile authorities would have intervened. This seems particularly so where the school had already taken disciplinary action, including suspension, against the perpetrator.

Finally, we find it unreasonable to impose a duty on the school to notify a parent about a fight between two students when the school has already affirmatively addressed the misconduct. In *Matter of Kimberly S.M. v Bradford Cent. School* (226 AD2d 85 [1996]), cited by the dissent, the Court found that a teacher who had been notified by a child of sexual abuse had no common-law duty to inform the parents because the abuse took place outside of school. Although here the first fight occurred on school

grounds, as in *Kimberly*, the risk of danger arose from potential conduct away from school by a third party, not from anything the school did or failed to do. Similarly, in *Anglero v New York City Bd. of Educ.* (2 NY3d 784 [2004]), also cited by the dissent, the duty imposed upon the school derived from its failure to stop an assault on school premises that led to a further assault shortly afterward off school grounds. All the other cases cited by the dissent involve failure to act on the part of school officials with respect to students in the custody of the school.

All concur except Saxe, J.P. and Abdus-Salaam, J. who dissent in a memorandum by Saxe, J.P. as follows:

SAXE, J.P. (dissenting)

When a student assaults another student during school hours and on school property, and then assaults the same student again two days later off school grounds, the school may, in appropriate circumstances, be liable for the victim's injuries arising from the second assault, if the second incident was foreseeable and the school failed to take appropriate action to prevent it.

The majority finds, as a matter of law, that even if the school breached its duty, its conduct was not the proximate cause of the victim's injuries, because the other student's intentional acts were an intervening cause. I disagree, concluding that the evidence in the record establishes the existence of triable questions of fact as to whether the school breached its duty and whether that breach was a proximate cause of the harm. I would therefore affirm the denial of defendants' motion for summary judgment, and reverse the grant of plaintiffs' cross motion for summary judgment on the issue of liability, leaving that issue for the finder of fact.

"Negligence arises from breach of duty and is relative to time, place and circumstance" (*Sadowski v Long Is. R.R. Co.*, 292 NY 448, 455 [1944]). Courts determine the existence and scope of duty (*Donohue v Copiague Union Free School Dist.*, 64 AD2d 29, 33

[1978]) with reference to "what is socially, culturally and economically acceptable" (*Darby v Compagnie Nat. Air France*, 96 NY2d 343 [2001]). If duty exists, breach of duty occurs when an actor fails to do what a reasonable person would have done under the same circumstances (*Sadowski*, 292 NY at 454). Negligent actors in breach of duty are liable only if their negligence was a proximate cause of the harm, that is, if the breach of duty was a substantial factor in bringing about foreseeable harm (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Schools have a duty of care towards students because they act in loco parentis; that is, they take the place of parents while students are in their custody, and therefore must act with the same care "as a parent of ordinary prudence would observe in comparable circumstances" (*Hoose v Drumm*, 281 NY 54, 57-58 [1939]; *see Pratt v Robinson*, 39 NY2d 554, 560 [1976]; *Garcia v City of New York*, 222 AD2d 192, 194 [1996], *lv denied* 89 NY2d 808 [1997]).

A liability determination by the finder of fact will therefore be appropriate in the present context if it is found, first, that the school, acting in loco parentis, breached its duty to the student, either by failing to inform his mother about the first incident or by failing to take other available

reasonable steps to discourage or prevent a further incident, and second, that the failure constituted a proximate cause of the second assault. The proximate cause determination entails two separate findings: first, that the chain of causation leading from the breach actually led to the injuries, and, second, that the second assault and resulting injuries were a foreseeable consequence of the breach, rather than an intervening cause of plaintiff's injuries.

The record establishes the following: In 2003, plaintiff Jayvaun Stephenson, then a 13-year-old eighth-grade student, attended Middle School 113 in the Bronx. At around noon on October 22, 2003, between fifth and sixth period, Stephenson congregated with several friends in the school's first-floor hallway. Lorenzo McDonald, then a seventh-grade student, approached Stephenson from behind and stated that he was going to take a black-and-white handkerchief out of Stephenson's back pocket. Stephenson replied that he could wear whatever he wanted to wear. McDonald pulled Stephenson around and punched him in the nose once. Stephenson reacted by punching McDonald once on each side of his face. Stephenson's friends then restrained Stephenson from further contact with McDonald, and Stephenson went to his next class.

Stephenson was taken to the assistant principal's office during sixth period. After determining that McDonald had initiated the fight, Assistant Principal Reed punished McDonald with several weeks of in-school suspension and Stephenson with one day of in-school suspension; she dismissed Stephenson early and told him to go directly home, staggering Stephenson's and McDonald's dismissal times to ensure that no further confrontation between the two occurred outside of school. However, Reed never contacted Stephenson's mother, Nadra Sinclair, about the fight or the in-school suspension. Nor did Stephenson tell his mother about the incident.

The next day, October 23, 2003, Stephenson served his in-school suspension without incident. While he was leaving the school, he encountered McDonald, who allegedly threatened to "get [him] jumped." The school was unaware of this threat, and Stephenson did not inform his mother of it.

The following morning, October 24, 2003, around 8:00 A.M., Stephenson exited the subway at East 219th Street and saw McDonald on the other side of street. He went into a corner store to purchase breakfast, but three of McDonald's friends pulled him out of the store and brought him outside to McDonald. Two of McDonald's friends held Stephenson's hands behind his back

while McDonald and another friend punched Stephenson in the face for five to seven minutes. The assault occurred two blocks from the school. Following the assault, the attackers let Stephenson go, and an unidentified person brought him to school. After an unsuccessful attempt to contact Stephenson's mother, the school nurse called for an ambulance, which took him to Jacobi Hospital. The assault resulted in a broken mandible bone on both sides of Stephenson's face, which required surgery.

Plaintiffs served a summons and complaint dated April 8, 2004 against the City of New York and the Department of Education, alleging that defendants negligently failed to take steps to prevent a continuation of the assault, in breach of their duty to protect the infant plaintiff when the school stood in loco parentis, resulting in the injuries he suffered on October 24, 2003.

For over four years defendants failed to comply with discovery orders, until finally, on October 30, 2008, they responded with affidavits proclaiming that a document search, which did not take place until August 2008, failed to locate any of the demanded records, statements, witness information, or investigative documentation as to the October 22, 2003 incident, or any records of the school's investigation into the October 24,

2003 incident. A preclusion order resulted, preventing defendants from disputing that they had prior notice of the first assault, the threat to Stephenson, and the assailant's history of violence.

Defendants moved for summary judgment, contending that as a matter of law: (1) with respect to the October 24, 2003 incident, the school had no duty to supervise plaintiff before school and off school premises; (2) Stephenson was not injured as a result of the October 22, 2003 incident; and (3) the negligence (if any) of defendants was not a proximate cause of either incident. Plaintiffs cross-moved for summary judgment on the issue of liability, arguing that the school acted negligently by failing to properly respond to the initial assault, either by notifying the boys' parents or by taking steps to stem the reasonably anticipated escalation of the assailant's violence. The motion court denied defendants' motion and granted plaintiffs' cross motion, holding that "defendant breached a duty it had to plaintiff inside the school, during school hours, by never notifying plaintiff's parent of the October 22nd incident." In addition, the court determined that "[s]ince the defendant was on notice . . . as a matter of law, it was foreseeable that the assailant would continue the assault and even escalate it."

Defendants appeal from the denial of their motion for summary judgment and the grant of plaintiffs' cross-motion.

There is no dispute that, as previously stated, schools owe a duty to provide adequate supervision to students in their custody and are liable for foreseeable injuries proximately resulting from the absence of adequate supervision (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], citing *Mirand v City of New York*, 84 NY2d 44, 49 [1994]), which duty is breached if the school, acting in loco parentis fails to act "as a parent of ordinary prudence would . . . in comparable circumstances" (*Hoose*, 281 NY at 58). Of course, "[s]chools are not insurers of safety" (*Mirand*, 84 NY2d at 49, citing *Lawes v Board of Educ. Of City of N.Y.*, 16 NY2d 302, 306 [1965]), and cannot be held accountable for others' acts when the students are outside their custody, that is, when the students are off school property during non-school hours, including on the way to and from school. However, a school may be liable for negligent supervision if a failure to comport with its duty, arising while a student is in its custody, results in foreseeable injuries to the student while he or she is outside its custody.

For example, in *Anglero v New York City Bd. of Educ.* (2 NY3d 784 [2004]), the Court of Appeals held that liability could be

found for an assault outside school custody when school employees witnessed and failed to react to an assault upon the same victim earlier that day during school dismissal. The Court made clear that the school breached a duty to supervise if "intervention might have averted the second assault, which occurred off the school grounds" (*id.* at 785). Thus, the fact that plaintiff sustained injuries while outside school custody is not dispositive, if the school could have prevented the second assault by fulfilling its duty to supervise when the plaintiff was in its custody. The essence of plaintiffs' argument here is that defendants breached their duty to supervise by failing to inform Stephenson's mother of the first assault or take appropriate steps to prevent any continuation or escalation. As in *Anglero*, a question of fact exists here as to whether the school failed to take appropriate steps while Stephenson was in its custody, which failure resulted in foreseeable danger of a future assault outside school.

A school's duty to supervise will support liability for an attack by a third party only if the school has actual or constructive notice of the dangerous conduct that caused the plaintiff's injury (*Mirand*, 84 NY2d at 49). That notice is established here. Not only was the first fight between

Stephenson and McDonald similar conduct that provided actual notice to the school, but, also, under the motion court's preclusion order defendants may not dispute their notice of the prior conduct. Under *Mirand* (84 NY2d at 50), once a school receives notice of an incident, it must take measures reasonably calculated to prevent further escalation of the incident.

I do not agree with plaintiffs' contention that 8 NYCRR 136.3 imposes on schools a legal obligation to inform parents about assaults on their children while in school custody. This provision requires schools to inform parents about students' existing health conditions; it does not place an affirmative duty on them to inform parents about assaults at the hands of other students. Similarly, plaintiffs' reliance on *Port Washington Teacher's Assn. v Board of Educ. of the Port Washington Union Free School Dist.* (361 F Supp 2d 69 [ED NY 2005]) is misplaced; that case concerned notification of student pregnancy, which is clearly a "health condition."

However, the lack of a specific statutory duty requiring schools to inform parents about acts of violence against students does not preclude a common-law obligation. Schools' undisputed common-law duty, arising because they stand in loco parentis, already requires them to take such affirmative steps as a

reasonably prudent parent under similar circumstances would take to protect students in their care (*Hoose*, 281 NY at 58). When a school becomes aware of foreseeable danger while its charges are within its custody, the duty to supervise requires the school "to take energetic steps to intervene" (*Lawes*, 16 NY2d at 305). When the school receives notice that one of its students poses a danger to another student in its custody, the school must take affirmative steps to prevent further escalation of that danger (*Mirand*, 84 NY2d at 50), and is liable for foreseeable injuries proximately related to its failure to intervene regardless of where the injuries occur (*see Anglero*, 2 NY3d at 785). Here, one possible means of intervention was to inform the parents about the initial fight; others included speaking to the assailant or his parents in order to impress upon him the potentially serious consequences of repeating or further escalating the violence, whether inside or outside of school.

Requiring schools to take affirmative steps to inform of foreseeable danger is not unprecedented. In *Ferraro v Board of Educ. of City of N.Y.* (32 Misc 2d 563 [1961], *affd* 14 AD2d 815 [1961]), a student with violent propensities attacked the infant plaintiff under the supervision of a substitute teacher. The school principal knew of the student's violent propensities, but

had failed to inform the substitute teacher. The court held that a reasonable jury could find that the principal's failure to inform the substitute teacher about the danger the student posed constituted negligence in breach of the duty to supervise. The court reasoned that while "the assault itself cannot be the basis for liability of the defendant[,] [i]t is the failure of the principal to have alerted the substitute teacher, thereby depriving her of the opportunity of using her own judgment, which I believe constitutes the act of negligence in this case" (*id.* at 567). The court suggested that "[h]ad [the substitute teacher] been told, she would have been in a position to decide whether anything further was required to be reasonably done to avoid the trouble" (*id.* at 568). Similarly, in this case, the school is not liable for a failure to prevent the first fight or to supervise students on their way to school. However, a reasonable jury could find that the school acted negligently in its response to the initial altercation by, inter alia, failing to inform Stephenson's mother of the danger that McDonald presented to Stephenson outside school.

The present case is distinguishable from *Matter of Kimberly S.M. v Bradford Cent. School Dist.* (226 AD2d 85 [1996]), where the Court ruled that despite the teacher's statutory duty to

report suspected child abuse, the teacher had no common-law duty to inform parents when their child told the teacher that she had been sexually abused outside school. The Court reasoned that "the reported acts of sexual abuse did not occur while [the child] was in the custody and control of school officials and the threatened harm posed to her by continued acts of a third party did not involve foreseeable conduct that could occur while the child was in the custody and control of school officials" (*id.* at 88). That is, neither the initial harm nor the potential future harm arose within the school's area of responsibility. In the matter now before us, the school had a duty "to take energetic steps to intervene" (*Lawes*, 16 NY2d at 305), because the initial acts of violence against Stephenson occurred while he was in the school's custody.

Other states have imposed on schools a common-law duty to inform parents about foreseeable harm posed to children in the schools' care. For example, in *Phyllis P. v Superior Court* (183 Cal App 3d 1193 [1986]), a school in California became aware that another student sexually assaulted the plaintiff's daughter a number of times while the students were in the school's custody, but the school chose not to inform the plaintiff about the assaults. The student thereafter raped the plaintiff's daughter

on school premises. Had the school warned her about the initial assaults, the plaintiff claimed, she could have prevented the subsequent rape. The court held that the school, acting in loco parentis, owed a duty to the child to supervise, and a duty to the parent to warn of the foreseeable harm. When parents entrust a school with their child, a "special relationship" between the parent and the school is created. As a result, the school has a duty to warn the parents of threats to their children if the school has knowledge of "'real and foreseeable' victims of the predictable tragedy" (*id.* at 1196). The school's knowledge of the initial sexual assaults made the plaintiff's daughter the target of foreseeable harm; therefore, the school had a duty to warn the parent. Although, in California, the school owes a duty to warn to the parent rather than to the student, *Phyllis P.* is instructive on the question of when a duty to inform should arise. As in that case, the school here had knowledge that Stephenson had been the target of a particular type of harm at the hands of a specific individual, and reason to expect further such assaults in the future. Thus, it is reasonable to impose on the school a duty to inform Stephenson's mother about the risks of a future assault on her son.

The question of whether the school breached its duty to

supervise in the present case must be addressed by the trier of fact, rather than decided as a matter of law, since it depends on the particular circumstances. The steps a reasonably prudent parent would take under similar circumstances vary based upon the age and maturity of the child in question (*see e.g. Garcia v City of New York*, 222 AD2d 192, 196 [1996], *supra* ["even the most prudent parent will not guard his or her teen at every moment in the absence of some foreseeable danger of which he or she has notice; but a five-year-old child in a public bathroom should be supervised"]). Since determining what constituted reasonable care is a fact-intensive inquiry, whether the school breached its duty to supervise by failing to inform plaintiff's parents or take other appropriate steps is properly a question for the trier of fact (*see Wilson v Vestal Cent. School Dist.*, 34 AD3d 999, 1000 [2006]). "The adequacy of a school's supervision of its students is generally a question left to the trier of fact to resolve" (*id.*).

The majority asserts that the cases imposing a duty only involve a failure to act while the student is in the custody of the school. I agree. However, while schools may not have a duty to protect their students once those students are off the premises, the duty owed by a school *while the plaintiff is still*

in its custody includes taking steps to prevent further attacks after the student has left the premises (*see Anglero*, 2 NY3d at 785). It is the question of whether the actions taken by the school satisfied that obligation that must be addressed by a jury. In suggesting that it is unreasonable to impose a further duty on the school to notify a parent about a fight "when the school has already affirmatively addressed the misconduct," the majority fails to recognize that the school may not have addressed the misconduct adequately.

If it is determined that the school breached its duty to plaintiffs, a question of fact will remain as to whether that negligence was the proximate cause of the harm. While no causation may be established when, as a matter of law, by the manner in which they occurred, the injuries could not have been prevented in any event (*see Walsh v City School Dist. of Albany*, 237 AD2d 811 [1997]), it is not appropriate in these circumstances to hold, *as a matter of law*, that the second assault could not have been prevented. Certainly, McDonald could have launched his second attack at any time, or in any place. The issue here is whether, if Stephenson's mother had been notified, she could have made arrangements to effectively protect her son. She had a number of potentially viable options. She

could have accompanied her son to and from school herself, or arranged for another adult to do so. She could have arranged for her son to be accompanied, in the weeks that followed, by others who would have been able to call for help, or perhaps would have intervened in the three-on-one attack that occurred. She also could have sought the intervention of the juvenile authorities, who might have emphasized to the assailant and, importantly, his parents or guardians, that any further incidents could have serious legal repercussions. Indeed, even a mere threat by the mother to contact the juvenile authorities, addressed to the attacker or perhaps to his family, could have prompted the attacker to squelch any plans for further attacks on Stephenson.

