SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 28, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Andrias, Renwick, Abdus-Salaam, JJ.

4382 627 Acquisition Company, LLC, Index 600165/10
Plaintiff-Appellant,

-against-

627 Greenwich, LLC, et al.,
Defendants-Respondents,

Gerald Birch, et al.,
Defendants.

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Kaye Scholer LLP, New York (H. Peter Haveles, Jr. of counsel), for appellant.

Cyruli Shanks Hart & Zizmor LLP, New York (Jeffrey C. Ruderman of counsel), for 627 Greenwich, LLC, Peter Moore Associates, KMG Greenwich LLC, 627 Greenwich Management Corp., Stanley E. Kleger, Eric S. Granowsky, Burt W. Miller, KMG Partners LLC and Peter Moore, respondents.

Tane Waterman & Wurtzel, P.C., New York (Stewart E. Wurtzel of counsel), for Christopher Caudwell, Judy Hudson, Michael Schlegal, Cynthia Schlegal, Peter Shapiro and Mark Zeff, respondents.

Kriss & Feuerstein LLP, New York (Jerold C. Feuerstein and Jennifer A. Tolston of counsel), for Howard Ellins, respondent.

Hartmann Doherty Rosa Berman & Bulbulia, LLC, New York (Paul S. Doherty III of counsel), for Stephen Hasker, respondent.

Thomas M. Mullaney, New York, for John Holden, respondent.

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Order, Supreme Court, New York County (James A. Yates, J.), entered October 15, 2010, which, to the extent appealed from, denied plaintiff's motion for summary judgment and granted defendant Howard Ellins's cross motion to amend his answer, unanimously modified, on the law, to grant so much of plaintiff's motion as sought to dismiss (i) the seventh counterclaim of 627 Greenwich, LLC (Borrower) and Peter Moore Associates, KMG Greenwich LLC, 627 Greenwich Management Corp., Stanley E. Kleger, Eric S. Granowsky, Burt W. Miller, KMG Partners LLC, and Peter Moore (Managing Member Defendants) and (ii) the counterclaims of the guarantor defendants (other than Stephen Hasker) insofar as they are based on Petra Mortgage Capital Corp. LLC's (Petra's) alleged misrepresentations to Borrower, and otherwise affirmed, without costs.

Plaintiff failed to make a prima facie showing to warrant summary judgment on its causes of action to foreclose two mortgages (*see TPZ Corp. v Dabbs*, 25 AD3d 787, 789 [2006]). With its opening papers, it submitted the mortgages, but they were in favor of nonparty Petra. As proof that it owned the mortgages, plaintiff merely submitted an affidavit by its vice president, who said that Petra had assigned the mortgages to nonparty Petra Fund REIT Corp. (Petra REIT), which assigned them to nonparty Royal Bank of Scotland PLC (RBS), which assigned them to

plaintiff. Plaintiff only submitted the actual assignments with its reply (*see Migdol v City of New York*, 291 AD2d 201 [2002]).

Since defendants ask us to search the record and grant them summary judgment dismissing the foreclosure causes of action, we consider the documents submitted belatedly by plaintiff. We find that plaintiff did not satisfy section 16.1 of the Building Loan Agreement between Petra and Borrower. For example, section 16.1 requires an assignment to be "in substantially the form of Exhibit K" (emphasis removed). Plaintiff failed to submit an assignment of the Building Loan *Agreement* (as opposed to the Building Loan *Mortgage*) from Petra to Petra REIT. It submitted an assignment of the Building Loan (including the Building Loan Agreement) from Petra REIT to RBS, but that assignment is not in substantially the form of Exhibit K. Furthermore, none of the assignments were delivered to Borrower, as required by section 16.1(b).

Plaintiff's claim that it could foreclose on the mortgages as an investor in a Secondary Market Transaction pursuant to section 27.4 of the Building Loan Agreement was improperly raised for the first time on reply and will not be considered (*see e.g. Meade v Rock-McGraw, Inc.*, 307 AD2d 156, 159 [2003]).

Nevertheless, summary judgment dismissing the foreclosure causes of action is not warranted. In its complaint, plaintiff

does not limit itself to a particular section of the Building Loan Agreement; it alleges more generally that it was the successor by assignment from Petra. As the motion court noted, there are other provisions of the Building Loan Agreement and mortgages besides sections 16.1 and 27.4 that might allow plaintiff to foreclose.