As this non-exhaustive list of options illustrates, the mother's claim that she would have prevented the second assault if informed of the first is not merely speculative. Rather, a question of fact is presented as to whether she could have arranged feasible means of preventing the second, more severe assault. The majority's back-handed dismissal of the precautionary steps that Stephenson's mother might have taken is indicative of an unnecessarily defeatist approach to the protection of one's minor children, an option that parents of public school students should not have to accept.

Nor can McDonald's second attack on Stephenson be deemed an intervening cause of his injuries, precluding liability as a matter of law due to its criminal, intentional nature. Although, as a matter of law, schools are not liable when a sudden, *unforeseeable* act of a third party causes injury (*see Ohman v Board of Educ. of City of N.Y.*, 300 NY 306, 309 [1949]), proximate cause becomes a question of fact when the third party act may be reasonably foreseen (*see Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944 [1997]). "When the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs" (*Kush v City of Buffalo*, 59 NY2d 26, 33 [1983]). A defendant may be liable if "a reasonably prudent person in the defendant's situation, before the [third party's act], would have foreseen that an act of the kind committed by [the third party] would be a probable result of the defendant's negligence" (PJI 2:72). Since the school had notice of McDonald's first assault on Stephenson, a reasonable jury could find that his second assault was reasonably foreseeable from the school's perspective.

"The plaintiff need not establish that the precise manner in which the accident occurred was foreseeable. Rather, it is

sufficient that she demonstrate that the risk of some injury from the defendant's conduct was foreseeable" (*Boderick v R.Y. Mgt. Co., Inc.*, 71 AD3d 144, 148 [2009] [citation omitted]). A question of fact exists as to whether it was foreseeable that Stephenson would sustain injuries because of the school's failure to take appropriate measures after the initial altercation.

In view of the questions of fact presented as to whether the school's failure to inform Stephenson's mother or take other steps to prevent further incidents was a breach of its duty to plaintiffs, and whether that failure was a proximate cause of the harm, both parties' motions for summary judgment should have been denied, and the case should proceed to trial.

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

ENTERED: JUNE 16, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4349 Jillmarie Siciliano, Index 16051/06
Plaintiff-Appellant,

-against-

Henry Modell & Company, Inc., etc.,
Defendant-Respondent.

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Dubow, Smith & Marothy, Bronx (Steven J. Mines of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered December 15, 2009, which granted defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion denied.

Plaintiff testified that she was injured on July 8, 2005, when, exiting a store owned by defendant, she was struck on the left temple by a metal box affixed to the outer door. Plaintiff stated that as she proceeded to the exit she went through a set of doors into a vestibule. As she was about to go through the outer set of doors, the man in front of her let go of the door. Plaintiff testified that the door "swung back too fast" for her to stop with her hand and that she was "smashed" on the left side

of her head by the metal lock box on the door. Her boyfriend, who witnessed the incident, testified that the door "swung open and just jerked right back as if it didn't open all the way."

The store manager, Julio Salazar, testified that what he referred to as the "lock box" had been present on the door since the time he began working at the store, in November 2004. He speculated that the box was a lock box because it "had a hole through the door," but stated that it was not functional at the time of plaintiff's accident. The box was eventually removed, after it was hit by a fixture being moved into the store. Salazar testified that the door had a weighted arm at the top that controlled the speed of the door and prevented the door from closing too quickly. The door also had a "storm chain," the purpose of which was to limit the extent to which the door could open.

After plaintiff reported the accident, the store manager asked her to show him what had happened. Salazar testified that he "pushed" the door many times, witnessed customers walking in and out, and thus concluded that "nothing was wrong with the door," including its opening and closing speed.

Defendant moved for summary judgment dismissing the

complaint, arguing that it did not create, nor did it have actual or constructive notice of, any dangerous or defective condition of the door. Plaintiff opposed the motion, asserting that defendant had not established prima facie its entitlement to summary judgment, and, in any event, that she had raised an issue of fact sufficient to defeat the motion. Plaintiff contended that both the storm chain and the protruding metal box on the door were dangerous conditions, violative of applicable codes and reference standards, and not in accordance with good and accepted industry practice.

Plaintiff relied, inter alia, on an affidavit by Vincent A. Ettari, a licensed professional engineer who inspected the premises and reviewed the relevant testimony and pleadings. Ettari opined that the chain, by limiting the travel of the door, diminished the width of the exit passage to less than was required by the 1961 New York State Building Construction Code and the New York State Uniform Fire Prevention and Building Code. Ettari explained that since the chain prevented the door from opening through the full arc as required, the door closed more quickly than it should have. In addition, the chain served as a "snap back mechanism," causing the door to close more quickly.

Ettari explained that exiting patrons would push harder against the door and the chain when the door failed to open fully.

Ettari opined that the presence of the metal box, which he characterized as a "protruding object," was a clear violation of Reference Standard CABO/ANSI A117.1-1992, which provides that "protruding objects" are not permitted to reduce the clear width of an accessible route.

As to the "testing" of the subject door performed by defendant's store manager, Ettari stated that there was nothing in the record to suggest that the manager was aware of the relevant standards for door closing speed and nothing in the record to indicate how the door was tested beyond the assistant manager's vague testimony. Ettari noted that in order to comply with the applicable standard, CABO/ANSI A117.1-1992, a closing door must take at least five seconds to go from being open 90 degrees to being open 12 degrees, and that it was insufficient for the untrained store manager to simply "eyeball" the door and conclude that it was functioning properly.

Ettari opined, with a reasonable degree of engineering certainty, that the multiple code violations were the proximate cause of plaintiff's accident and resulting injuries.

The motion court found that defendant had met its initial

burden of demonstrating that it did not have notice of the defective condition of the door and did not cause or create the condition, and that plaintiff in turn had failed to raise an issue of fact, because Ettari's opinion was "speculative" and unsupported by any evidentiary foundation. We now reverse.

Defendant failed to establish prima facie that the condition of the door was not dangerous or defective. Salazar's test of closing speed was limited to pushing the door many times and "looking that the door was not coming back fast." Salazar did not indicate how far he opened the door, nor did he define "too fast." Defendant did not identify any applicable code or industry standard relevant to Salazar's determination of door closing speed. Defendant offered no expert analysis, relying instead on the testimony of the manager, who merely observed the door and concluded that it was functioning properly.

Assuming, arguendo, that defendant met its burden, plaintiff's evidence was sufficient to raise a triable issue of fact. The presence of a metal box at eye level on the exit door, in conjunction with the fast closing of the door, is enough to permit a trier of fact to conclude that defendant was negligent under the common law (*see Salvador v New York Botanical Garden*,

74 AD3d 540 [2010]).

The motion court improperly disregarded the affidavit by plaintiff's expert engineer. The engineer's opinions were based on facts in evidence and facts reasonably inferable from the evidence. The presence on the exit door of the protruding metal box, at eye level, was undisputed. The presence of the box, alone, on the exit door, was arguably dangerous. It was reasonably inferable from the evidence that the box diminished the width of the door opening. It was also reasonably inferable from the evidence that the door was prevented from opening fully due to the presence of the storm chain. The engineer explained that the storm chain decreased the arc of the door and acted as a "snap back" mechanism, resulting in a faster than permissible closing time. The testimony of plaintiff's boyfriend that he observed the door "jerk" back supports the expert's opinion. The motion court faulted the expert for failing to inspect the door himself. However, the box had been removed from the door and ownership of the premises had changed in the interim, and the expert stated that he had inspected the premises and that he had examined photos of the doorway taken shortly after the accident. The expert's testimony concerning how to measure door closing

speed should have been analyzed in the context in which it was offered, namely, to demonstrate that the store manager's assessment, based on "eyeballing" the door, is of limited probative value.

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

SWEENY, J. (dissenting)

The complaint alleges that on July 8, 2005, plaintiff sustained injuries when she was struck in the head by a door as she was exiting a store owned and operated by defendant. Plaintiff claims that defendant failed to properly maintain the door in a safe condition and that the door was defective. Her bill of particulars alleges that the exit door of defendant's premises was defective in that a metal box/alarm box attached thereto was positioned at or near head level, the door's opening and closing mechanism was not working properly, and the door closed rapidly without warning.

On its motion for summary judgment, defendant submitted evidence showing that it did not have notice of the allegedly dangerous condition of the door and that it maintained the door in a reasonably safe condition. At his deposition, the store's assistant manager testified that he worked at that store from November 2004 until May 2007 and that he was working on the day of the incident. He stated that he inspected the door in question on a daily basis to see that it was working properly. He also stated that he looked at the alarm box on the exit door during those inspections. He further testified that the door in

question had not been repaired since he began working at the store and that he had received no complaints about the door before this incident (*see Hunter v Riverview Towers*, 5 AD3d 249 [2004]). When plaintiff informed him that she was struck by the door, he tested the door immediately following the accident by pushing the door repeatedly and detected no problems. He also watched the door as customers were walking in and out, and determined that nothing was wrong with it. He testified that he checked the closing speed of the door and concluded that the speed was correct and that the door was not swinging back too fast. According to this witness, the "storm chain" on the door did not interfere with the opening width of the door or its closing speed. Thus, defendant established prima facie its entitlement to summary judgment.

In opposition, plaintiff failed to raise a triable issue of fact. The affidavit by her expert, who opined, inter alia, that the door closed too rapidly, was not sufficient to defeat the motion. The expert concluded that, based upon the store manager's deposition and photographs, the door did not comply with New York State Building Code. He also opined that the storm chain and the box on the door reduced the width of the passage through the door, thus causing the door to close too rapidly when

opened. In response, defendant submitted an affidavit by the same assistant store manager, clarifying his prior testimony and stating that the storm chain did not prevent the door from opening at its full width but rather was there to prevent the door from striking the plate glass display window when opened during a storm. He also stated again that there were no complaints regarding the door before this incident.

Contrary to the majority's view, plaintiff's expert's opinion was speculative and unsupported by any evidentiary foundation (*see Parris v Port of N.Y. Auth.*, 47 AD3d 460,461 [2008]). The expert's conclusion that the door closed too rapidly was not based on either a personal inspection or any scientific tests, although the expert himself claimed that scientific tests were necessary to detect any defects in the door (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544-545 [2002]; *Santiago v United Artists Communications*, 263 AD2d 407 [1999]). Moreover, the expert could not state the dimensions of the box attached to the door. The failure to conduct an inspection of the door, coupled with the lack of evidence concerning whether there were any complaints about the door or the box attached to the door at any time, precludes plaintiff's evidence from raising a triable issue of fact whether defendant had notice of a

dangerous condition. Plaintiff's argument that the location of the box created an inherently dangerous condition is unconvincing, since she claims that the speed of the door, not the box attached to the door, was the proximate cause of her injuries.

As a result, the motion court correctly granted defendant's motion for summary judgment and properly dismissed the complaint.

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

ENTERED: JUNE 16, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Moskowitz, Román, JJ.

4724-
4724A Jose Fernandez, Index 24109/06
Plaintiff-Appellant-Respondent,

-against-

707, Inc.,
Defendant-Respondent,

Biltmore Contracting, Inc.,
Defendant-Respondent-Appellant.

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Rosenberg, Minc, Falkoff & Wolff, LLP, New York (Robert H. Wolff of counsel), for appellant-respondent.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for respondent-appellant.

Kaufman Borgeest & Ryan LLP, New York (Dennis J. Dozis and Jacqueline Mandell of counsel), for respondent.

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Order, Supreme Court, Bronx County (Barry Salman, J.), entered July 22, 2010, which granted defendant 707, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs. Order, same court and Justice, entered July 22, 2010, which denied defendant Biltmore Contracting, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed enter judgment in Biltmore's favor dismissing the complaint as against it.

707, Inc. (707) obtained a "Builder's Pavement Plan" permit from the New York City Department of Transportation, dated May 3, 2006, to rebuild the sidewalks abutting its Bruckner Boulevard property. By its agent Hagivah, 707 hired Biltmore to perform the work, instructing Biltmore to leave specified sections of the sidewalk open to accommodate tree wells. 707 also obtained a tree planting permit from the New York City Department of Parks & Recreation and hired another company to plant the trees.

Biltmore commenced work on or about August 24, 2006 and completed it on or about September 14, 2006. On October 15, 2006, plaintiff allegedly was injured when he stepped into a tree well that was not level with the sidewalk. At the time, the City had yet to sign off on the sidewalk, and no trees had been planted. Subsequently, on October 30, 2006, 707's project engineer certified that the sidewalks had been constructed in accordance with the specifications set forth in the Rules and Regulations of the Department of Highways.

Although Administrative Code of the City of New York § 7-210 (eff September 14, 2003) imposes tort liability on property owners who fail to maintain abutting city-owned sidewalks in a reasonably safe condition, 707 cannot be held liable for plaintiff’s injuries by virtue of its status as an abutting

landowner because a property owner's responsibility for a sidewalk does not extend to tree wells (*see Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]; *Grier v 35-63 Realty, Inc.*, 70 AD3d 772 [2010]). The motion court correctly rejected plaintiff's argument that the area where he fell was not a tree well because at the time of the accident the City had yet to "sign off" on the project and no tree had been planted. These considerations do not bear on the character of the area, which the court described as "a square or rectangular dirt area surrounded by cement designed to accommodate one or more trees." Accordingly, 707 cannot be held liable for plaintiff's injuries unless it affirmatively created the dangerous condition, negligently made repairs to the area, or caused the dangerous condition to occur through a special use of the area (*see Vucetovic*, 10 NY3d at 520).

A property owner ordinarily is not responsible for the negligence of an independent contractor retained to work upon its property, unless the work is inherently dangerous, or the owner interferes with and assumes control over the work *(see Kleeman v Rheingold,* 81 NY2d 270, 273 [1993]; *Rosenberg v Equitable Life Assur. Socy. of U.S.,* 79 NY2d 663, 668 [1992]; *Laecca v New York Univ.*, 7 AD3d 415 [2004], *lv denied* 3 NY3d 608 [2004]). On its

motion for summary judgment, 707 submitted proof that it hired Biltmore to build the sidewalk and tree well. It also submitted the deposition transcript of Biltmore's president who testified that a representative of the owner gave him a layout showing where to leave the tree wells and that the president's uncle was present on a daily basis and supervised the work.

In opposition, plaintiff failed to raise a triable issue of fact whether any exception to the "independent contractor rule" applied (*see Campbell v HEI Hospitality, LLC*, 72 AD3d 860, 861 [2010]). A senior project manager for Hagivah testified at his deposition that he explained to Biltmore where to place the tree wells, and "that's it." Plaintiff did not submit any proof that would rebut this or raise an issue whether 707 controlled the method and means of Biltmore's work. That 707's architect or engineer may have drawn up the plans, or that 707 may have inspected the work, does not establish that 707 had supervisory authority (see *Haefeli v Woodrich Eng'g Co.*, 255 NY 442, 450 [1931]). "[T]he mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal" (*Goodwin v Comcast Corp.*, 42 AD3d 322, 323 [2007]; *Melbourne v New York Life Ins. Co.*, 271 AD2d 296, 297 [2000]).

Biltmore made a prima facie showing of its entitlement to judgment as a matter of law by demonstrating that it owed no duty of care to plaintiff (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Biltmore's president testified at his deposition that when Biltmore completed the work, approximately one month before the accident, the tree well was level with the sidewalk. While some of his responses suggested that he was referring to Biltmore's general custom or practice, others addressed the subject tree well. The record further indicates that 707 paid Biltmore's invoice and that its senior project manager had no problem with Biltmore's work.

In opposition, plaintiff failed to raise a triable issue of fact whether Biltmore created the alleged hazardous condition (*Espinal*, 98 NY2d at 141-142; *Peluso v ERM*, 63 AD3d 1025 [2009]). Although a contractor may be liable for an affirmative act of negligence that results in the creation of a dangerous condition upon a public street or sidewalk (*Barbitsch v City of New York*, 241 AD2d 472 [1997]), "it would be mere speculation [on the record before us] to conclude that the allegedly dangerous condition which caused the plaintiff to trip and fall was caused by any affirmative act of negligence by [Biltmore]" (*Kleeberg v City of New York*, 305 AD2d 549, 550 [2003]; *Humphreys v*

Veneziano, 268 AD2d 461 [2000]). There is no evidence that Biltmore breached its contractual obligations, or that it assumed a continuing duty to return to the premises after completing its work and remedy any defects that eventually developed there (*see Horowitz v Marel Elec. Servs.*, 271 AD2d 572 [2000]; *Long v Danforth Co.*, 236 AD2d 781 [1997]).

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

ENTERED: JUNE 16, 2011

CLERK

Tom, J.P., Andrias, Friedman, Abdus-Salaam, Román, JJ.

4897 Inez Colon, et al., Ind. 7290/06
Plaintiffs-Respondents,

-against-

Vincent Plumbing & Mechanical Co., et al.,
Defendants,

Vincio Almonte, et al.,
Defendants-Appellants.

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

Sobel, Ross, Fliegel & Stieglitz, LLP, New York (Michael P. Stieglitz of counsel), for respondents.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered July 14, 2010, which denied defendants Almonte and Collado's motion for summary judgment dismissing the complaint on the threshold issue of serious injury under Insurance Law §§ 5102 and 5104, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of said defendants dismissing the complaint as against them.

Defendants established prima facie their entitlement to judgment as a matter of law by submitting medical evidence that plaintiffs did not sustain a serious injury and that any injuries

were not caused by the accident.

Regarding plaintiff Colon, a radiologist found that an MRI of the left knee revealed no evidence of acute or recent injury and no evidence of traumatic tear or rupture of the regional ligaments, tendons or menisci. The radiologist found degenerative changes of the lateral meniscus and patella. An MRI of the cervical spine revealed regional discogenic changes unrelated to the accident. A neurologist found some limited range of motion in the cervical spine and normal range of motion in the knee, and an orthopedist found normal range of motion in the cervical spine and knee.

In opposition, plaintiffs did not submit any medical evidence indicating that Colon's claimed cervical spine injury was causally related to the accident. Regarding the knee injury, while the orthopedic surgeon who performed arthroscopic surgery on Colon to repair a torn meniscus submitted a report indicating that the injury was the result of the accident, that Colon had "limited range of motion" in the knee, and that she could fully extend the knee but flex was limited to about 115/135 degrees, the surgeon "fail[ed] to identify or describe the objective medical tests employed in measuring the alleged restrictions in range of motion" (*Lloyd v Green*, 45 AD3d 373, 374 [2007]; *see*

also Gorden v Tibulcio, 50 AD3d 460, 464 [2008]). "Nor did he explain the significance of his findings, or provide a sufficient description of the qualitative nature of the limitations based on the normal function and use of the knee" (*Mickens v Khalid*, 62 AD3d 597 [2009]). Thus, Colon failed to raise any issue of fact under the permanent consequential limitation and significant limitation categories of Insurance Law § 5102(d).

Similarly, with respect to Puente, defendants met their initial burden by submitting the report of a radiologist who opined that the MRI of Puente's lumbar spine revealed regional discogenic changes representing longstanding wear-and-tear degenerative changes unrelated to the accident and consistent with Puente's age (71 years). An MRI of the right knee showed no evidence of acute or recent injury; it showed significant and advanced degenerative changes involving all three joint compartments, menisci and anterior cruciate ligament, representing chronic wear-and-tear degenerative change unrelated to the accident. A neurologist found some limited range of motion in the cervical spine, "observed to be limited by volitional guarding." The motor examination of the knee was normal. An orthopedic surgeon found normal ranges of motion in the lumbar spine and right knee.

In opposition, Puente failed to present medical evidence sufficient to raise a triable issue. His treating doctor did not identify any serious injury; his diagnoses included, as relevant here, possible L4-5 sciatica discogenic disease and SP lumbar strain (severe). The doctor did not make any reference to the claimed injury to the right knee or address the fact that, as noted in the doctor's report, Puente had complained of lower back pain eight months before the accident (*see Pommells v Perez*, 4 NY3d 566, 580 [2005]; *Montgomery v Pena*, 19 AD3d 288, 290 [2005]). Moreover, while his report indicated some limitation in back motion, the doctor failed to indicate the normal ranges of motion for the areas tested, and did not provide an objective assessment of Puente's claimed range of motion limitations (*see Gorden v Tibulcio*, 50 AD3d 460, 464 [2008], *supra*).

Regarding plaintiffs' 90/180-day claims, defendants appropriately relied on plaintiffs' deposition testimony (*see Canelo v Genolg Tr., Inc.*, 82 AD3d 584 [2011]). Puente testified that he was not confined to home or bed for more than a brief period of time, "negat[ing] his chance of establishing a 90/180-day serious injury claim under section 5102(d)" (*Lopez v Abdul-Wahab*, 67 AD3d 598, 600 [2009]). As for Colon, the only evidence in the record on this issue is that she missed some days of work.

Even if she had missed 90 days of work, that would not be determinative (*see Simpson v Montag*, 81 AD3d 547 [2011]). Her inconsistent testimony regarding how much time she was out of work as a beautician in her beauty salon,[1] coupled with the absence of any other evidence that she was prevented from performing substantially all of her usual and customary daily activities for the requisite period, is insufficient to support her claim.

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

ENTERED: JUNE 16, 2011

CLERK

[1]She testified that she lost about two weeks from work right after the accident, explaining that it did not take her very long to get back, because that was her only source of income. She further testified that she lost about four weeks from work after her surgery. However, she also testified at that same deposition that she was confined to her home for about two weeks and then after that did not work for two months.

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

5339 Pedro Lopez, Index 109978/09
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

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Gruvman, Giordano & Glaws, LLP, New York (Louis P. Giordano of counsel), for appellant.

Norman A. Olch, New York, for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered April 30, 2010, which, in this personal injury action, denied defendant's motion for an order holding plaintiff in contempt for his alleged failure to comply with a preliminary conference order, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying the motion. Plaintiff demonstrated a good faith effort to comply with the preliminary conference order. Indeed, in opposition to defendant's motion, plaintiff provided several authorizations for the release of medical records (*compare Matter of Benson Realty Corp. v Walsh*, 54 AD2d 881, 883 [1976], *lv dismissed* 43 NY2d 732 [1977], *lv denied* 43 NY2d 642 [1977], *with 1319 Third Ave. Realty Corp. v Chateaubriant Rest. Dev. Co., LLC*, 57 AD3d 340, 341 [2008]). The preliminary conference order did

not unequivocally mandate that the authorizations state that they will remain valid until the end of litigation. In addition, defendant has failed to show that it suffered prejudice as a result of plaintiff's delay, or that plaintiff intentionally violated successive court orders that unequivocally directed him to provide discovery (*cf. Emanuel v Sheridan Transp. Corp.*, 58 AD3d 583, 584 [2009], *lv dismissed* 13 NY3d 758 [2009]). Any issues regarding outstanding discovery can be addressed at the next compliance conference.

We note that while Supreme Court is vested with the power to adjudicate a party in contempt (Judiciary Law § 753[A]), it is nonetheless a drastic remedy rarely to be used in the context of ordinary discovery disputes (*Oak Beach Inn Corp. v Babylon Beacon, Inc.*, 62 NY2d 158, 166-167 [1984] ["contempt is not a penalty enumerated in CPLR 3126 and the court must resort to other more general provisions of the law in the rare instances where it may be necessary to hold a person in contempt for failure to make disclosure in a civil case"]). The Transit Authority's resort to a contempt motion on a routine discovery dispute absent application for any other remedy under CPLR 3126 is wholly inexplicable and equally meritless.

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

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

ENTERED: JUNE 16, 2011

CLERK

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

5340 In re Matthew Niko M., etc.,
a Dependent Child under 18 Years of Age, etc.,

-against-

Niko M.,
Respondent-Appellant.

Catholic Guardian Society and Home Bureau, et. al.,
Petitioners-Respondents,

_____

Frederic P. Schneider, New York, for appellant.

Magovern & Sclafani, New York (Frederick J. Magovern of counsel), for respondents.

Proskauer Rose LLP, New York (Myron D. Rumeld of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about May 21, 2010, which, to the extent appealed from, committed custody and guardianship of the subject child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

We previously determined that clear and convincing evidence supported the finding that respondent's consent was not required for the adoption of the child (*see Matter of Matthew Niko M. [Niko M.]*, 71 AD3d 440 [2010]).

A preponderance of the evidence supports Family Court's subsequent determination that the child's best interests would be served by freeing him for adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The record shows that respondent has not seen the child in years and has little insight into his needs. By contrast, the child is in a stable foster home where his special needs are being met and where he wishes to remain (*see Matter of Chandel B.*, 58 AD3d 547, 548 [2009]).

Respondent's request for a suspended judgment was raised for the first time on appeal, and therefore is unpreserved (*see Matter of Omar Saheem Ali J. [Matthew J.]*, 80 AD3d 463 [2011]). In any event, a suspended judgment is not warranted. The record shows that respondent has not adequately planned for the child's future, and that the child's needs are currently being met in his foster home (*id.*).

We decline to review respondent's argument that Family Court erred in granting an order of protection against him with respect to the child's half brother, since respondent never appealed from that order. In any event, were we to review it, we would reject it. Family Court had the authority to grant the order of protection, given that respondent was a member of the half child's household (*see* Family Court Act §§ 1056[4], 812[1][d]).

Respondent's due process rights were not violated by the issuance of the order. Indeed, respondent's counsel was present at the hearing and objected before the order was issued. There was sufficient evidence supporting the order, including statements the half brother made to the staff at Bellevue Hospital regarding respondent's sexual abuse.

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

ENTERED: JUNE 16, 2011

CLERK

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

5341-
5341A New York City Economic Development Corporation, Plaintiff-Respondent, Index 405031/07

-against-

Corn Exchange LLC., Defendant-Appellant.

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Milbank, Tweed, Hadley & McCloy LLP, New York (John K. White, Jr., of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

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Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered December 9, 2009, inter alia, awarding plaintiff title to and possession of the premises located at 81 East 125th Street in Manhattan, and bringing up for review orders, same court and Justice, entered on or about August 19, 2008, on or about January 29, 2009, and February 3, 2010, respectively, unanimously affirmed, without costs. Judgment, same court and Justice, entered May 28, 2010, awarding plaintiff attorneys' fees, unanimously reversed, on the law, without costs, the motion denied, and the judgment vacated.

Plaintiff established prima facie its right to recover from defendant the title to the subject premises. The terms of the

deed required defendant to rehabilitate the property and construct on it a culinary institute, within a certain time period. The deed further provided that, in the event defendant failed to do so, the fee simple would revest in plaintiff. The deed created a condition subsequent for educational and public purposes. Therefore, RPAPL 1953(4) applies here. The import of RPAPL 1953(4) is that plaintiff's right of re-entry and defendant's forfeiture of the property were automatic upon defendant's breach of the condition (*see DiPietro v County of Westchester*, 237 AD2d 325 [1997]). In opposition, defendant failed to raise an issue of fact as to the validity of the condition subsequent.

Plaintiff's motion for attorneys' fees was untimely made (*Aslanidis v United States Lines, Inc.*, 7 F3d 1067, 1073 [1993]).

We have considered defendant's remaining contentions and find them without merit.

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

ENTERED: JUNE 16, 2011

CLERK

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

5342- Sarah Schottenstein, Index 600661/07
5343- Plaintiff-Appellant,
5344

-against-

Windsor Tov, LLC, etc., et al.,
Defendants-Respondents.

Bellmark Property Management
Services, Inc., etc., et al.,
Defendants.

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Sarah Schottenstein, appellant pro se.

Rosenberg & Pittinsky, LLP, New York (Laurence D. Pittinsky of counsel), for Board of Managers of Windsor Park Condominium, respondent.

Zane and Rudofsky, New York (Eric S. Horowitz of counsel), for Windsor-Tov, LLC, respondent.

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Judgment, Supreme Court, New York County (Emily Jane Goodman, J.), entered May 17, 2010, granting defendant Board of Managers of Windsor Park Condominium the total sum of $57,372.71, and bringing up for review an order, same court and Justice, entered April 8, 2010, which denied plaintiff's motion for a preliminary injunction staying her obligation to pay past and current common charges pendente lite, and an order, same court (Michael D. Stallman, J.), entered June 17, 2009, which granted the Board's motion for summary judgment on its counterclaims for

unpaid common charges, fees and interest for the period of September 2006 through January 2009, unanimously affirmed, without costs. Order, same court (Emily Jane Goodman, J.), entered January 7, 2011, which granted the Board's motion for judgment in the amount of $20,466.99 for unpaid common charges from February 2009 through December 2010, and directed plaintiff to pay ongoing common charges when due, unanimously affirmed, without costs.

Plaintiff seeks a preliminary injunction staying her obligation to pay past and current common charges on the ground that her condominium unit was destroyed by extensive water leaks and mold and suffered a "Casualty Loss" within the meaning of the condominium bylaws, thereby relieving her from the obligation to pay common charges. Plaintiff failed to demonstrate a likelihood of success on the merits, the prospect of irreparable harm absent an injunction, and a balance of equities in her favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]).

She failed to demonstrate that her unit suffered a Casualty Loss or that the bylaws provide for an abatement of common charges when an individual unit, as opposed to "either (I) the Building or a part thereof," is "damaged or destroyed by fire or other casualty." She failed to demonstrate that her potential

damages are not compensable in money and capable of calculation (*see Credit Index v RiskWise Intl.*, 282 AD2d 246 [2001]). She failed to demonstrate that any injury she is likely to sustain will be more burdensome to her than the harm likely to be caused the Board by the imposition of an injunction will be to it (*see id.*).

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: JUNE 16, 2011

CLERK

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

5345 The People of the State of New York, Ind. 90139/05
Respondent,

-against-

Faith Dove,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Jones Day, New York (Matthew R. Loecker of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered May 21, 2007, convicting defendant, after a jury trial, of criminal possession of stolen property in the third degree and falsifying business records in the first degree, and sentencing her to an aggregate term of 3 days, with 5 years' probation, a $5,000 fine and restitution, unanimously affirmed.

We reject defendant's argument that her conviction of possession of stolen property was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. We also find that the jury's mixed verdict, which convicted defendant of possessing stolen property but acquitted her of

third-degree grand larceny related to the same property, does not warrant a different result. Defendant argues that the verdicts were inconsistent because the evidence that she possessed stolen money was also evidence that she stole it, but "[w]here a jury verdict is not repugnant, it is imprudent to speculate concerning the factual determinations that underlay the verdict" (*People v* Horne, 97 NY2d 404, 413 [2002]; *see also People v Hemmings*, 2 NY3d 1, 5 n [2004]). The verdict was not inconsistent because, as charged by the court, acquittal on the crime of grand larceny was not conclusive as to a necessary element of the crime of possession of stolen property (*see People v Tucker*, 55 NY2d 1, 7 [1981]). Moreover, the jury could have determined that defendant did not commit the crime of grand larceny because she did not intend to convert the money when she accepted it from the victim, but committed the crime of possession of stolen property because she later decided to keep the money for herself. The jury also could permissibly split its verdict as a compromise or act of leniency (*see People v Horne,* 97 NY2d at 413).

Defendant also challenges the legal sufficiency of the evidence supporting her conviction of first-degree falsifying business records. As part of a scheme to steal money from a customer, defendant, an insurance agent, forwarded a false

document to her employer. The document purported to be a letter from the victim voiding a coverage agreement and a receipt for $9,000. The evidence clearly establishes that defendant made or caused a false entry to be made. Furthermore, the document was a business record within the meaning of Penal Law § 175.00(2) because it purported to evidence or reflect "activity" by the insurer.

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

ENTERED: JUNE 16, 2011

CLERK

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

5346 In re Madonna Constantine, Index 113663/09
Petitioner-Appellant,

-against-

Teachers College, et al.,
Respondents-Respondents.

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The Law Offices of Paul J. Giacomo, Jr., New York (Paul J. Giacomo Jr., of counsel), for appellant.

Nixon Peabody LLP, Jericho (Michael S. Cohen of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered March 16, 2010, which denied the petition seeking, inter alia, to challenge respondents' determination to terminate petitioner from her tenured faculty position, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondents' decision to terminate petitioner from her tenured position at respondent college was not arbitrary and capricious. The findings of the college's Faculty Advisory Committee (FAC) that petitioner committed plagiarism and fabricated documents that she presented in her defense was supported by the evidence (*see Matter of Bigler v Cornell Univ.*, 266 AD2d 92 [1999], *lv dismissed* 95 NY2d 777 [2000]). There

exists no basis to disturb the credibility determinations of the FAC (*see Matter of Ebert v Yeshiva Univ.* 28 AD3d 315, 316 [2006]).

Further, the record establishes that respondents substantially complied with the college's statutes (*see Matter of Loebl v New York Univ.*, 255 AD2d 257, 257-259 [1998]). Petitioner was also provided with a full and fair opportunity to present her defense against the charges of plagiarism (*see Ebert* at 315; *cf. Tedeschi v Wagner Coll.*, 49 NY2d 652, 661-662 [1980]). There is nothing in the college's "Statutes" prohibiting its president from referring the investigation of this matter to outside counsel or prohibiting the college from indemnifying certain witnesses.

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

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

ENTERED: JUNE 16, 2011

CLERK

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

5348 In re Jacquelyn Garcia, Index 401401/10
Petitioner-Appellant,

-against-

John B. Rhea, etc., et al.,
Respondents-Respondents.

_____

Christopher D. Lamb, MFY Legal Services, Inc., New York (Brian J. Sullivan of counsel), for appellant.

Sonya M. Kaloyanides, New York City Housing Authority, New York (Andrew M. Lupin of counsel), for respondents.

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered November 9, 2010, denying the petition to vacate respondents' determination that petitioner is ineligible for Section 8 assistance, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated, and the petition reinstated.

The court erred in making findings of fact in granting respondents' motion to dismiss the petition for failure to state a cause of action (CPLR 3211[a][7]). Whether petitioner actually applied for Section 8 benefits and whether respondents actually denied that application are factual issues beyond the scope of the motion (*see Matter of 1300 Franklin Ave. Members, LLC v Board of Trustees of Inc. Vil. of Garden City*, 62 AD3d 1004, 1006

[2009]; *211 W. 56th St. Assoc. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 78 AD2d 793 [1980]; *see also Matter of Schwab v McElligott*, 282 NY 182, 185-186 [1940]).