The court correctly denied the portion of plaintiff's motion that sought to dismiss Borrower's counterclaims, except for the seventh counterclaim. Since plaintiff did not comply with section 16.1, it cannot take advantage of the portion of section 16.1(a) that says, "All the rights and remedies of Borrower in connection with the interest so assigned shall be enforceable against the Permitted Assignee *except for Lender's delinquencies in performing its obligations prior to assignment*" (emphasis added). With respect to section 21.13, in light of the affidavit submitted by defendant Saif Sumaida and all inferences that can be drawn in favor of the nonmovants, there is an issue of fact as to when Borrower first had knowledge of the event that gave rise to its claim.

The Borrower's and Managing Member Defendants' sixth, seventh, and eighth counterclaims sound in fraud. While RBS "had no communications with [the Borrower and Managing Member Defendants] in connection with their *entering into* the Loan

Documents and the Guarantees" (emphasis added), this does not bar the eighth counterclaim, which alleges, "*During the term* of the Loan Agreements, plaintiff, as Assignee, or through its predecessors-in-interest, Petra, Petra REIT and RBS, represented to Answering Defendants that it was capable of funding the Obligations" (emphasis added), or the sixth counterclaim, which relies on representations made by *Petra* prior to the execution of the Loan Agreements.

The representation that a party is "capable of funding the Obligations" is a statement about a present fact; thus, the sixth and eighth counterclaims are sufficient. However, the seventh counterclaim alleges that Petra "had the undisclosed and preconceived intention not to perform under the Loan Agreements," without alleging facts to show that Petra never intended to perform, and therefore could not convert the breach of contract cause of action into a fraud cause of action (*Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 118 [1998]; *see also Gordon v De Laurentiis Corp.*, 141 AD2d 435, 436 [1988]).

Since plaintiff did not establish that it could enforce the principal obligation, it was not entitled to summary judgment on the guarantees, which are accessory obligations (*see Security-First Natl. Bank of Los Angeles v Lloyd-Smith*, 259 App Div 220, 221 [1940], *affd* 284 NY 795 [1940]). Furthermore, the guarantees

are in favor of the administrative agent, and plaintiff failed to comply with section 20.20 of the Building Loan Agreement (concerning successor administrative agents). Nevertheless, plaintiff may be able to prove in the future that it is a successor administrative agent, so we decline the guarantor defendants' request to dismiss plaintiff's claims under the guarantees.

All the guarantees – even the version that Ellins claims he signed – say that they are absolute and unconditional and that the guarantor waives any defenses that the Borrower might have against the Administrative Agent and the Lender. Therefore, the guarantor defendants (other than Hasker, who maintains he never signed a guaranty) should not be allowed to assert fraud in the inducement based on Petra's alleged misrepresentations to the Borrower (*see Citibank v Plapinger*, 66 NY2d 90 [1985]; *Raven El. Corp. v Finkelstein*, 223 AD2d 378 [1996], *lv dismissed* 88 NY2d 1016 [1996]).

Contrary to plaintiff's claim, Hasker submitted "more than a bald assertion of forgery" (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2004]), and thus raised a triable issue of fact in opposition to plaintiff's motion.

The motion court appropriately allowed Ellins to amend his

answer (*see e.g. Mezzacappa Bros., Inc. v City of New York*, 29 AD3d 494 [2006], *lv denied* 7 NY3d 712 [2006]). Plaintiff claims no prejudice or surprise arising from the amendment.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: JUNE 28, 2011

CLERK

Gonzalez, P.J., DeGrasse, Freedman, Manzanet-Daniels, Román, JJ.

2324-
2325-
2326 Joseph Edmond, Index 15923/05
Plaintiff-Appellant-Respondent, 85624/06
85724/07

-against-

23rd Street Properties LLC, et al.,
Defendants-Respondents-Appellants,

Larry Berger,
Defendant.

[And Other Actions]

Appeals having been taken to this Court by the above-named appellants from orders of the Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered on or about March 3, and August 20, 2009,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 27, 2011,

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

ENTERED: JUNE 28, 2011

CLERK

Gonzalez, P.J., Tom, Andrias, Renwick, Abdus-Salaam, JJ.

4384 Ambrosia De Los Santos, Index 15971/06
Plaintiff-Appellant, 86039/07

-against-

Amsterdam Apartments Manager, LLC, etc., et al.,
Defendants-Respondents.