We note that while the testimony of a representative of the Department of Homeless Services would be valuable in developing the factual record, "complete relief" can be accorded between the parties without making the department a party (*see* CPLR 1001[a]; 3211[a][10]).

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

ENTERED: JUNE 16, 2011

CLERK

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

5350 The People of the State of New York, Ind. 56722C/05
Respondent,

-against-

Savannah Rivera,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III, of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered June 29, 2007, convicting defendant, after a jury trial, of attempted assault in the third degree, and sentencing her to a conditional discharge, 3 days of community service, and 2 days of social service, unanimously affirmed.

The evidence demonstrated that defendant and two other women brutally beat the victim. The incident arose out of animosity between the victim and one of defendant's companions. Defendant's defense was that she watched the altercation but did not participate.

The admission of testimony about the property taken from the victim during the assault provides no basis for reversal. There was overwhelming evidence that defendant was a participant and

not a bystander. Among other things, the victim's testimony was corroborated in part by the testimony of a paramedic who intervened to break up the fight. Furthermore, the court instructed the jury on several occasions that there were no charges of robbery in the case. Thus, there is no reasonable possibility that testimony about the taking of property had any influence on the verdict.

Defendant did not preserve her argument that the court should have told the trial jury about the grand jury dismissal, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: JUNE 16, 2011

CLERK

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

5352 Enoos Gonzalez, Index 114796/05
Plaintiff-Respondent,

-against-

The Port Authority of New York and New Jersey,
Defendant-Appellant-Respondent,

T.U.C.S. Cleaning Service, Inc.,
Defendant-Respondent-Appellant.

_____

Kathleen Gill Miller, New York, for appellant-respondent.

Lewis Brisbois Bisgaard & Smith LLP, New York (Bari Klein of counsel), for respondent-appellant.

Gorayeb & Associates, P.C., New York (Roy A. Kuriloff of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered September 14, 2010, which denied defendant T.U.C.S. Cleaning Service, Inc.'s motion and defendant the Port Authority of New York and New Jersey's cross motion for summary judgment dismissing the complaint and any cross claims against them, unanimously modified, on the law, to grant T.U.C.S.'s motion, and otherwise affirmed, without costs.

The Port Authority failed to establish that it timely filed its cross motion (*see Corchado v City of New York*, 64 AD3d 429 [2009]). Counsel's statement in a reply affirmation that it

timely served an affirmation in support of the cross motion is unsupported by any claim of personal knowledge. Accordingly, it is without evidentiary value and thus unavailing (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Were we to consider the merits of the cross motion, we would find that the Port Authority failed to establish prima facie that it did not have constructive notice of the ice on the sidewalk on which plaintiff allegedly slipped (*see Santiago v New York City Health & Hosps. Corp.*, 66 AD3d 435, 435 [2009]). A Port Authority employee initially testified that his duties included patrolling the sidewalks at the start of his shift. However, at a subsequent deposition, he denied having such a duty and could not recall whether he patrolled the sidewalks prior to the accident.

The Port Authority also failed to establish prima facie that it properly inspected and maintained the fire hose cabinets, which allegedly leaked water onto the subject sidewalk (*cf. Stewart v Canton-Potsdam Hosp. Found., Inc.*, 79 AD3d 1406, 1406-1407 [2010]). Indeed, the Port Authority's general maintenance supervisor did not know the frequency of inspections. In addition, its utility systems maintainer (USM) testified that USMs only looked inside the cabinets to check for water when they were not busy. Accordingly, the Port Authority's cross motion

would be denied regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

T.U.C.S's motion, however, should have been granted. T.U.C.S. established prima facie that it did not create the alleged loose valve condition that caused plaintiff's accident. We need not determine whether or not T.U.C.S. used the fire hose cabinet when it power washed the terminal. T.U.C.S. submitted its cleaning services contract with the Port Authority, which provided that power washing was only performed "during the months of April 1 through November 31." Accordingly, T.U.C.S. established that it did not perform power washing on or about December 15, 2004, the date of plaintiff's accident. Plaintiff's speculation that T.U.C.S. may have performed power washing on the date of the accident in the middle of the winter is insufficient to create a triable issue of fact.

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

ENTERED: JUNE 16, 2011

CLERK

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

5355 Mary Stevenson-Misischia, etc., Index 600122/07
Plaintiff-Appellant,

-against-

L'Isola D'Oro SRL, et al.,
Defendants.

Atlantic International Products, Inc., et al.,
Defendants-Respondents.

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Frank J. Monteleone, New York, for appellant.

C. Louis Abelove, Utica, for respondents.

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Order, Supreme Court, New York County (Louis B. York, J.), entered January 10, 2011, which denied plaintiff's motion for summary judgment declaring that defendant Atlantic International Products, Inc. became the 60% owner of defendant L'Isola D'Oro USA, Inc. (USA) in 2004 and summary judgment on her causes of action for conversion, an accounting, and breach of fiduciary duty, unanimously affirmed, without costs.

The record reflects that USA's 2004 tax return stated that Atlantic held a majority shareholder interest in USA. However, plaintiff's argument that the tax return estops Atlantic from denying that it purchased the majority interest in USA is unavailing. A party to litigation may not take a position

contrary to a representation made in an income tax return (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]; *see also Peterson v Neville*, 58 AD3d 489 [2009]). The tax return was filed by USA, which is not a party to this action, the complaint having been dismissed as against it (64 AD3d 458 [2009]). Plaintiff's remaining submissions, including the Letter of Intent, which states explicitly that it is not a binding agreement, fail to demonstrate conclusively that Atlantic purchased the majority shareholder interest in USA.

In view of the foregoing, plaintiff failed to establish that Atlantic owed a fiduciary duty to the estate (*see Littman v Magee*, 54 AD3d 14, 17 [2008]). Indeed, defendants' evidence raises the inference that Atlantic simply managed USA between January 2004 and April 2005, pursuant to an initial agreement entered into by all the parties, and had been given only an option to purchase USA, which it did not exercise. In light of the conflicting financial information regarding USA's annual fiscal performance, plaintiff also failed to establish that Atlantic was obligated to compensate the estate, as the minority shareholder in USA. Nor did she establish that defendants intentionally and without authority exercised dominion and

control over property belonging to the estate (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]).

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

ENTERED: JUNE 16, 2011

CLERK

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

5356 The People of the State of New York, Ind. 4027/08
Respondent,

-against-

Shawn Caldwell,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James A. Yates, J., at plea; Daniel Fitzgerald, J., at sentencing), rendered on or about July 2, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

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

ENTERED: JUNE 16, 2011

CLERK

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

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

5357N Eitan Ogen, Index 117175/07
Plaintiff-Appellant

-against-

Juliann Nordstrom, et al.
Defendants-Respondents.

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Natalie Sedaghati, New York, for appellant.

Leahey & Johnson, P.C., New York (Peter James Johnson, Jr., of counsel), for respondents.

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Order, Supreme Court, New York County (George J. Silver, J.), entered September 28, 2010, which, inter alia, granted defendants' CPLR 5015(a)(1) motion to vacate an inquest judgment entered against them upon default, unanimously reversed, on the law and the facts, without costs, and the judgment reinstated.

Supreme Court improvidently exercised its discretion in vacating the judgment. Defendants failed to offer a meritorious defense on the issue of damages, or a reasonable excuse for failing to attend the inquest on November 17, 2008 (*see On Kee Foods, Inc. v 7 Eldridge LLC*, 80 AD3d 462 [2011]).

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

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

ENTERED: JUNE 16, 2011

CLERK

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

5358N Amaranth Roslyn Ehrenhalt, Ind. 106347/09
Plaintiff-Respondent,

-against-

Scott Kinder, et al.,
Defendants,

Frederick Mehl,
Defendant-Appellant,

_____

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Christopher Russo of counsel), for appellant.

Martin S. Rapaport, New York, for respondent.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered February 17, 2010, which, inter alia, granted plaintiff's motion for summary judgment on the issue of defendant Frederick Mehl's liability for legal malpractice, unanimously affirmed, without costs.

Defendant's failure to inform plaintiff of the defects in title to the apartment when he learned of them was a failure "to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession," and this failure resulted in actual damages to plaintiff (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]).

Defendant's contention that plaintiff's motion is premature

because more discovery is required is unsupported by any evidence suggesting that additional discovery will lead to further relevant evidence (*see* CPLR 3212[f]; *Zinter Handling, Inc. v Britton*, 46 AD3d 998, 1001 [2007]; *Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418 [2009]).

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

ENTERED: JUNE 16, 2011

CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5360 Ydaiza DeCastro, Index 23683/05
Plaintiff-Appellant,

-against-

Andrews Plaza Housing Associates, L.P., et al.,
Defendants-Respondents.

_____

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

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

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Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered February 19, 2010, which, in an action for personal injuries sustained when plaintiff tripped on a hole in the floor of defendants' building and fell, granted defendants' motion to set aside the jury's award of $350,000 for past pain and suffering and $250,000 for future pain and suffering over 37 years, and ordered a new trial on such damages unless the parties stipulated to a reduced award of $250,000 and $200,000 for past and future pain and suffering, respectively, unanimously reversed, on the facts, without costs, the motion denied, and the verdict reinstated.

The trial evidence showed that as a result of her fall, plaintiff suffered a chondral fracture defect in the articular

surface of the right knee joint and a partial tear of the anterior cruciate ligament, requiring corrective arthroscopic surgery. She also sustained lower spinal injuries in the form of a bulging and a herniated disc. Plaintiff underwent several months of physical therapy and her treating physicians testified that her injuries are permanent and progressive, and that she will require corrective back surgery and additional surgeries on her right knee.

Under the circumstances presented, the jury's award did not materially deviate from what would be reasonable compensation (CPLR 5501[c]; *see Harris v City of N.Y. Health & Hosps. Corp*, 49 AD3d 321 [2008]; *Salop v City of New York*, 246 AD2d 305 [1998]; *see also Sanabia v 718 W. 178th St LLC*, 49 AD3d 426 [2008]).

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

ENTERED: JUNE 16, 2011

CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5361 Rene Baulieu, et al., Index 114779/08
Plaintiffs-Respondents,

-against-

Ardsley Associates, L.P., et al.,
Defendants-Appellants,

Ardsley Realty Associates, LLC, et al.,
Defendants,

Powerhouse Maintenance Inc.,
Defendant-Respondent.

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Torino & Bernstein, P.C., Mineola (Vincent J. Battista of counsel), for appellants.

Gorton & Gorton LLP, Mineola (John T. Gorton of counsel), for Baulieu respondents.

Harris, King & Fodera, New York (Kevin J. McGinnis of counsel), for Powerhouse Maintenance Inc., respondent.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 13, 2010, which, in this trip and fall personal injury action, denied that branch of defendants ISJ Management Corp. (ISJ) and Ardsley Associates L.P.'s (Ardsley LP) motion for summary judgment dismissing the complaint and all cross claims as against ISJ; denied, with leave to renew, that branch of ISJ/Ardsley's motion seeking a change of venue from New York County to Westchester County; and granted defendant

Powerhouse Maintenance Inc.'s (Powerhouse) motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, Powerhouse's motion denied, and the complaint and cross claims reinstated as against it, and ISJ/Ardsley LP's motion for summary judgment as to ISJ and for a change of venue as to Ardsley LP, granted. The Clerk is directed to enter judgment dismissing the complaint and all cross claims as against ISJ.

Powerhouse contracted with Ardsley LP to perform "as-needed" repair work on Ardsley LP's strip mall parking lot. Plaintiff Rene Baulieu allegedly lost her balance as she stepped down from the mall sidewalk, into the parking lot, and her right foot came into contact with a "build-up" of asphalt, which abutted the curb and sloped sharply downward to the level of the parking area. Plaintiff was allegedly "pitched-forward" and inadvertently stepped into a pothole, which caused her injury.

We find that Powerhouse did not establish prima facie entitlement to summary judgment dismissing plaintiffs' claim, which was predicated upon the first exception in *Espinal v Melville Snow Contrs.* (98 NY2d 136 [2002]) (*see generally Martorel v Tower Gardens, Inc.*, 74 AD3d 651 [2010]); *Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334 [2004]).

Powerhouse never addressed the issue of the steep slope/macadam raised in plaintiffs' bill of particulars and deposition testimony, and Powerhouse's principals could not state with certainty whether Powerhouse had performed asphalt repair work in the area where plaintiff was injured.

In any event, even assuming, arguendo, Powerhouse had met such prima facie burden, the evidence proffered by ISJ/Ardsley LP and plaintiffs raised triable issues of fact whether the asphalt work performed by Powerhouse created an unreasonable risk of harm, or exacerbated a pre-existing hazardous condition (*see Church v Callanan Indus.*, 99 NY2d 104 [2002]). The affidavit of plaintiffs' expert engineer, which was submitted in opposition to Powerhouse's motion, opined that the macadam had a dangerous slope and violated certain specified local codes and regulations. The expert affidavit should have been considered on the motion, notwithstanding that plaintiffs failed to timely disclose information about the expert before filing their note of issue. On this record, we find no evidence that plaintiffs' belated disclosure of the expert information was willful, or that it prejudiced Powerhouse, inasmuch as the specifics of the alleged macadam defect, and the codes and regulations claimed to be violated, were previously set forth in plaintiffs' bill of

particulars and deposition testimony (*see generally Downes v American Monument Co.*, 283 AD2d 256 [2001]; *Jefferson v Temco Servs. Indus.*, 272 AD2d 196 [2000]).

The evidence did not raise a triable issue of fact as to whether ISJ, as managing agent to mall owner Ardsley LP, owed plaintiffs' a duty of care. ISJ established that its management of the premises was not comprehensive or exclusive (*see Espinal*, 98 NY2d 136). While ISJ employees performed bookkeeping for the mall, fielded complaints from tenants regarding the mall premises, and contacted contractors to perform repairs at the mall when needed, inspection of the premises was conducted by a separate independent contractor (Raho), and Raho would perform minor repairs. Substantial repairs, having a cost of $5,000 or more, had to be approved by the owner. The owner paid for all repairs, and whether the owner had sufficient money at a given time dictated the extent of allowable repairs. Such evidence precluded a finding that ISJ had authority over the management of even minor repairs at the mall (*see Vushaj v Insignia Residential Group, Inc.*, 50 AD3d 393 [2008]).

While there was evidence that ISJ was given prior notice of the pothole defect in front of the Sunnydale store (*see e.g. Tushaj v Elm Mgt. Assoc.*, 293 AD2d 44 [2002]), and that it was

ISJ's duty to make arrangements to remedy the defect, financial issues regarding asphalt repair still remained largely within Ardsley LP's control. Indeed, the defects at issue which allegedly contributed to Baulieu's fall appear to involve substantial cost to repair (i.e., potential correction of the macadam slope along the 241-foot curbline, in addition to pothole repair). On this record, it may not be reasonably inferred from the facts that a triable issue exists whether ISJ had comprehensive control and authority over remedying the alleged property defects that plaintiffs' claimed contributed to the fall and injury.

With dismissal of ISJ from the action, that branch of ISJ/Ardsley's motion that sought a change of venue to Westchester County should be granted, as venue in New York County was predicated solely upon ISJ's principal place of business in such county (*see Moracho v Open Door Family Med. Ctr., Inc.*, 79 AD3d 581 [2010]; *Halina Yin Fong Chow v Long Is. R.R.*, 202 AD2d 154 [1994]), and the remaining parties in the action either reside in Westchester County or are agreeable to a change of venue to that

county (*see e.g. Gramazio v Borda, Wallace & Witty*, 181 AD2d 428 [1992]).

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

ENTERED: JUNE 16, 2011

CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5365 Jim Beam Brands Co., Index 600122/08
Plaintiff-Respondent,

-against-

Tequila Cuervo La Rojena, S.A. De C.V.,
Defendant-Appellant.

Jose Cuervo International Inc., et al.,
Defendant.

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Abelman, Frayne & Schwab, New York (Richard L. Crisona of counsel), for appellant.

Kenyon & Kenyon LLP., New York (Michelle Mancino Marsh of counsel), for respondent.

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Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered January 31, 2011, which, in an action alleging breach of a settlement agreement, granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, with costs.

The court properly determined the motion for summary judgment, although it was made more than 120 days after the filing of the note of issue. The motion was made pursuant to both a stipulation and the court's own order, upon a showing of

good cause" (CPLR 3212[a]; *cf. Brill v City of New York*, 2 NY3d 648, 651-652 [2004]).

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

ENTERED: JUNE 16, 2011

CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5366 Christopher Tennant, et al., Index 116372/08
Plaintiffs-Appellants,

-against-

Manhattan Skyline Management Corporation, et al.,
Defendants-Respondents.

Anne Rogers Mitchell,
Defendant.

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The Price Law Firm, LLC, New York (Joshua C. Price of counsel), for appellants.

Rosenberg & Estis, P.C., New York (Alexander Lycoyannis of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard Braun, J.), entered December 1, 2010, which, to the extent appealed from as limited by the briefs, granted the cross motion of defendants Manhattan Skyline Management Corporation, 450 Village Company, L.P. and 450 Village Company, LLC (collectively, 450) for summary judgment declaring that plaintiffs are not the lawful rent-stabilized tenants of the subject unit, and denied plaintiffs' motion for a declaration that they are the lawful tenants of record and to strike a number of 450's affirmative defenses, unanimously affirmed, without costs.