[And a Third Party Action]

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Fitzgerald & Fitzgerald, P.C., Yonkers (John M. Daly of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered July 23, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

"Viewing the evidence in a light most favorable to plaintiff" (*Roth Law Firm, PLLC v Sands*, 82 AD3d 675, 676 [2011]) and drawing all inferences in her favor "as we are bound to do" (*Cruz v American Export Lines,* 67 NY2d 1, 13 [1986], *cert denied* 476 US 1170 [1986]), triable issues of fact exist regarding whether the rooftop door was defective, preventing plaintiff from escaping from the fire and whether the fire emanating from the mattress in the hallway was deliberately set. While the Fire

Marshal who investigated the fire concluded that the cause of fire was "incendiary," his deposition testimony, considered in conjunction with the affidavit of plaintiff's expert, raises a triable issue as to this conclusion. Furthermore, even if the fire was an act of arson, under these circumstances, especially given the Fire Marshal's testimony that with mattress fires, people typically burn mattresses left in the hallway to get rid of them, we cannot conclude that any arson would be unforeseeable as a matter of law (*see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]; *see also Salmon v Wendall Terrace Owners Corp.*, 5 AD3d 372, 374 [2004]).

The Decision and Order of this Court entered herein on March 1, 2011 is hereby recalled and vacated (*see* M-1651 decided simultaneously herewith).

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

ENTERED: JUNE 28, 2011

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Freedman, Román, JJ.

4675 In re 925 D Realty LLC, Index 103303/09
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent.

_____

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for appellant.

Gary R. Connor, New York (Jack Kuttner of counsel), for respondent.

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 11, 2009, denying the petition to annul respondent's determination, dated January 14, 2009, which denied petitioner's application for a major capital improvement (MCI) rent increase, and dismissing the proceeding brought pursuant to CPLR article 78, reversed, on the law, without costs, the proceeding reinstated, the petition granted to the extent of annulling respondent's determination, and the matter remanded to respondent for further proceedings consistent with this decision.

Under the circumstances of this case, it was arbitrary and capricious for respondent to fail to recognize that the 2007 MCI was completely different from the 1991 MCI. Accordingly, we reverse and remand for further proceedings consistent herewith.

To the extent there may be any overlap, no rent increase should be granted that duplicates the MCI rent increase in 1993.

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

GONZALEZ, P.J. (dissenting)

I would affirm the judgment on the ground that the denial of petitioner's 2007 application for a major capital improvement (MCI) rent increase was not arbitrary and capricious and was rationally based on the record (*see Matter of Arif v New York City Taxi & Limousine Commn.*, 3 AD3d 345, 346 [2004]). The agency denied the application because it was made prior to the expiration of the 25-year useful life of a prior elevator upgrade that was performed in 1991 (*see* 9 NYCRR 2522.4[a][2][i][d][9]).

In its administrative appeal, petitioner contended that it did not seek a waiver of the useful-life requirement because it was unaware of its predecessor's MCI application for elevator work until the current application was denied. It also argued that the 25-year useful-life requirement for the prior MCI should not apply because the present application contemplates work different from that which was approved in 1993. Both claims were rejected by the agency, whose expertise in interpreting its statutes and regulations is entitled to deference unless shown to

be irrational or unreasonable (*Matter of Ansonia Residents Assn. v New York State Div. of Hous. & Community Renewal*, 75 NY2d 206, 213 [1989]). Mindful of our limited standard of review, I would affirm the judgment appealed.

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

ENTERED: JUNE 28, 2011

CLERK

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5304 The People of the State of New York, Respondent, Ind. 4428/07

-against-

Jason Moczo, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Cravath, Swaine & Moore LLP, New York (Brendon DeMay of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (John Cataldo, J.), rendered February 26, 2009, convicting defendant, after a jury trial, of rape in the first degree (three counts), criminal sexual act in the first degree (three counts), aggravated sexual abuse in the third degree, criminal possession of a weapon in the third degree and endangering the welfare of a child, and sentencing him, as a second violent felony offender, to an aggregate term of 23 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's credibility determinations, including its evaluation of inconsistencies in testimony.

The court's *Sandoval* ruling balanced the appropriate factors

and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court only permitted inquiry into a portion of defendant's criminal history. Defendant's burglary conviction, including its underlying facts, was probative of defendant's credibility, and that probative value outweighed any prejudicial effect. The facts of the burglary were very different from the charges on which defendant was being tried.

The court properly exercised its discretion when it permitted the People to introduce a recording of a 911 call. The tape was admissible under the excited utterance and present sense impression exceptions to the hearsay rule. We reject defendant's argument that the tape's prejudicial effect outweighed its probative value. The tape provided significant corroboration of the victim's testimony. Any differences between the victim's testimony and the account of the incident relayed on the tape did not go to admissibility. Instead, they went to the weight to be accorded the tape by the jury.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 28, 2011

CLERK

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3548 Gayle Grenadier Richman, Index 600467/06
Plaintiff-Respondent,

-against-

Harleysville Worcester
Insurance Company, et al.,
Defendants-Appellants,

All Cleaning, A.V., Inc.,
Defendant.

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Morrison Mahoney LLP, New York (Arthur J. Liederman of counsel), for Harleysville Worcester Insurance Company, appellant.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for Alexander Wall Corporation, appellant.

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

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered December 1, 2009, which denied the motions of defendants Harleysville Worcester and Alexander Wall for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

In this action for insurance coverage and damages resulting from a raccoon infestation and alleged faulty remediation, plaintiff's submissions raised triable issues of fact.

While failure to submit a signed proof of loss within 60 days after the insurer's request, as called for in the policy,

can be an absolute defense to an action on the policy, this is true only in the absence of a waiver or conduct by the insurer that results in an estoppel against the assertion of that defense (*see Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201 [1984]). Here, questions exist as to whether Harleysville's actions in -- among other things -- issuing a check that it deemed "in satisfaction" of the damages to the house without requesting a sworn proof of loss, constituted a waiver of its right to a sworn statement in proof of loss, inasmuch as it is only when Richman rejected the proffered amount did Harleysville seek a sworn proof of loss, fully aware that it was impossible to ascertain the full extent of the damage until remediation was completed.

Questions of fact also exist as to whether Alexander Wall was an agent of Harleysville, whether the remediation work was properly performed, and whether Alexander Wall's actions in connection with the removal and storage of plaintiff's personal property and the interference with her right of possession supports the conversion claim.

Conversion is the intentional and unauthorized exercise of control over personal property owned by another that interferes with the owner's right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]). Here, Richman asserts

that she did not know that the contents of her home would be removed until Alexander Wall actually began to remove them, and that she never authorized Alexander Wall to do so. Significantly, Alexander Wall does not deny that it refused Richman access to her belongings. Clearly there is an issue as to whether Alexander Wall interfered with Richman's possessory rights. *Cohen v Allied Van Lines* (2002 NY Slip Op 50038[U] [2002]) which Alexander Wall cites for the proposition that it cannot be liable for conversion since Richman was aware of the location of her belongings, is clearly distinguishable. In *Cohen,* there was a contract which allowed for the temporary storage of furniture, too large to be moved on the subject building's elevator, pending the plaintiff's approval and consent to hoisting at an additional cost. Here, there was no such contract between Richman and Alexander Wall.

Furthermore, Alexander Wall's purported offer to make Richman's possessions available for inspection was conditioned on

her advanced payment of alleged storage and labor fees associated with the inspection. Even then, Alexander Wall would not allow the return of Richman's possessions.

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

ENTERED: JUNE 28, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4160 Richard Rojas, Index 302941/07
Plaintiff-Respondent,

-against-

Livo Car Inc., et al.,
Defendants-Appellants.

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

Daniel Neveloff, New York, for respondent.

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Order, Supreme Court, Bronx County (Alan Saks, J.), entered on or about January 5, 2010, which denied defendants' motion for summary judgment seeking to dismiss the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion as to plaintiff's 90/180-day claim, and otherwise affirmed, without costs.

On March 28, 2007, plaintiff, who was 32 years old at the time, was injured when a vehicle struck him while he was walking and knocked him to the ground. Plaintiff sustained a short-term loss of consciousness. The impact caused plaintiff to lose his glasses and shoes.

The motion court was correct to conclude that the conflicting medical testimony created a question of fact as to

serious injury. Defendants submitted reports from several doctors who found, after examining plaintiff, that he had normal ranges of motion, that there was no neurological disability and that any injury was attributable to preexisting, degenerative conditions unrelated to the accident.

However, in opposition, the report from plaintiff's treating orthopedist, who initially saw plaintiff just two weeks after the accident and continued to treat him thereafter, raised an issue of fact as to whether plaintiff sustained a "permanent consequential limitation of use of a body organ or member" and a "significant limitation of use of a body function or system" (Insurance Law § 5102[d]). Plaintiff's doctor stated that plaintiff did not have normal range of motion in many areas, including his spine, left shoulder and both knees. He also noted that plaintiff suffered from severe headaches, that each specific area of injury was "a permanent condition directly attributable to the trauma of 3/28/07" from which plaintiff "will not fully recover" and that plaintiff has "a permanent impairment/disability due to the injuries sustained in said accident" (*see McClelland v Estevez*, 77 AD3d 403, 404 [2010]; *Vera v Islam*, 70 AD3d 525 [2010]). The doctor's report also raised an issue of fact as to whether the accident caused plaintiff's injuries. Indeed, the doctor stated that any seeming

degenerative changes were the result of the accident (*see* *McDuffie v Rodriguez*, 72 AD3d 568 [2010]).

However, plaintiff failed to raise an issue of fact as to his 90/180-day claim because the record shows he returned to work within 10 days of the accident. Furthermore, he did not submit competent medical evidence or documentation showing that the injuries he allegedly sustained in the accident rendered him unable to perform substantially all of his usual and customary daily activities for not less than 90 of the first 180 days following the accident (*see* Insurance Law § 5102[d]; *Lazarus v Perez*, 73 AD3d 528 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [2010]).