The record establishes that plaintiffs are not entitled to

become the recognized rent-stabilized tenants of the subject apartment. It is undisputed that when plaintiffs subtenants initially took possession in 2004, the legal monthly rent exceeded $2,000. Accordingly, upon vacatur of the apartment by the registered tenant, plaintiffs were only entitled to receive a deregulated lease (*see* Administrative Code of City of NY § 26-504.2[a]; *see also Matter of 450-452 E. 81st St., LLC v New York State Div. of Hous. & Community Renewal*, 70 AD3d 489, 490 [2010]).

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

ENTERED: JUNE 16, 2011

CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5367 The People of the State of New York, Ind. 6496/08
Respondent,

-against-

Dwight Parks,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Kirkland & Ellis LLP, New York (Alexis Gorton of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 13, 2009, convicting defendant, after a jury trial, of two counts of assault in the second degree, and sentencing him to an aggregate term of 6 months, concurrent with 5 years' probation, unanimously affirmed.

The court properly exercised its discretion in precluding testimony purporting to show that the complainant threatened defendant several hours before the incident. It was within the court's discretion to preclude this evidence as too speculative or conjectural to be presented to the jury (*see e.g. People v Martinez*, 177 AD2d 600, 601 [1991], *lv denied* 79 NY2d 829 [1991]). Furthermore, even if the jury could have interpreted the cryptic remark as a threat, there was no evidence that

defendant knew about it. Where, as here, a defendant asserts a justification defense, a threat made by the alleged victim against the defendant may be relevant to the issue of who was the initial aggressor, even if the defendant was unaware of the threat (*People v Miller*, 39 NY2d 543, 549 [1976]). However, here the People conceded that the complainant may have been the initial aggressor and argued that defendant was unjustified in the amount of force he used. Therefore, the evidence of a possible threat had little or no probative value (*see People v Barrow*, 19 AD3d 189 [2005], *lv denied* 6 NY3d 809 [2006]).

The court also properly exercised its discretion in precluding defendant from calling a witness to testify as to his own unrelated, violent encounter with the complainant. The court permitted defendant to testify as to his own knowledge of any violent acts by the complainant, including the act he wanted to establish by calling a witness. The court correctly determined that the proposed witness's testimony would have been cumulative, of little probative value, and an unnecessary distraction (*see People v Levy*, 186 AD2d 66, 67 [1992], *lv denied* 80 NY2d 975 [1992]).

The court's limitations on defendant's use of certain hospital records related to another of the complainant's violent encounters were proper exercises of discretion. We note that

defendant received a sufficient opportunity to inform the jury of the complainant's aggressive tendencies.

In any event, any error with respect to the any of the above-discussed evidentiary rulings was harmless (*see People v Crimmins*, 36 NY2d 230, 241-42 [1975]). There was overwhelming evidence that, regardless of who was the initial aggressor, defendant used excessive force against the complainant. The excluded evidence had little or no bearing on the principal issue in the case, which was whether the degree of force used by defendant was justified.

Defendant's challenges to the constitutionality of the court's evidentiary rulings are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

Defendant's complaints about the court's instructions on interested witnesses and witness credibility are unpreserved (*see People v Whalen*, 59 NY2d 273, 280 [1983]), and we decline to review them in the interest of justice. As an alternative holding, we would find that viewed as whole, the court's charge was sufficient, under the circumstances of the case, to guide the jury in making credibility assessments (*see People v Francisco*, 44 AD3d 870, 871 [2007], *lv denied* 9 NY3d 1033 [2008]).

Defendant failed to preserve his complaints about the

court's justification charge, and we decline to review them in the interest of justice. As an alternative holding, we find that viewed as a whole, the justification charge conveyed the appropriate legal principles to the jury (*see generally People v Fields*, 87 NY2d 821 [1995]).

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

ENTERED: JUNE 16, 2011

CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5368 Karyn Harrigan also known as Karyn Tyler,
Plaintiff-Appellant,

-against-

Henchan Kemmaj,
Defendant-Respondent.

Index 301129/07

_____

Greenberg & Massarelli, LLP, Purchase (Crystal Massarelli of counsel), for appellant.

Cohen, Kuhn & Associates, New York (Ira Goldman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered September 14, 2010, which granted defendant's motion for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, without costs, the motion denied as to the 90/180-day claim, and otherwise affirmed, without costs.

Defendant made a prima facie showing that plaintiff did not sustain permanent injuries as a result of the April 2007 automobile accident by submitting an affirmed report by an orthopedist who examined plaintiff in March 2009 and found full range of motion and no abnormalities in her knee (*see Porter v*

Bajana, 82 AD3d 488 [2011]; *DeJesus v Paulino*, 61 AD3d 605, 607 [2009]).

In response, plaintiff failed to raise an issue of fact as to the permanent nature of her injuries. We note that the August 2007 post-operative report by plaintiff's surgeon indicates no restrictions in range of motion (*see Pou v E&S Wholesale Meats, Inc.*, 68 AD3d 446 [2009]).

Defendant failed to show prima facie that plaintiff did not sustain a 90/180-day injury.

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

ENTERED: JUNE 16, 2011

CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5369 Robert Nagel, Index 3451/95
Plaintiff-Respondent,

-against-

Mette Nagel,
Defendant-Appellant.

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King & King LLP, Long Island City (Peter M. Kutil of counsel), for appellant.

Law Office of Michael D. Karnes, Bronx (Philip Newman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ellen Gesmer, J.), entered January 11, 2010, which, after a hearing, denied defendant's motion for an order directing plaintiff to sell the parties' former marital residence and pay her $100,000 from the proceeds of the sale, unanimously affirmed, without costs.

On a prior appeal in this matter (*Nagel v Nagel*, 52 AD3d 258 [2008]), we determined that while Supreme Court correctly denied defendant's motion for summary judgment, it incorrectly found that a particular provision of the parties' oral stipulation was unambiguous. Accordingly, we remanded the matter for further proceedings consistent with our opinion.

The subject provision provides as follows: "[I]n the event the marital residence shall be sold no later than the

emancipation of the parties' child and that Sophie, since the house is going to remain titled as it is today, in the event of the death of [defendant], the proceeds to which she is entitled under this agreement shall be-shall inure to the benefit of [defendant]'s heirs, distributors, or assignees, whoever she decides."

On remand and following a hearing, Supreme Court determined, as a matter of fact, that the parties' intent in executing the stipulation was to provide that plaintiff was not required to sell the residence during his lifetime, and that, upon its sale, defendant was entitled to receive $100,000. In addition, the court found that the parties' intent in agreeing to the disputed provision was to clarify that defendant's $100,000 share would go to her heirs if the residence was sold after her death, even if Sophie was not yet emancipated.

Where, as here, Supreme Court's findings of fact "rest in large measure on considerations relating to the credibility of witnesses," they "should not be disturbed on appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Nightingale Rest. Corp. v Shak Food Corp.*, 155 AD2d 297, 297-298 [1989], *lv denied* 76 NY2d 702 [1990]).

Here, the record supports Supreme Court's conclusions. Plaintiff's witnesses testified in great detail about the parties' negotiations during the divorce proceedings and their intent in drafting the disputed clause. Defendant and her former counsel, however, could not recall any of the negotiations.

Defendant was not entitled to a jury trial. Subject to exceptions not present here (*see* Domestic Relations Law §§ 143, 173), "matrimonial actions and proceedings incidental thereto are matters of equity" (*Matter of Sumiya v Murtari*, 275 AD2d 928 [2000], *lv dismissed* 96 NY2d 730 [2001], *lv denied* 96 NY2d 708 [2001]). Accordingly, they "are not within the constitutional guarantees of a right to a jury trial" (*id.* [internal quotation marks and citation omitted]).

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

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

ENTERED: JUNE 16, 2011

CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5370 Ricarda Velez, Index 301944/08
Plaintiff-Appellant,

-against-

Luis Manuel Almonte, et al.,
Defendants-Respondents.

_____

Law Office of Bruce A. Newborough, Brooklyn (Bruce A. Newborough of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered December 21, 2009, which, in an action for personal injuries, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law by showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Defendants submitted, inter alia, affirmed reports from a radiologist, who reviewed plaintiff's MRI films, and found preexisting degenerative disease in plaintiff's knees and spine that was consistent with her age and weight (*see Lemos v Giacomo Mgt., Inc.*, 82 AD3d 602 [2011]; *Amamedi v Archibala*, 70 AD3d 449

[2010], *lv denied* 15 NY3d 713 [2010]). Plaintiff's radiologist and treating physician also noted findings of degenerative disease.

In opposition, plaintiff failed to raise a triable issue of fact, as she did not present evidence rebutting the asserted lack of causation (*see Valentin v Pomilla*, 59 AD3d 184, 186 [2009]). The statement by plaintiff's treating physician that plaintiff's injuries were caused by the accident was conclusory and insufficient to defeat the motion (*see Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 557 [2009]). Nor did plaintiff raise a triable issue of fact with respect to her 90/180-day claim in the absence of evidence that her injuries were related to the accident (*see Reyes v Esquilin*, 54 AD3d 615 [2008]).

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

ENTERED: JUNE 16, 2011

CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5373 E1 Entertainment U.S. LP, Index 650135/09
Plaintiff-Appellant,

-against-

Real Talk Entertainment, Inc., et al.
Defendants-Respondents.

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Daniel J. Aaron, P.C., New York (Daniel J. Aaron of counsel), for appellant.

Meyerowitz Law Firm, New York (Ira S. Meyerowitz of counsel), for respondents.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered May 6, 2010, which, insofar as appealed from as limited by the briefs, dismissed the amended complaint's fraud-based claims, unanimously reversed, on the law, with costs, to reinstate the second, third, and fourth causes of action.

Defendant Derrick Johnson's alleged statement that there were "existing deals" constitutes a statement of "then-present facts" sufficient to sustain the fraud claims (*see Success, LLC v Stonehedge Capital Co., LLC*, 81 AD3d 478, 479 [2011]).

The fraud-based claims are independent of the breach of contract claim. According to the complaint, plaintiff relinquished its contractual right to hold the reserves based on Johnson's alleged misrepresentations (*see Richmond Shop Smart,*

Inc. v Kenbar Dev. Ctr., LLC, 32 AD3d 423, 424 [2006]).

Similarly, Johnson's statements of intent to perform, which were false according to the complaint - coupled with other allegations in the complaint which support the inference that there was never an intention to perform on Johnson's part - make out a cause of action for fraud (*see Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 122 [1995]; *compare Abacus v Datagence, Inc.*, 66 AD3d 552 [2009]).

Supreme Court erred when it held that plaintiff could not, as a matter of law, have reasonably relied on Johnson's July 2008 statements of using the reserve monies for a business purpose, when Johnson stated, in June 2007, that he needed the money to pay his personal expenses. The fact that Johnson expressed his true intent to use the money for personal use in June 2007, does not, as a matter of law, mean that plaintiff could not justifiably rely on his statement (over a year later) that the money was to be used for a legitimate business purpose. Furthermore, plaintiff wrote the check to the corporate defendant, evincing its then belief that the money was to be used for a business purpose.

The complaint pleads fraud with sufficient particularity so as to satisfy CPLR 3016(b)'s requirement that the "circumstances

constituting the wrong be stated in detail" (CPLR 3016[b]). In this regard, the complaint states who made the misrepresentation to whom, the date the misrepresentation was made, and its content (*see Selechnik v Law Off. of Howard R. Birnbach*, 82 AD3d 1077 [2011] [internal quotation marks and citations omitted]; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-92 [2008]).

The complaint also adequately pleads that Johnson is liable for fraud in his personal capacity. "[A] corporate officer may be held personally liable for committing fraud on the corporation's behalf" (*see First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 294 [1999]).

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

ENTERED: JUNE 16, 2011

CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5374 The People of the State of New York, Ind. 2087/07
Respondent,

-against-

Jerry Etienne,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (William A. Wetzel, J.), rendered on or about December 15, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JUNE 16, 2011

CLERK

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

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5375 In re Probate Proceedings, Will of Allen J. Wenzel, etc., Index 116940/08 File 4248/08

Joan Wenzel,
Plaintiffs,

Kimberly Wenzel, etc.,
Plaintiff-Respondent,

-against-

Atlantic Trust Co., N.A., et al.,
Defendants,

Margaret Wenzel,
Defendant-Appellant.

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Markewich and Rosenstock, LLP, New York (Eve Rachel Markewich of counsel), for appellant.

McLaughlin & Stern, LLP, New York (Jon Paul Robbins of counsel), for respondent.

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Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered August 24, 2010, which, to the extent appealed from, granted plaintiff Kimberly Wenzel's motion for partial summary judgment on the first and third causes of action, and denied defendant Margaret Wenzel's cross motion for summary judgment dismissing those causes of action, unanimously modified, on the law, to grant the motion to the extent of declaring that the residue of decedent's estate be apportioned equally between

Margaret Wenzel and Kimberly Wenzel, and to grant the cross motion to the extent of directing that plaintiff Joan Wenzel's share under the inter vivos revocable trust established by decedent on November 22, 2007 (the trust) be reduced by an amount equal to half of the value of the estate residue, and otherwise affirmed, without costs.

Decedent and his then-wife, Joan Wenzel, entered into a separation agreement which required decedent to execute and keep in effect a will treating their daughter, Kimberly Wenzel, no less favorably than any child of decedent's born afterwards. Decedent then established a trust, which named a sub-trust for benefit of Margaret Wenzel (decedent's after-born daughter) and Joan Wenzel as remainderers in equal shares, except that decedent noted his intention to name Margaret Wenzel's resulting sub-trust as beneficiary of his individual retirement account and life insurance. On the same day, decedent executed a will which treated Margaret and Kimberly dissimilarly by providing for the residue to be conveyed to the trust.

The parties here could have expressly provided that inter vivos trusts would be deemed to be part of decedent's estate, and subject to the requirement that his children be treated equally under his will. The parties, although undisputedly represented

by counsel, made no such provision, and their contract should not be read to contain such an additional term (*see Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). Nor is there any dispute that the inter vivos revocable trust which decedent established was a testamentary substitute (*see* Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL § 5-1.1-A, at 198). Accordingly, the separation agreement's provision requiring decedent to treat Margaret and Kimberly equally under his will, should not be construed as extending to his inter vivos revocable trust (*see Blackmon v Estate of Battcock*, 78 NY2d 735, 740 [1991]).

As Margaret concedes, however, the will's residuary clause, which provides for the residue of the estate to be conveyed to the trust, violates the separation agreement, insomuch as the trust by its terms benefits only Margaret and Joan, and not Kimberly. Hence, the residue of decedent's estate should be apportioned equally between Kimberly and Margaret, rather than being conveyed to the trust.

Since no party has appealed the Surrogate Court's dismissal of the complaint's second cause of action, which sought to declare void the trust's in terrorem clause, that clause remains in effect. Accordingly, as provided for in the trust, Joan's

share under the trust should be reduced by an amount equal to half of the value of the estate residue.

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

ENTERED: JUNE 16, 2011

CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5377N James Yu, etc., Index 403016/09
Plaintiff-Appellant,

Kathleen Johnson, etc.,
Plaintiff,

-against-

Vantage Management Services, LLC, et al.,
Defendants-Respondents.

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James Yu, appellant pro se.

Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 13, 2010, which, to the extent appealed from as limited by the briefs, granted defendants' motion to vacate a default judgment, unanimously affirmed, without costs.

In light of the strong public policy of this State to dispose of cases on their merits, the brief delay involved, the defendant's lack of willfulness, and the absence of prejudice to the plaintiffs, Supreme Court providently exercised its discretion in vacating the default and granting the defendant leave to interpose an answer (*see New York & Presbyt. Hosp. v. Am. Home Assur. Co.*, 28 AD3d 442 [2006]). Defendants asserted a reasonable excuse for the default, i.e. insurance company delay

in determining coverage for a claim alleging toxic mold (*see Seccombe v Serafina Rest. Corp.*, 2 AD3d 516 [2003]), the delay in answering was relatively minimal, a potentially meritorious defense was demonstrated by affidavit, and no prejudice to plaintiffs was shown to have resulted in the delay (*see Siwek v Phillips*, 71 AD3d 469 [2010]; *Arrington v Bronx Jean Co., Inc.*, 76 AD3d 461 [2010]).

We also note that defendants actually served and filed an answer before plaintiffs applied ex parte for a default, and promptly moved to vacate. Further, the additional delay in plaintiffs' receipt of defendants' answer was attributable to plaintiffs having moved from the address indicated on the summons and complaint.

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

ENTERED: JUNE 16, 2011

CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5378N Investec Trustees (Jersey) Limited, Index 651040/10
Petitioner-Appellant.

-against-

Oppenheimer & Co., Inc.,
Respondent-Respondent.

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Chaffetz Lindsey LLP, New York (Cecilia Froelich Moss and Boris Ayala of counsel), for appellant.

Satterlee Stephens Burke & Burke LLP, New York (Meghan H. Sullivan of counsel), for respondent.