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

ENTERED: JUNE 28, 2011

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Richter, JJ.

4894 In re Edna Duryea, Index 400139/10
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Alison Wilkey, Youth Represent, New York, for petitioner.

Sonya M. Kaloyanides, New York (Corina L. Leske of counsel), for respondent.

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Determination of respondent New York City Housing Authority, dated September 16, 2009, which required the permanent exclusion of petitioner's grandson from her apartment as a condition of petitioner's continued occupancy in public housing, unanimously modified, on the facts, to vacate the grandson's exclusion as well as respondent's finding that the record did not establish that his misconduct "is not likely to repeat" or that he has been rehabilitated, and remand the matter for imposition of a lesser penalty, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Joan B. Lobis, J.], entered May 4, 2010) is otherwise disposed of by confirming the remainder of the determination, without costs.

Except as noted below, substantial evidence supports

respondent's findings (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). The grandson, who was 18 years old at the time of the underlying incident, was arrested with other youths and charged with the possession of a loaded gun that was recovered from the ground in the vicinity of the Housing Authority's premises. The grandson pleaded guilty to criminal possession of a weapon in the second degree on February 20, 2009 and was promised youthful offender treatment plus a sentence of probation of one year upon conditions that included the completion of a program under the auspices of the Center for Alternative Sentencing and Employment Services (CASES). At the time of the hearing and respondent's determination, the grandson was enrolled in the CASES program and his youthful offender adjudication was pending. The Hearing Officer made a finding that since his enrollment in the program, the grandson's school attendance improved significantly and he stopped associating with the individuals with whom he was arrested. In light of the unchallenged evidence of the grandson's progress in the CASES program, respondent's finding that his misconduct was likely to be repeated or that he has not been rehabilitated is not supported by substantial evidence. Accordingly, the penalty shocks our sense of fairness to the extent that it requires the exclusion of petitioner's grandson from her public housing unit.

We find the incident involving the grandson's arrest to be an isolated and apparently aberrant event in petitioner's otherwise unblemished 36-year tenancy (*see Matter of Powell v Franco*, 257 AD2d 509 [1999], *lv denied* 94 NY2d 753 [1999]).

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

ENTERED: JUNE 28, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4950 Siegel Consultants, Ltd., Index 603277/08
Plaintiff-Appellant, 590221/09

-against-

Nokia, Inc., et al.,
Defendants-Respondents.

- - - - - - -

5 LLC,
Third-Party Plaintiff-Appellant,

-against-

Friedland Realty, Inc., et al.,
Third-Party Defendants-
Respondents-Respondents.

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Mitchell Silberberg & Knupp LLP, New York (James E. Schwartz of counsel), for Siegel Consultants, Ltd., appellant.

Callan, Koster, Brady & Brennan LLP, New York (David A. LoRe of counsel), for Nokia, Inc. and 5 LLC, respondents and for 5 LLC, appellant.

Alfieri, Frohman & Primoff, LLP, New York (Paul Frohman of counsel), for respondents-respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 12, 2010, which, insofar as appealed from, denied plaintiff Siegel Consultants, Ltd.'s motion for partial summary judgment on the issue of liability as against defendant 5 LLC, granted defendant Nokia, Inc.'s cross motion for summary judgment dismissing the complaint as against it, and granted the motion of third-party defendants Friedland Realty, Inc. and Gene

Meer to dismiss the third-party complaint to the extent of dismissing the complaint in its entirety against Meer and dismissing the third-party causes of action against Friedland for breach of a contractual obligation to pay commissions, fraud, breach of fiduciary duty, breach of loyalty, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and contribution, unanimously modified, on the law, to grant summary judgment to 5 LLC to dismiss Siegel's complaint in its entirety, and to dismiss 5 LLC's third-party complaint against Friedland Realty, Inc., and otherwise affirmed, without costs.

This action arises out of a dispute concerning a real estate broker's commission for the rental of premises located in Manhattan. Nokia first became aware of the subject property owned by 5 LLC, in January, 2005, when one of its employees, Jeremy Wright, was in New York City to scout out possible spaces for a new flagship store. Wright, in an affidavit, states that he observed a sign in the window of the subject property and notified Andrew Bathurst, Nokia's real estate consultant. Bathurst then contacted Ronald Austin, a real estate agent, who in turn contacted Siegel for its consulting services. 5 LLC contends that it arranged for Nokia to view the property on January 19, 2005, and that Siegel did not attend this meeting.