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Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered January 26, 2011, denying the petition and application for a partial stay of arbitration and dismissing the proceeding brought pursuant to CPLR article 75, unanimously affirmed, with costs.

Petitioner seeks to stay arbitration of a counterclaim respondent asserted against petitioner, in its capacity as trustee, in pending arbitration commenced by the trustee. Petitioner is not a party to the arbitration submission agreement and thus has no standing to seek a stay (*see Cantor Fitzgerald Partners v Municipal Partners, LLC*, 11 AD3d 247, 247-248 [2004]).

We reject petitioner's argument that it is entitled to a stay because it will be required to satisfy any judgment

respondent obtains on its counterclaim. Whether petitioner will be required to satisfy any judgment is irrelevant to the issue at bar - namely, whether the submission agreement required petitioner, as trustee, to arbitrate the counterclaim (*see Brown v Caldarella*, 2008 US Dist LEXIS 25918, *9-10 [SD NY 2008]). Moreover, if, as petitioner repeatedly asserts, petitioner, the corporation, is a separate legal entity from petitioner, as trustee, then any judgment obtained against petitioner, as trustee, will be exactly that – a judgment against the trustee. That petitioner may be required to satisfy any judgment obtained against the trustee does not convert respondent's counterclaim into a third-party claim or a claim asserted against petitioner.

Contrary to petitioner's contention, New York law does not prohibit counterclaims against trustees (*see Birjah v Citibank*, 224 AD2d 228 [1996]). Rather, it prohibits counterclaims "asserted against a plaintiff in a capacity different from that in which [plaintiff] appears in the action" (*Corcoran v National*

Union Fire Ins. Co. of Pittsburgh, 143 AD2d 309, 311 [1988]; *see* CPLR 3019). Such is not the case here.

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

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

ENTERED: JUNE 16, 2011

CLERK

Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2708 Osqugama F. Swezey, 104734/09
Petitioner-Respondent,

-against-

Merrill Lynch, et al.,
Respondents,

Philippine National Bank, et al.,
Intervenors-Appellants.

_____

Mayer Brown LLP., Washington, DC (Charles A. Rothfeld of the Bar of the District of Columbia, admitted pro hac vice, of counsel), for appellants.

Kohn, Swift & Graf, P.C., Philadelphia, PA (Robert A. Swift of the Bar of the State of Pennsylvania, admitted pro hac vice, of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered November 16, 2009, reversed, on the law and the facts, without costs, the motion granted pursuant to CPLR 3211(a)(10), and the proceeding dismissed without prejudice.

Opinion by Friedman, J. All concur except Catterson, J. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
James M. Catterson
James M. McGuire
Nelson S. Román, JJ.

2708
Index 104734/09

_____x

Osqugama F. Swezey,
Petitioner-Respondent,

-against-

Merrill Lynch, et al.,
Respondent,

Philippine National Bank, et al.,
Intervenors-Appellants.

_____x

Intervenors appeal from a judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered November 16, 2009, which, insofar as appealed from as limited by the briefs, denied their motion to dismiss the petition pursuant to CPLR 3211(a)(7) and (10).

Mayer Brown LLP, New York (Michael O. Ware and Andrew J. Calica of counsel), and Mayer Brown LLP, Washington, DC (Charles A. Rothfeld, of the Bar of the District of Columbia, admitted pro hac vice, of counsel), for appellants.

Anderson Kill & Olick, P.C., New York (Jeffrey E. Glen of counsel), and Kohn, Swift & Graf, P.C., Philadelphia (Robert A. Swift of the Bar of the State of Pennsylvania, admitted pro hac vice, of counsel), for respondent.

Friedman, J.

This is a proceeding to execute a judgment against a fund located in New York. A foreign sovereign, asserting that the fund comprises the proceeds of assets corruptly acquired and removed from its territory by its former president, claims to be the true owner of the fund. Because the foreign sovereign declines to waive its immunity from suit, we are required to dismiss the proceeding based on nonjoinder of an indispensable party.

Petitioner is the representative of a class of people who suffered violations of their human rights in the Philippines under the regime of the late President Ferdinand E. Marcos. In 1995, the class obtained a money judgment against the Marcos estate in Hawaii federal court. In 2008 and 2009, the class filed judgments in Supreme Court, New York County, pursuant to CPLR 5018(b) and 5402, based indirectly on the 1995 Hawaii federal judgment.[1]

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[1]The New York judgments relevant to this appeal derive from the class's registration of the 1995 Hawaii federal judgment in the United States District Court for the Northern District of Illinois in January 1997 pursuant to 28 USC § 1963. The January 1997 Illinois registered judgment was revived in accordance with Illinois law in September 2008; the 2008 revived Illinois federal judgment was registered in the Southern District of New York in October 2008 pursuant to 28 USC § 1963; and the Southern District registered judgment was docketed in New York County Supreme Court on October 15, 2008, pursuant to CPLR 5018(b). The class revived

Based on the New York County judgments, petitioner commenced this CPLR 5225 turnover proceeding against respondent Merrill Lynch in 2009. Merrill Lynch held approximately $35 million in New York for the account of Arelma, Inc., a Panamanian entity formerly owned by Marcos. Arelma's share certificates are now held in escrow by the Philippine National Bank (PNB) in connection with legal proceedings against the Marcos estate in the Philippines. The instant turnover proceeding seeks an order (1) declaring the Arelma assets to be property of the Marcos estate and (2) directing Merrill Lynch to transfer the Arelma assets to the fund for the compensation of class members administered by the Hawaii federal court.

PNB and Arelma (collectively, intervenors) moved to intervene in this proceeding and to dismiss the petition on the ground of the impossibility of joining two assertedly indispensable parties that enjoy sovereign immunity, namely, the Republic of the Philippines and the Philippine Presidential

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the 1997 Illinois registered judgment a second time in March 2009, registered the revived 2009 Illinois federal judgment in Illinois state court in accordance with Illinois law in June 2009, and finally filed the Illinois state court judgment in New York County Supreme Court on July 1, 2009, pursuant to CPLR 5402. It appears to be undisputed that yet another New York County judgment, filed by the class in July 2008, is invalid because it was based on a registration of the original 1995 Hawaii judgment in the Southern District of New York in July 2008, by which time the Hawaii judgment had lapsed.

Commission on Good Government, an agency of the Philippine government (collectively, the Republic). Intervenors also moved to dismiss on the alternative ground that petitioner does not hold an enforceable judgment, given that the underlying 1995 Hawaii judgment lapsed under Hawaii law in 2005, before the class filed any New York judgment against the Marcos estate (*see In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 536 F3d 980, 987 [9th Cir 2008], *cert denied* __ US __, 129 S Ct 1993 [2009] [Hawaii judgment lapsed in 2005 because the class failed to renew it within 10 years]). In the judgment appealed from, Supreme Court granted the motion to intervene but denied the motion to dismiss. Intervenors have appealed.[2]

For the reasons discussed below, we reverse and dismiss the petition without prejudice on the ground that the proceeding should not proceed in the absence of the Republic. Under CPLR 1001, the Republic should be a party to this proceeding but, by virtue of its sovereign immunity, cannot be made a party without

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[2]Merrill Lynch also moved to dismiss in Supreme Court but has not participated in this appeal. After the judgment appealed from was rendered, a consent order was entered, pursuant to which Merrill Lynch has deposited the Arelma assets with the Commissioner of Finance of the City of New York. The consent order discharged Merrill Lynch, upon its payment of the funds to the Commissioner of Finance, "from liability to any party to this proceeding (including any party who intervenes in this proceeding subsequent to the date of this order)."

its consent.[3] Given that the Republic has to date refused to participate in this proceeding (as is its right), we conclude, as

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[3]CPLR 1001, entitled "Necessary joinder of parties," provides:

> "(a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant.
>
> "(b) When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:
>
> 1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
>
> 2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
>
> 3. whether and by whom prejudice might have been avoided or may in the future be avoided;
>
> 4. the feasibility of a protective provision by order of the court or in the judgment; and
>
> 5. whether an effective judgment may be rendered in the absence of the person who is not joined."

did the United States Supreme Court in an earlier proceeding concerning ownership of the same assets (*Republic of the Philippines v Pimentel*, 553 US 851 [2008]), that respect for the principles of sovereign immunity and international comity mandates dismissal pursuant to CPLR 1003 and 3211(a)(10).[4]

The Republic's claim to the Arelma assets is based on its position, taken in proceedings against the Marcos estate in the Philippines, that the Arelma assets are the proceeds of property Marcos acquired corruptly in the Philippines through the misuse of his office. As noted by the Supreme Court in *Pimentel*, "a 1955 Philippine law provid[es] that property derived from the misuse of public office is forfeited to the Republic from the moment of misappropriation" (553 US at 858). In April 2009, a Philippine anti-corruption court (the Sandiganbayan) ruled that the Arelma assets constitute the ill-gotten gains of Marcos's corruption and, as such, have always belonged to the Republic, not to Marcos or his estate. That ruling is now on appeal to the Philippine Supreme Court.

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[4]CLPR 1003 provides in pertinent part: "Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provisions of that section." Under CPLR 3211(a)(10), a motion to dismiss may be made on the ground that "the court should not proceed in the absence of a person who should be a party."

At the outset, we reject petitioner's argument that the Republic is merely another creditor of the Marcos estate and, as such, subject to permissive joinder entirely as a matter of the court's discretion.[5] The Republic is not a general "claimant" (CPLR 5225) against the Marcos estate that would have no claim to the Arelma assets if it lost the "race of diligence" among creditors to execute against that fund (*Matter of Ruvolo v Long Is. R.R. Co.*, 45 Misc 2d 136, 148 [Sup Ct, Queens County 1965]). Rather, the Republic is a person that (according to the Sandiganbayan's ruling) "possesses an actual, current interest in the property in question" (*Bergdorf Goodman, Inc. v Marine Midland Bank*, 97 Misc 2d 311, 314 [Civ Ct, New York County 1978]) and, as such, its right to that property cannot be placed in jeopardy by the outcome of the race among the estate's general creditors (*see id.* [holding that the co-owner of a joint bank account was a necessary party in a turnover proceeding brought by a judgment creditor of the other owner of the account]). Further, contrary to petitioner's argument that adverse claimants to the property or debt at issue in a turnover proceeding are

[5]Contrary to petitioner's contention, CPLR 1003, which provides for dismissal in the event joinder of a necessary party is not possible, applies to special proceedings, including CPLR 5225 turnover proceedings. The term "action" as used in the CPLR is defined to include special proceedings (CPLR 105[b]).

subject only to permissive joinder, such an adverse claimant may, in a proper case, be entitled to intervene in the proceeding as a matter of law (*see Triangle Pac. Bldg. Prods. Corp. v National Bank of N. Am.*, 62 AD2d 1017, 1017-1018 [1978] [in CPLR 5225 proceeding seeking turnover of joint bank account, it was an abuse of discretion to deny the motion by the account's co-owner to intervene]). As noted in *Pimentel*, "[c]onflicting claims . . . to a common [fund] present a textbook example of a case where one party may be severely prejudiced by a decision in his absence" (553 US at 870 [citation and internal quotation marks omitted]).

Seeking to bolster her argument that the Republic is not a necessary party, petitioner invokes (with the dissent's concurrence) the truism that the Sandiganbayan does not have in rem jurisdiction of the Arelma assets, which are held in an account in New York. We fail to see how this limitation on the reach of the Sandiganbayan's mandate deprives the Republic of its status as a necessary party to this proceeding. The fact remains that the Republic claims to be the true owner of the Arelma assets, which have been found by a Philippine court to constitute the proceeds of wealth stolen from the Philippine people and spirited out of that country by its faithless former president. Beyond question, the issue of title to the Arelma assets is

within the jurisdiction of the Sandiganbayan, even if the fund itself -- having been secreted abroad by the wrongdoer -- is no longer present in the Philippines (*see Pimentel*, 553 US at 866 [because the Republic's "claims . . . arise from events of historical and political significance for the Republic and its people," it has "a unique interest in resolving the ownership of or claims to the Arelma assets"]).[6]

Unless the Sandiganbayan's ruling is overturned on the pending appeal, the Republic will be entitled -- if and when it chooses to seek the aid of our courts in recovering possession of the Arelma account -- to have that ruling enforced or recognized in litigation against general creditors of the Marcos estate (such as petitioner), subject to the principles governing recognition of foreign country judgments (*see* 1 Restatement [Third] of Foreign Relations Law § 481[1] [subject to exceptions specified in § 482, "a final judgment of a court of a foreign state . . . determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in

[6]Similarly, when the Swiss Federal Supreme Court ordered the return of the Marcos assets held in Switzerland (including the Arelma share certificates) to the Philippines for the determination of ownership, that court explained (in a decision translated and set forth in the instant record) that resolution of claims to the assets "must be carried out in the Philippines, which is the situs where the alleged criminal acts were committed."

the United States"]). In this regard, we note that petitioner is in privity with the Marcos estate for these purposes -- and as such bound by the determination of the ownership of the Arelma assets reached in the litigation between the Republic and the Marcos estate -- because her claim to the Arelma assets derives entirely from the estate's purported title to that fund (*see* Restatement [Second] of Judgments § 43[1][b] [a judgment in an action determining interests in real or personal property "(h)as preclusive effects upon a person who succeeds to the interest of a party (in the subject property) to the same extent as upon the party himself"]). Needless to say, "a creditor stands in no better position with respect to property of the garnishee than does his debtor" (*Smith v Amherst Acres*, 43 AD2d 792, 793 [1973]; *see also Bass v Bass*, 140 AD2d 251, 253 [1988] [a judgment creditor "cannot . . . reach assets in which the judgment debtor has no interest"]; Siegel, NY Prac § 488, at 826 [4th ed] ["The judgment creditor stands in the shoes of the judgment debtor, and if a given property, asset, interest, or deposit is unavailable to the debtor, it is unavailable to the creditor"]).

The view of petitioner and the dissent that the Sandiganbayan's judgment may only be recognized in New York through enforcement as a money judgment -- with the implication that the Republic would be on the same footing as other judgment

creditors of the Marcos estate seeking to execute against the Arelma assets -- is not correct.[7] "Whether a foreign judgment should be recognized, may be in issue . . . not only in enforcement . . . , but in other contexts, for example . . . where either side in a litigation seeks to rely on prior determination of an issue of fact or law" (1 Restatement [Third] of Foreign Relations Law § 481, Comment *b*). Hence, the Republic may, if it chooses, institute a proceeding in New York asserting an in rem claim to the Arelma account (for example, a replevin action, or an action seeking specific enforcement of a contractual right to the return of the assets) and rely in that proceeding on the Sandiganbayan's judgment to establish its ownership of the fund.[8]

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[7]In addition, we do not understand the dissent's assertion, in the penultimate paragraph of its writing, that dismissal of this proceeding would allow a foreign sovereign to "claim[] ownership of assets located in New York based simply on the exercise of personal jurisdiction over the person or entity who owns the assets." To reiterate, it is the Republic's position that Marcos never owned the Arelma assets; rather, the Republic claims, the Philippine assets from which the Arelma assets are derived belonged to the Republic as a matter of Philippine law from the times Marcos originally misappropriated them. Thus, the dissent's concern that a foreign government could fine an American tourist and then claim ownership of his assets in the United States has nothing to do with this case.

[8]We note that CPLR article 53 ("Recognition of Foreign Country Money Judgments"), to which the dissent refers, applies only to foreign state judgments "granting or denying recovery of a sum of money" (CPLR 5301[b]). Thus, article 53 may not apply

The foregoing establishes that the Republic is a "[p]art[y] who should be joined" in this proceeding under CPLR 1001(a), in that the Republic, given its substantial claim to be the true owner of the Arelma assets, "might be inequitably affected by a judgment" (*id.*) disposing of those assets in its absence.[9] Given

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to the Sandiganbayan's judgment, which simply declares that the Republic owns the Arelma assets without fixing the dollar amount of those assets -- not surprisingly, since that amount is subject to periodic change. Specifically, the Sandiganbayan's judgment (which is in the record) declares forfeited to the Republic all assets in the Arelma account "in the *estimated* aggregate amount of US$3,369,975.00 *as of 1983*, plus all interest and all other income accrued thereon" through the time of transfer to the Republic (emphasis added). Although article 53 may not apply to this declaratory judgment, article 53 "does not prevent the recognition of a foreign country judgment in situations not covered by th[at] article" (CPLR 5307).

[9]*Lamont v Travelers Ins. Co.* (281 NY 362 [1939]) does not, under current law, support petitioner's contention that the Republic is not a necessary party to this proceeding. In *Lamont*, notwithstanding the assertion by the Mexican government of an interest in the fund at issue in an action for an accounting, the Court of Appeals rejected Mexico's argument that it was a necessary party based on the Court's view that the United States government had *not* "recognized and allowed" (i.e., endorsed) Mexico's claim, which left the Court "free to give to the claim of immunity such consideration as the Court may deem necessary and proper" (281 NY at 374 [internal quotation marks omitted]). In practice, this meant that the trial court was to determine for itself, on remand, whether Mexico "has, in fact, retained some right or interest in the property which is the subject of the accounting, and is a necessary party to any adjudication" (*id.*). In other words, the trial court was to judge whether Mexico's claim to the fund had sufficient merit for that sovereign to be considered a necessary party. Since *Lamont* was decided, the legal landscape has changed drastically by virtue of the enactment of the Foreign Sovereign Immunities Act of 1976 (28 USC §§ 1330, 1602-1611 [FSIA]), which greatly reduced the role of the

that the Republic currently declines to waive its sovereign immunity and therefore cannot be joined, it remains to be determined, based on a consideration of the factors enumerated in CPLR 1001(b), whether this proceeding should be allowed to go forward in the Republic's absence.[10] While *Pimentel* (as an

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executive branch of the United States government in a court's consideration of issues relating to sovereign immunity. (In any event, in this case, the United States supported the Republic's claim before the Supreme Court in *Pimentel* [*see* 553 US at 854]). Moreover, in *Pimentel*, the United States Supreme Court made it clear that today an American court should not probe the merits of the claim of a foreign sovereign asserting immunity beyond determining whether the claim is "frivolous" on its face (553 US at 867; *see also id.* at 868 ["We need not seek to predict the outcomes. It suffices that the claims would not be frivolous"]).

[10]The dissent asserts that we engage in "sophistry" in characterizing the Republic as having declined to waive its sovereign immunity in this proceeding. To the contrary, the Republic's embassy in the United States sent a letter to New York County Supreme Court during the pendency of the proceedings below transmitting a copy of a letter from the Philippine ambassador to the United States Department of State asserting the Republic's position that this proceeding should not go forward, given the Republic's claim to be the owner of the assets at issue. Even in the absence of this communication, we would not understand the dissent's position. In *Pimentel*, the Republic asserted sovereign immunity upon being named as a defendant in Merrill Lynch's interpleader action concerning the very same assets (553 US at 859). Thus, it is not surprising that petitioner has not named the Republic as a respondent in the instant turnover proceeding, which was commenced after the United States Supreme Court issued its *Pimentel* decision. The dissent apparently would allow petitioner, by forbearing to name the Republic as a respondent, to avoid having effect given to the Republic's sovereign status. Further, the dissent's position suggests that we cannot consider the effect of the Republic's sovereign immunity on this proceeding unless the Republic formally intervenes (i.e., makes itself a party), thus demanding that the Republic waive sovereign

application of a federal procedural rule) is not binding on us, we find persuasive the United States Supreme Court's resolution in that case of substantially the same question under Federal Rules of Civil Procedure rule 19(b).[11]

Like the Supreme Court in *Pimentel*, we find the overriding consideration in this case "the prejudice which may accrue from the nonjoinder . . . to the person not joined" (CPLR 1001[b][2]; *compare* Fed Rules Civ Pro rule 19[b][1]). In view of the Sandiganbayan's judgment, the Republic plainly has a substantial claim to the Arelma assets, even if it cannot be said with absolute certainty that its claim would prevail if it were fully litigated on the merits in New York.[12] The Republic's asserted

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immunity in order to have effect given to that immunity. In sum, while the dissent is correct that the Republic has "*declined to appear to assert* its immunity" (emphasis in original), the only reasonable conclusion from the Ambassador's letter is that the Republic is, in fact, asserting its sovereign immunity.

[11]As previously noted, *Pimentel* was an interpleader action commenced by Merrill Lynch to determine ownership of the Arelma assets. The judgment creditor class represented by petitioner in this proceeding participated in *Pimentel* through its previous representative, who (having died) has since been replaced by petitioner Swezey.

[12]We agree with the Supreme Court in *Pimentel* that the Republic would have good-faith, nonfrivolous arguments that a suit on its claim to the Arelma assets would be timely under New York law (*see* 553 US at 867-868). As the Supreme Court observed, the Republic could argue, in a future suit for breach of contract against the custodian of the assets, that such a contractual claim accrues only "if and when [the custodian] refuse[s] to hand

interest in the Arelma assets would be irretrievably lost if those assets were disposed of, and dispersed to the class, pursuant to a judgment rendered in this proceeding. To require the Republic to participate in this proceeding to avoid such a result would essentially negate the Republic's sovereign immunity. "Th[e] privilege [of sovereign immunity] is much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal [or state] court in the sovereign's absence and over its objection" (*Pimentel*, 553 US at 868-869). We think it inappropriate for the courts of New York to put the Republic to a Hobson's choice between, on the one hand, its right not to litigate in this state and, on the other hand, protecting its interest in property that (through no fault of the Republic itself) happens to be located here. Hence, like the *Pimentel* Court, we conclude that a proceeding should not be allowed to go forward if it would result in the issuance of "a definitive holding regarding a nonfrivolous, substantive claim made by an

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[them] over" (*id.* at 868). Similarly, we note that the Republic could plausibly argue that the three-year statute of limitations (CPLR 214[3]) applicable to a replevin cause of action as to the Arelma assets begins to run only when the custodian of the assets refuses a demand for their return (*see Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 317-318 [1991]). While we venture no opinion as to whether these arguments would prevail, they plainly are not frivolous.

absent, required entity that was entitled by its sovereign status to immunity from suit" (553 US at 868). Stated otherwise, "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign" (*id.* at 867; *see also Oliner v Canadian Pac. Ry. Co.*, 34 AD2d 310, 315 [1970], *affd* 27 NY2d 988 [1970] [dismissing action based on nonjoinder of an indispensable party, where "the real dispute" concerning the ownership of stock certificates located in New York was between the plaintiff and an agency of the Canadian government, which was "entitled to sovereign immunity"]); *Federal Motorship Corp. v Johnson & Higgins*, 192 Misc 401, 405 [Sup Ct, New York County 1948], *affd* 275 App Div 660 [1949], *lv dismissed* 299 NY 673 [1949], *appeal dismissed* 299 NY 793 [1949] [noting that "an action involving specific property in which a sovereign asserts an interest" should "be dismissed because no adjudication of the rights of others in that property can be made without affecting the interests of the sovereign"]).

CPLR 1001(b)(2) also directs us to consider "the prejudice which may accrue from the nonjoinder to the defendant," i.e., respondent Merrill Lynch. It appears that, notwithstanding the protective provisions of the consent order pursuant to which Merrill Lynch paid over the Arelma assets to the Commissioner of

Finance of the City of New York, a judgment in this proceeding in the Republic's absence poses a serious risk of duplicative liability for Merrill Lynch.[13] In brief, if petitioner succeeds in executing on the Arelma assets in this proceeding, the Republic -- which would not be bound by the outcome of litigation to which it was not party -- might sue Merrill Lynch in a later proceeding (possibly in a foreign country), and the outcome of such litigation obviously cannot be predicted.

While certain of the remaining factors to be considered under CPLR 1001(b) weigh in favor of petitioner, they cannot overcome the weight to which the "[c]omity and dignity interests" (*Pimental*, 553 US at 866) protected by sovereign immunity are entitled. The first CPLR 1001(b) factor -- "whether the plaintiff [here, petitioner] has another effective remedy in case the action is dismissed on account of the nonjoinder" -- brings into consideration the class's interests in recovering damages

[13]Although Merrill Lynch has not participated in this appeal, it did move to dismiss before the motion court based on the inability to join the Republic, and the aforementioned consent order (pursuant to which Merrill Lynch divested itself of the Arelma assets) provides that "Merrill Lynch will be deemed to oppose . . . any Order or Judgment which leaves Merrill Lynch in fear of multiple liability or is otherwise adverse to [its] rights." In any event, the statute authorizes us to consider the potential for prejudice to Merrill Lynch arising from nonjoinder of the Republic whether or not Merrill Lynch believes itself sufficiently protected by the stipulation.

against the Marcos estate for the grievous injuries inflicted on its members by the Marcos regime. While we sympathize with the class's efforts to vindicate this interest, and notwithstanding the general principle that dismissal for nonjoinder of a necessary party is a last resort (*see L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 11 [2007]), it remains the case that a dismissal for nonjoinder that leaves claimants "without a forum for definitive resolution of their claims" is a "result . . . contemplated under the doctrine of foreign sovereign immunity" (*Pimentel*, 553 US at 872; *see also Davis v United States*, 343 F3d 1282, 1293-1294 [10th Cir 2003], *cert denied* 542 US 937 [2004] ["plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit"]). It is for the Republic, not petitioner or this Court, to determine whether the Republic will litigate the issue of the ownership of the Arelma assets in New York. We would add that, if the Republic's claim to the Arelma assets has merit, as the Sandiganbayan has held, the class, notwithstanding its judgment against the Marcos estate, simply has no right to execute its judgment against those assets. Stated otherwise, however morally compelling the claim underlying a judgment may be, the judgment creditor is entitled to execute only against property that

actually belongs to the judgment debtor.

The third and fourth factors of the CPLR 1001(b) analysis -- "whether and by whom prejudice might have been avoided or may in the future be avoided" (CPLR 1001[b][3]) and "the feasibility of a protective provision by order of the court or in the judgment" (CPLR 1001[b][4]) -- do not change the result in this case. The prejudice in this case is unavoidable because both the Republic and the class claim the entirety of the Arelma assets. While it is true that the difficulty would be avoided if the Republic chose to waive its sovereign immunity, as we have already discussed, to penalize the Republic for declining to do this would eviscerate the principle of sovereign immunity. As to the fifth factor, in our view "an effective judgment [cannot] be rendered in the absence of the person who is not joined" (CPLR 1001[b][5]). As the Supreme Court noted in *Pimentel*, a judgment rendered in the Republic's absence "would not further the public interest in settling the dispute as a whole because the Republic . . . would not be bound by the judgment" (553 US at 870-871). Hence, the possibility of future litigation over the same assets would not be precluded.

Without suggesting that there is any relevant material difference in the analysis of indispensable party issues between federal law and New York law, the dissent asserts that allowing

this proceeding to go forward can be reconciled with the *Pimentel* holding that the inability to join the Republic mandated dismissal of the earlier interpleader action concerning ownership of the very same assets. We disagree. The Supreme Court did state in *Pimentel* that "[t]he balance of equities may change in due course," and that "[o]ne relevant change may occur if it appears that the Sandiganbayan cannot or will not issue its ruling within a reasonable period of time" (553 US at 873). Within a year of the issuance of the *Pimentel* decision, however, the Sandiganbayan rendered its judgment in April 2009. According due deference to the highest court of a foreign sovereign, we are not prepared to join the dissent in branding as unreasonable the pendency for the last two years of the appeal of the Sandiganbayan's judgment to the Philippine Supreme Court. Petitioner has presented nothing to support the view that the Philippine Supreme Court will not decide this appeal within a reasonable time under the standards of Philippine jurisprudence. Indeed, we fail to see how the interests of a private litigant, other than in the most extreme circumstances, could warrant our passing judgment on the time the Philippine Supreme Court takes to dispose of the business on its docket. Moreover, to the extent certain statements in *Pimentel* may support the dissent's view that the Republic will ultimately have to submit to the

jurisdiction of American courts in order to recover possession of the Arelma assets, this circumstance did not lead the *Pimentel* Court to allow the interpleader action to proceed and should not lead to a contrary result here. Even if it will at some point be necessary for the Republic to litigate in New York to vindicate its claim that it owns the Arelma assets, it is the Republic's privilege, under the doctrine of sovereign immunity, to determine when it will do so.

In arguing that this proceeding should be allowed to go forward, petitioner and the dissent rely heavily on *Saratoga County Chamber of Commerce v Pataki* (100 NY2d 801 [2003], *cert denied* 540 US 1017 [2003]), in which a suit challenging the constitutionality of a gaming compact between the governor and an Indian tribe was allowed to proceed in the tribe's absence. The *Saratoga* Court, while recognizing that "in other cases sovereign immunity might support dismissal" (100 NY2d at 821), held that "the factors weigh toward allowing judicial review of th[e] *constitutional* question" presented by that case (*id.* [emphasis added]). *Saratoga*'s elaboration on the public interest in maintaining recourse to the courts to protect the integrity of the constitutional structure of state government demonstrates the limited scope of the holding:

"[I]f we hold that the Tribe is an indispensable party,

> . . . no member of the public will ever be able to bring this constitutional challenge. In effect, the Executive could sign agreements with any entity beyond the jurisdiction of the Court, free of constitutional interdiction. The Executive's actions would thus be insulated from review, a prospect antithetical to our system of checks and balances" (100 NY2d at 820).

If the lack of an alternative remedy alone had been sufficient to avoid dismissal, the Court of Appeals' discussion of the nature of the claim -- and the state's interest as a political community in having it adjudicated -- would have been unnecessary.

The instant case presents no constitutional issue that the citizens of New York have an interest in seeing decided by their own courts. Notwithstanding the gravity of the class's claim against the Marcos estate (which has already been fully adjudicated), all that is at issue in this proceeding is the ownership of a particular fund of money formerly held in a brokerage account that Marcos (who was never domiciled in New York) and, subsequently, his estate happened to maintain in New York. In contrast to New York's distinctly limited interest in the resolution of this dispute, "the Republic . . . ha[s] a unique interest in resolving the ownership of or claims to the Arelma assets" (*Pimentel*, 553 US at 866), which have been found by the Sandiganbayan to be the fruit of wealth stolen from the Philippines by its former president. Nothing in *Saratoga* warrants disregarding the Republic's preference to have its own

courts adjudicate its claim to be the true owner of such assets.[14]

The opinion of our dissenting colleague emphasizes the sympathetic nature of the class petitioner represents and the difficulty the class has had in giving effect to its judgment against the Marcos estate. We recognize that this proceeding and the issues it has placed before us raise a troubling moral dilemma. There is no question that the members of the class have suffered grievous wrongs -- wrongs for which basic human decency would mandate compensation by the wrongdoer. On the other hand, there is reason to believe that the funds that are within our jurisdiction may be the fruit of misdeeds against the Republic and, as such, property of the Republic under Philippine law. We cannot disregard this substantial claim of ownership, which has

[14]While we acknowledge the difficulties the class has encountered in seeking to enforce the judgment it originally won against the Marcos estate more than a decade and a half ago, we cannot say that denying petitioner the ability to execute against the Arelma assets will deprive the class of any remedy (meaning, in this context, any opportunity to enforce the judgment against the estate). On the limited record before us, we have no way of knowing what other assets of the estate may be available to satisfy the judgment. All that petitioner will lose as a result of the dismissal of this proceeding is the opportunity reach the particular fund at issue to satisfy a small fraction of the class's judgment against the estate. Further, because the dismissal is without prejudice, it will not necessarily permanently deprive petitioner of this potential avenue of relief.

already been endorsed by a Philippine tribunal. Further, it is not the role of this Court to sit in judgment on the official actions of the current Philippine government or to tell that government how it should exercise its sovereign prerogative to determine whether and when to participate in litigation in the courts of New York. Given that petitioner seeks to execute the class's judgment against a fund of which the Republic claims to be the true owner, we are bound to give effect to the doctrine of sovereign immunity by dismissing this proceeding.[15]

Accordingly, the judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered November 16, 2009, which, insofar as appealed from as limited by the briefs, denied intervenors' motion to dismiss the petition pursuant to CPLR

[15]Because we are dismissing the proceeding without prejudice based on the inability to join the Republic, we need not address intervenors' alternative argument that petitioner does not have an enforceable judgment. We note that recent attempts by the class to enforce other judgments based indirectly on the 1995 Hawaii judgment have resulted in conflicting federal court decisions concerning the validity of such judgments under 28 USC § 1963 (*compare Del Prado v B.N. Dev. Co., Inc.*, 602 F3d 660 [5th Cir 2010], *with De Leon v Marcos*, 742 F Supp 2d 1168 [D Colo 2010]).

3211(a)(7) and (10), should be reversed, on the law and the facts, without costs, the motion granted pursuant to CPLR 3211(a)(10), and the proceeding dismissed without prejudice.

All concur except Catterson, J. who dissents in an Opinion.

CATTERSON, J. (dissenting)

I must respectfully dissent because I disagree with the majority's view that the principle of international comity requires this Court to assert sovereign immunity on behalf of a foreign sovereign. The majority frames this action as one where the Republic of the Philippines has "declin[ed] to waive its immunity." That assessment is inaccurate. It simply cannot be disputed that the Republic has *declined to appear to assert* its immunity.

The ambassador of the Republic, in a letter dated July 13, 2009, to the Department of State, and copied to the motion court stated only that "neither the Republic nor the Commission intends to intervene or appear in the New York State Court Litigation." The ambassador referenced the United States Supreme Court decision, Republic of the Philippines v. Pimentel (553 U.S. 851, 128 S.Ct. 2180, 171 L.Ed.2d 131 (2008)), a federal interpleader action in which the Republic and the Commission were named as defendants. He wrote: "[a]s the [United States] Supreme Court explained 'where sovereign immunity is asserted, and the claims of the sovereign are not frivolous [...] dismissal of the action must be ordered.'"

The majority, in order to bolster its determination, cites to the same section of Pimentel. Yet, the majority cannot avoid

the obvious fact that the Republic has not asserted sovereign immunity in this case. Indeed, the majority, throughout its writing characterizes the Republic's non-action as the Republic "declin[ing] to waive" its sovereign immunity. This is sophistry since the Republic's non-action may only be described as *declining to assert* sovereign immunity.