According to 5 LLC, it had no communication or interaction with anyone from Siegel.

Siegel, however, contends that it was contacted by Austin, who was acting as an agent for Nokia, to find a suitable retail space in Manhattan. Siegel further states that it proposed the subject space and that it arranged, with 5 LLC's permission and consent, to show Nokia the space. On February 9, 2005, Siegel claims it sent 5 LLC an offer to lease the subject property. However, 5 LLC contends it never received this offer because Siegel, in fact, sent it to NAI Friedland Realty (Friedland), 5 LLC's exclusive agent.

In February 2005, Siegel contacted 5 LLC and Nokia claiming it was entitled to compensation for its work on the lease. Both 5 LLC and Nokia took the position that they were not obligated to pay any commission to Siegel. Neither 5 LLC nor Nokia had a broker agreement, or any written employment agreement, with Siegel regarding the subject property.

In July 2005, 5 LLC, as landlord, and Nokia, as tenant, signed a lease for the retail space. Paragraph 40 of the lease states that 5 LLC will pay "any and all commissions due NAI Friedland Realty, Inc. and Siegel Consultants, Ltd. pursuant to separate agreement or otherwise" and that 5 LLC promises to indemnify, defend and hold Nokia harmless from and against any

claims made by Friedland or Siegel, for commissions or other payments allegedly due.

According to 5 LLC and Nokia, this provision was included exclusively for the benefit of the parties to the contract, and was not an acknowledgment that any specific broker was entitled to a commission. 5 LLC and Nokia further contend that Siegel was named in the lease because Siegel had contacted both parties several times demanding a commission, and the parties wanted to insulate themselves from possible liability. Notably, in subsequent communications between Siegel and Nokia's general counsel, Siegel admitted that it was not a party to any written broker or employment agreement with Nokia, and that Nokia was not responsible for paying a broker commission because the commission is customarily paid by the owner and not the tenant.

Siegel commenced this breach of contract action alleging it was instrumental in effectuating a lease agreement between 5 LLC and Nokia and thus it was entitled to a full commission. Siegel moved for summary judgment as to its liability claim against 5 LLC, and Nokia cross-moved for summary judgment dismissing the complaint as against it. Third-party defendants Meer and Friedland also moved for an order dismissing 5 LLC's third-party

complaint that asserted eight causes of action, including breach of contract for failure to hold harmless, defend and indemnify 5 LLC.

The motion court properly granted Nokia's cross motion for summary judgment dismissing the complaint as against it. The facts do not establish that Nokia retained Siegel as its broker. Indeed, both Nokia and Siegel agree that Siegel was contacted by Austin for its consulting services. There is no written brokerage agreement, retainer, or any other written employment agreement between Nokia and Siegel. Further, Siegel acknowledged that Nokia had no duty to pay a commission because Nokia was the tenant and not the landlord.

After searching the record, we find that summary judgment should be granted to 5 LLC, dismissing Siegel's complaint against it in its entirety. "A court entertaining a motion for summary judgment may search the record and, if appropriate, grant summary judgment to the nonmoving party on any related claim, and this prerogative may be exercised even on appeal" (*Carnegie Hall Corp. v City Univ. of N.Y.*, 286 AD2d 214, 215 [2001]). 5 LLC did not have any written or verbal agreement with Siegel. In fact, Siegel did not provide any evidence showing that it communicated with or had dealings with 5 LLC.

Siegel relies on the fact that it is referenced as a broker in the lease between 5 LLC and Nokia and alleges that 5 LLC breached this agreement to pay Siegel a commission. However, Siegel is unable to point to any agreement between 5 LLC and Siegel that could have possibly been breached. Unlike in *Helmsley-Spear, Inc. v New York Blood Ctr.* (257 AD2d 64 [1999]), the lease here did not include a provision constituting a clear admission by 5 LLC that Siegel rendered services with respect to the transaction that entitled it to a commission payment (*see Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148 [2003]). Indeed, 5 LLC included the indemnity provision and brokerage statement in the lease to protect the parties to the lease. It did not reference Siegel in the lease in an effort to obligate itself to pay Siegel a commission.

Dismissal of the third-party complaint as against Meer was appropriate as 5 LLC "failed to allege particularized facts to warrant piercing the corporate veil" (*Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407, 407 [2007]). The court also properly dismissed the remaining claims against Friedland,

which are duplicative of the claim for breach of the contractual obligation to defend, indemnify and hold 5 LLC harmless. In light of our decision to dismiss Siegel's claim against 5 LLC, the third-party claim for indemnification also is dismissed.