To dismiss a turnover proceeding when the foreign sovereign who asserts a *claim* in the assets has neither appeared nor intervened nor asserted sovereign immunity on its own behalf not only defies logic, but is not supported by any legal authority. On the contrary, the ruling of the Philippine court which indisputably has no in rem jurisdiction over the assets cannot change the statutory scheme which, as set forth below, gives the petitioner and class priority in any turnover proceeding against the Arelma assets.

As petitioner correctly contends, to dismiss this proceeding by attributing sovereign immunity to the Republic is to allow the intervenors to parlay the Republic's shield of immunity from litigation and liability into a sword to preclude a judgment creditor from exercising her right to garnish assets that are held in New York. As such, in my opinion, it is an offensive use (in both meanings of the phrase) of the privilege of sovereign immunity. It is nothing more than an affirmative act to defeat

any claims of the victim class whom the Republic purports to support, but whose every avenue for recovery it bars.

The following facts are undisputed: In 1972, Ferdinand Marcos, then President of the Republic of the Philippines, created Arelma, Inc., a Panamanian corporation, now one of the intervenors in the instant action. Subsequently, Arelma established a securities account at the New York office of respondent Merrill Lynch, Pierce, Fenner & Smith Inc. with a deposit of $2 million.

In 1986, the Republic, through its Presidential Commission of Good Government (hereinafter referred to as "PCGG"), commenced several actions to recover the assets which Marcos allegedly obtained through the misuse of his office. In the same year, a class of human rights victims (hereinafter referred to as the "victim class" or the "class"), of which petitioner is a member, commenced a separate action seeking a judgment for damages for human rights violations rendered by Marcos and his regime. This action was initiated in the federal courts in Hawaii where Marcos then resided. Among the Marcos properties targeted by both the Republic and the victim class was Arelma and its assets.

The Republic, nevertheless, filed an amicus curiae brief in the victim class action, and appeared to support the rights of the victim class to recover against the Marcos estate. Before

the Ninth Circuit, the Republic argued that the victim class should be allowed to present their "evidence of gross human rights violations against [...] Marcos." The Republic stated "without hesitation or reservation" that its foreign relations with the United States "will *not* be adversely affected if these human rights claims are heard in U.S. courts." It further noted that "[t]he Philippine Government has previously expressed its deep concern [...] about the need for a just solution to the present suits" of the victim class against Marcos.

In 1995, the class obtained a federal judgment against the Marcos estate in the amount of $1.9 billion. The class eventually registered the judgment in the US District Court for the Northern District of Illinois on January 23, 1997, after it was affirmed by the Ninth Circuit. Meanwhile, the PCGG asked Merrill Lynch to turn Arelma's assets over to the Philippine National Bank (hereinafter referred to as the "PNB") to be held in an escrow account pending a ruling by the Sandiganbayan, a Philippine court with special jurisdiction over corruption cases.

Faced with competing claims for the Arelma assets, Merrill Lynch filed an interpleader action in 2000 naming the Republic, the PCGG, Arelma, PNB and the class as defendants. The Republic and PCGG asserted sovereign immunity and moved to dismiss the interpleader pursuant to Federal Rules of Civil Procedure rule 19

(b) on the grounds that they are required parties and the action cannot proceed without them. Subsequently, in 2008, the Supreme Court ruled in their favor and dismissed the interpleader. Republic of the Philippines v. Pimentel[1], 553 U.S. 851, 128 S.Ct. 2180, 171 L.Ed.2d 131 (2008); supra.

In 2009, the class filed the federal judgment with the Clerk of New York County as well as an Illinois state court. It then registered the Illinois state judgment with the Supreme Court of the State of New York. On April 3, 2009, the Sandiganbayan ruled that the assets of Arelma [2] – including the account at Merrill Lynch (last valued in 2000 at more than $35 million) – had been forfeited to the Republic of the Philippines.[3] This decision has been appealed to the Philippine Supreme Court.

On or about the same day, the petitioner commenced this proceeding pursuant to CPLR 5225(b) and 5227. She sought (1) a declaration that all property held by Merrill Lynch for Arelma was the property of the Marcos estate and (2) a turnover order

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[1]Pimentel, the class representative, died during the appeals process and was replaced by the petitioner Swezey.

[2] Some Arelma assets were transferred from Switzerland in 2000 into an escrow account at the PNB.

[3]"[A] 1955 Philippine law provid[es] that property derived from the misuse of public office is forfeited to the Republic from the moment of misappropriation." Pimentel, 553 US at 858, 128 S.Ct. at 2186.

requiring Merrill Lynch to transfer the assets in the Arelma account to the class action settlement fund maintained by the United States District Court for the District of Hawaii.

Merrill Lynch moved to dismiss the petition pursuant to CPLR 1001(b) and 3211(a)(10), noting that the petitioner failed to name, among others, Arelma, the PNB, the Republic and the PCGG as claimants to Arelma's account. Arelma and PNB moved to intervene and dismiss also on the ground that petitioner had failed to join necessary claimants, and additionally alleged that the class could not enforce their judgment in New York. The Philippine ambassador to the United States submitted a letter to the court stating that neither the Republic nor the PCGG intended to intervene or appear in the New York litigation.

The court granted the motion to intervene by Arelma and PNB (hereinafter referred to as "the intervenors"), but denied both the intervenors' and Merrill Lynch's motions to dismiss. The court found that, under CPLR 5225 and 5227, petitioner is not required to join rival claimants to the assets as respondents.

The court further held that Republic and the PCGG are necessary parties, but since the Republic and the PCGG voluntarily chose not to participate in the proceeding, and their participation was not necessary to render an effective judgment, the court refused to dismiss for failure to join necessary

parties. Further, the court held that the judgment of the class was entitled to full faith and credit since it was valid and conclusive in Illinois at the time it was registered in New York. Since then, Merrill Lynch, by consent order, has deposited the Arelma assets with the Commissioner of Finance of the City of New York, and has been discharged from liability to any party to this proceeding.

Now, the intervenors appeal the portion of the decision that denied their motion to dismiss the proceeding. They invoke the United States Supreme Court decision in the interpleader action, but correctly do *not* argue that it is controlling in this case, only that it is entitled to "great weight."

They argue instead that pursuant to CPLR 1001(b) the Republic is a necessary and indispensable party to the turnover proceeding because it is a foreign sovereign that has asserted claims to the Arelma assets. Moreover they argue that the turnover order sought by the petitioner is "flatly" inconsistent with the Republic's interest in the assets because it would consume the entire account. Further, because the Republic's sovereign immunity renders it immune from jurisdiction of New York courts, the intervenors argue that pursuant to CPLR 1003 nonjoinder of the Republic is grounds for dismissal of the proceeding. They contend that allowing the action to proceed

deprives the Republic of the substantial benefits of sovereign immunity, and in effect, presents it with a Hobson's choice between waiving its sovereign immunity or waiving its right not to have the case proceed without it.

In my opinion, this is not a valid assertion of sovereign immunity. Indeed, the Court of Appeals rejected an attempt by the St. Regis Mohawk Tribe to wield sovereign immunity in a similar fashion. See Saratoga County Chamber of Commerce v, Pataki, 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047 (2003), cert. denied, 540 U.S. 1017, 124 S.Ct. 570, 157 L.Ed2d 430 (2003). In that case, the Court refused to dismiss pursuant to CPLR 1003 even though the St. Regis Mohawk Tribe, considered an indispensable party, asserted sovereign immunity. The Court stated:

> "The Tribe has chosen to be absent. Nobody has denied it the 'opportunity to be heard' ... While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego the resolution of all disputes that could affect the Tribe. While we fully respect the sovereign prerogatives of the Indian tribes, we will not permit the Tribe's voluntary absence to deprive these Petitioners (and in turn any member of the public) of their day in court." 100 N.Y.2d at 820 -821, 766 N.Y.S.2d at 666.

Similarly in this case, the Republic's absence is voluntary; the Republic was not denied the opportunity to intervene; it simply declined to do so, with the expectation that by asserting

sovereign immunity as a necessary party, the court would be obligated to dismiss this turnover proceeding, and deprive the class of the benefit of its judgment.

In Saratoga County, the Court unequivocally underscored the principle that dismissal pursuant to CPLR 1001(b) and 1003 on the grounds of failure to join a necessary party is discretionary, not mandatory, even when the party is a sovereign entity. Hence, in my opinion, the motion court properly exercised its discretion under CPLR 1001(b) by considering the five factors set forth in that provision to determine whether the action should proceed despite the necessary party's absence. See Matter of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Stds. & Appeals, 5 N.Y.3d 452, 459, 805 N.Y.S.2d 525, 528-529, 839 N.E.2d 878, 881 (2005); see also L-3 Communications Corp.v. SafeNet, Inc. 45 A.D.3d 1, 10-11, 841 N.Y.S.2d 82, 90 (1st Dept. 2007).

Specifically, the motion court found, as did the Court in Saratoga County, that the first factor enumerated in CPLR 1001(b) tipped the balance in favor of the petitioner since dismissal would leave it without an alternative remedy and no alternative forum which could produce an all-inclusive resolution as to entitlement to the assets. See Saratoga County, 100 N.Y.2d at 819-820, 766 N.Y.S.2d at 665 (Court agreed with the plaintiffs that no remedy would exist if the Tribe's absence required a

dismissal; this tipped the scales in their favor). Dismissal is particularly disfavored when the plaintiffs would be left without a remedy. L-3 Communications Corp.v. SafeNet, Inc., 45 A.D.3d at 11, 841 N.Y.S.2d at 90 (1st Dept. 2007).

The majority makes much of the fact that there was a constitutional issue at stake in Saratoga County, and posits that this was the reason the Court rejected the idea of dismissal on the basis of non-joinder. In my view, that is incorrect. The Court held that "[n]ot only will these plaintiffs be stripped of a remedy ... but no member of the public will ever be able to bring this constitutional challenge." 100 N.Y.2d at 820, 766 N.Y.S.2d at 665.

First, a "not only...but [also]" construction indicates two important reasons, but does not mandate that both must exist in a finding for petitioner. Second, the Court's initial concern was not with the type of violation suffered, but that no remedy would exist for the subject plaintiffs –or any future plaintiffs– if the Tribe's absence required dismissal. Certainly, the Court did not indicate that any future analysis as to the first factor enumerated in CPLR 1001(b) would have to be a two-prong one in which a court must find not only that no alternative remedy exists, but that the violation suffered by plaintiff, say, for example, a human rights violation, is of equal weight to a

constitutional violation.

In this case, the class has been barred from litigating its claims in the Philippines.[4] The Republic has consistently ignored the ruling of the United Nations Human Rights Committee that it is under an obligation to ensure an adequate remedy to the class members. Thus, 15 years after securing a judgment against the Marcos estate, the class is no closer to collecting on its award, due, in no small measure, to the efforts of the Republic.

Moreover, in considering the second of the CPLR 1001(b) factors, the prejudice to the Republic in an action in which it is absent, the motion court correctly held that voluntary absence cannot be transmogrified into prejudice. Justice Stevens effectively made the same observation in the federal interpleader action when he noted that the risk of unfairness in conducting proceedings without the participation of the Republic and the PCGG is one that can be avoided by waiving sovereign immunity, and "the sovereign interest implicated here is not of the same

[4]Although, five members of the class attempted to seek enforcement of its judgment against other property of the Marcos estate in the Philippines, that action was dismissed for the failure to pay a $8.4 million filing fee. The class moved for a determination that a smaller filing fee was sufficient, and that motion remained pending for five years. While it was pending, the same Philippines court entered judgment for the Republic that the Marcos property at issue be forfeited to it.

magnitude as when a sovereign faces liability." Republic v.Pimentel, 533 U.S. at 878, 128 S.Ct. at 2197 (Stevens,J., concurring in part, dissenting in part).

In my opinion, the motion court's conclusion that the equities weigh against dismissal on the basis of non-joinder was a proper exercise of discretion adhering to New York's strong policy of viewing dismissal as a last resort. See Saratoga County, 100 N.Y.2d at 821, 766 N.Y.S.2d at 666; see also Red Hook/Gowanus Chamber of Commerce, 5 N.Y.3d at 459, 805 N.Y.S.2d at 528; Eclair Advisor Ltd. v. Jindo Am., Inc., 39 A.D.3d 240, 245, 833 N.Y.S.2d 440, 444 (1st Dept. 2007).

Nor is the motion court's conclusion contrary to the holding of Pimentel. In that case, the United States Supreme Court, while finding that the courts below had not given "sufficient weight to the likely prejudice to the Republic and Commission [PCGG] should the interpleader proceed in their absence" nevertheless cautioned: "The balance of equities may change in due course." Pimentel, 553 U.S. at 872-873, 128 S.Ct. at 2194. According to the Court, one such change could occur "if it appears that the Sandiganbayan cannot or will not issue its ruling within a *reasonable* period of time." 553 U.S. at 873, 128 S.Ct. at 2194 (emphasis added). In this case, while the Sandiganbayan did make a ruling in favor of the Republic one year

after the Supreme Court's Pimentel decision, a further two years have elapsed while the case languishes on appeal in the Philippine Supreme Court.

In any event, the Supreme Court contemplated that the Republic would have to submit to the jurisdiction of a state or federal court at some point, and not just as a pro forma plaintiff. The Court observed, "If the ruling is that the Republic and the Commission own the assets, then they may seek to enforce a judgment in our courts; or consent to become parties in an interpleader suit, *where their claims could be considered*." Id. (emphasis added).

More significantly, the United States Supreme Court's observation is an acknowledgment that, even if the foreign court rules that the Republic is the owner of the assets, and has been since their misappropriation, the Republic is not likely to be able to transfer those assets to its own accounts, or change the name on the current accounts, simply by sending its ambassador to Merrill Lynch (or the City's Finance Commissioner) with the court's order and a note informing the bank it must do so immediately.

Instead, the Court surmised that "if and when Merrill Lynch refuse[s] to hand over the assets," the Republic might file suit for breach of contract. Pimentel, 553 U.S. at 868, 128 S.Ct. at

2191. Or, Merrill Lynch or other parties could "elect to commence further litigation in light of changed circumstances." Pimentel, 553 U.S. at 873, 128 S.Ct. at 2194. Certainly, in the first scenario, the Republic would find itself in the position of submitting to the jurisdiction of our courts to litigate its claim – as it has previously done in its pursuit of recovery of Marcos assets. See e.g. Sotheby's, Inc. v. Garcia, 802 F. Supp. 1058 (S.D.N.Y. 1992); New York Land Co., v. Republic of Philippines, 634 F.Supp. 279 (S.D.N.Y. 1986), aff'd, 806 F.2d 344 (1986), cert. denied, 481 U.S. 1048, 107 S.Ct. 2178, 95 L.Ed2d 835 (1987).

It is indisputable that the Philippine Supreme Court does not have in rem jurisdiction over the Arelma assets in the Merrill Lynch account located in New York. Hence, its determination will not automatically transform the Republic into the owner of the Arelma account. The Philippine court may render only a money judgment for the Republic in the amount (or, more accurately, the sum) of the Arelma assets subsequent to which the Republic may seek to convert it into a New York judgment and enforce it against the Arelma assets by a turnover proceeding. See CPLR 5301 and 5303. Consequently, the Republic is a judgment creditor, nothing more.

Again, the Supreme Court decision does not reflect a

different view. It observed that upon a Philippine court ruling that the Republic and Commission own the assets, "then they may seek to enforce a judgment in our courts, ... *or file in some other forum if they can obtain jurisdiction over the relevant persons."* Pimentel,553 U.S. at 873, 128 S.Ct. at 2194 (emphasis added). In other words, contrary to the majority's view, they would be seeking to enforce a money judgment of a "sum of money." Finally, in New York, just as there is no mandatory joinder of necessary parties in general civil actions pursuant to CPLR 1001(b), there is no duty on the part of the petitioner and the class to join other claimants or potential judgment creditors or even the judgment debtor in an execution proceeding on a money judgment pursuant to CPLR 5225; joinder is permissive, not mandatory, and left to the court's discretion. See Koehler v. Bank of Bermuda Ltd., 12 N.Y.3d 533, 537-538, 883 N.Y.S.2d 763, 766, 911 N.E.2d 825, 828 (2009). Moreover, because the class was the first judgment creditor to file and seek to levy against the assets, the class has priority and is entitled to seek satisfaction of its valid judgment. See CPLR 5234(b).

To hold otherwise, would allow any foreign government to delay, even stymie, the efforts of legitimate domestic judgment creditors by alluding to the privilege of sovereign immunity while *claiming* ownership of assets located in New York based

simply on the exercise of personal jurisdiction over the person or entity who owns the assets. No precedent or statute provides for this extraordinary relief to a foreign sovereign. Under such a scheme, sovereign immunity hypothetically would allow any unstable foreign sovereign to put an American visitor on trial, fine him/her millions of dollars for some perceived transgression against the state and then claim ownership of the citizen's house and other assets in the United States simply by sending a letter informing a New York court of the judgment. The majority's holding would permit a foreign sovereign this extra territorial in rem relief without having it tested before any court in New York.

For the foregoing reasons, I would affirm the motion court's judgment in its entirety.

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

ENTERED: June 16, 2011

CLERK