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

ENTERED: JUNE 28, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5395N Nouveau Elevator Industries, Inc., Index 381009/09
Plaintiff-Respondent,

-against-

New York City Educational
Construction Fund, et al.,
Defendants,

Keith Plaza, Inc., et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about September 7, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 16, 2011,

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

ENTERED: JUNE 28, 2011

CLERK

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam, JJ.

5437 The People of the State of New York, Respondent, Ind. 3344/04

-against-

Kenneth Archbold, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Bruce Allen, J.), entered on or about June 29, 2010, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Contrary to defendant's contention, the record reflects that the court was aware that it had discretion to grant defendant's request for a downward departure from the risk level assessed by the Board of Examiners of Sex Offenders. The court properly denied that request in light of the serious injury defendant caused the victim. Both the prosecutor and defense counsel noted that the Board's assessment was subject to adjustment based on aggravating or mitigating factors, and the court expressly stated that the Board's assessment was a "recommendation."

Defendant, who was otherwise represented by counsel throughout the sex offender proceedings, was not prejudiced by the absence of counsel on the occasion that the court did nothing more than announce its determination. By the time defendant was produced in the courtroom, his attorney had departed. The announcement of the decision cannot be analogized to a sentencing, and it was not a critical stage of the proceedings. The matter had been fully argued and the presence of counsel would have had no impact (*see People v Garcia*, 92 NY2d 726, 731 [1999]). Even assuming that the court should not have announced its decision in the absence of counsel, a remand to the hearing court so that it could simply repeat its decision in the presence of counsel would serve no useful purpose (*see People v Wardlaw*, 6 NY3d 556, 559-561 [2006]; *People v Adams*, 52 AD3d 243, 244 [2008], *lv denied* 11 NY3d 829 [2008]).

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

ENTERED: JUNE 28, 2011

CLERK

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam, JJ.

5439 In re Fernando Alexander B., etc.,

Simone Anita W.,
Respondent-Appellant,

Julio Fernando B.,
Respondent,

Leake & Watts Services Inc.,
Petitioner-Respondent.

_____

Kenneth Walsh, Brooklyn, for appellant.

Law Office of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about June 2, 2009, which, inter alia, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence of respondent's failure to plan for the child's future, notwithstanding the agency's diligent efforts (Social Services Law § 384-b[7][a]). The record shows that the

agency met with respondent to review her service plan and discuss the importance of compliance (*see Matter of Lady Justice I.*, 50 AD3d 425 [2008]). The agency also referred respondent to parenting skills training, mental health therapy, housing assistance agencies, and scheduled regular visits with the child that accommodated her schedule. Despite these diligent efforts, respondent failed to attend therapy, obtain suitable housing or visit with the child on a consistent basis (*see Matter of Kevin J.*, 55 AD3d 468 [2008], *lv denied* 11 NY3d 715 [2009]; *Matter of William P.*, 23 AD3d 237 [2005]).

A preponderance of the evidence demonstrated that the termination of respondent's parental rights was in the best interests of the child, who has been living with his foster family for most of his life (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). A suspended judgment was not appropriate under the circumstances, given that the child was

thriving in a loving foster home, where his special needs were being met (*see Matter of Omar Saheem Ali J. [Matthew J.]*, 80 AD3d 463 [2011]).

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

ENTERED: JUNE 28, 2011

CLERK

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam, JJ.

5444 The People of the State of New York, Ind. 2238/08
Respondent,

-against-

Kirk Hanley,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew L. Mazur of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered July 28, 2009, convicting defendant, upon his plea of guilty, of kidnapping in the second degree, criminal possession of a weapon in the second degree (two counts), and reckless endangerment in the first degree, and sentencing him to concurrent terms of 14 years, 7 years, 7 years and 1 year, respectively, unanimously affirmed.

By pleading guilty, defendant forfeited appellate review of his argument that his kidnapping conviction merged into his

conviction for reckless endangerment (*see People v Brown*, 156 AD2d 204 [1989]; *see also People v Hansen*, 95 NY2d 227, 230-231 [2000]). Moreover, since there was no trial, the record is inadequate to review defendant's claim.

We find the sentence not to be excessive.

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

ENTERED: JUNE 28, 2011

CLERK

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam, JJ.

5446 The People of the State of New York, Ind. 4433/07
Respondent,

-against-

Jarrod Beinerman,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about September 4, 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 28, 2011

CLERK

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

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam, JJ.

5449 The People of the State of New York, Respondent, Ind. 1425/07

-against-

Cecil Richardson, Defendant-Appellant.

_____

Steven Bank, The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (William A. Wetzel, J. at suppression hearing and mistrial declaration; Richard D. Carruthers, J. at plea and sentencing), rendered March 11, 2009, convicting defendant of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously affirmed.

Defendant made valid written and oral waivers of his right to appeal (*see People v Lopez*, 6 NY3d 248 [2006]), which encompass his present claims (*see People v Kemp*, 94 NY2d 831 [1999]; *People v Muniz*, 91 NY2d 570 [1998]). As an alternative holding, we reject defendant's suppression claim, and we find that his double jeopardy claim, which has been raised and

rejected on the merits in a prior article 78 proceeding (*Matter of Richardson v Wetzel*, 47 AD3d 484 [2008], *lv denied* 10 NY3d 708 [2008]), is barred by the doctrine of res judicata (*see People v Walker*, 265 AD2d 254, 254 [1999], *lv denied* 94 NY2d 908 [2000]).

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

ENTERED: JUNE 28, 2011

CLERK

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam, JJ.

5452 Melissa Castillo, Index 305991/08
Plaintiff-Appellant,

-against-

Anthony Cinquina,
Defendant-Respondent.

_____

W. Matthew Sakkas, New York, for appellant.

Cohen, Kuhn & Associates, New York (Robert D. Wilkins of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about July 7, 2010, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint based on the failure to establish a "permanent consequential limitation" or "significant limitation" within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendant made a prima facie showing of entitlement to judgment as a matter of law. Defendant submitted the affirmed report of an orthopedic surgeon who, after conducting an independent examination of plaintiff, found that she had full range of motion in her neck and back and concluded that her

injuries were resolved (*see Dennis v New York City Tr. Auth.*, 84 AD3d 579 [2011]).

In opposition, plaintiff raised triable issues of fact. Plaintiff submitted an affidavit of her treating chiropractor who, based on testing performed both recently and contemporaneous with plaintiff's accident, found diminished range of motion in the cervical and lumbar spine and concluded that such limitations were caused by the accident (*see id.*). The chiropractor's opinion was supported by objective medical evidence, namely, MRI reports indicating that plaintiff had bulging discs in the cervical and lumbar spine (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]).

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

ENTERED: JUNE 28, 2011

CLERK

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam, JJ.

5453 The People of the State of New York, Respondent, Ind. 9407/07

-against-

Heallah Broadhead, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered July 23, 2008, convicting defendant, after a jury trial, of two counts of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of 2 to 4 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. We do not find the police account of the incident to be implausible.

The court properly denied defendant's suppression motion, without granting a hearing, because defendant's allegations failed to raise a legal basis for suppression (*see People v Roldan*, 37 AD3d 300 [2007], *lv denied* 9 NY3d 850 [2007]). The

information provided by the People apprised defendant of the factual predicate for his arrest. Defendant's conclusory denials of suspicious behavior at the time of his arrest did not address that predicate or raise any factual dispute requiring a hearing.

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

ENTERED: JUNE 28, 2011

CLERK

Andrias, J.P., Friedman, DeGrasse, Abdus-Salaam, JJ.

5454 In re Okslen Acupuncture, P.C., Index 114191/09
Petitioner-Appellant,

-against-

Andrew M. Cuomo, etc.,
Respondent-Respondent.

_____

Raymond J. Zuppa, Brooklyn, for appellant.

Eric T. Schneiderman, Attorney General, New York (Laura R. Johnson of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered April 14, 2010, which denied the petition seeking, inter alia, to compel respondent to investigate and prosecute non-party National Insurance Crime Bureau for its alleged criminal violations of article 7 of the General Business Law, and granted respondent's cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Dismissal of this proceeding on the ground that it seeks to compel discretionary acts was proper (*see Klostermann v Cuomo*, 61 NY2d 525, 539 [1984]; *see also People v Bunge Corp.*, 25 NY2d 91, 97 [1969]). General Business Law § 85 does not mandate that respondent prosecute all alleged violations of General Business Law article 7. Rather, the relevant language of that provision,

namely that "[c]riminal action for violation of this article shall be prosecuted by the attorney-general," is jurisdictional. The term "shall" in the section means that violations will be prosecuted by respondent as opposed to a district attorney, who ordinarily would have jurisdiction to prosecute criminal activities (*see e.g. People v Ifill*, 127 Misc 2d 678, 680 [Sup Ct, Kings County 1985]). Petitioner points to nothing in the provision requiring respondent to prosecute particular matters or take specific action.

We have considered petitioner's remaining contentions, including that a special prosecutor should be appointed, and find them unavailing.

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

ENTERED: JUNE 28, 2011

CLERK

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam, JJ.

5457N Global Imports Outlet, Inc., etc., Index 602695/07
Plaintiff-Respondent,

-against-

The Signature Group, LLC,
Defendant-Appellant,

240 Grand Studio, Inc., etc., et al.,
Defendants.

_____

Keidel, Weldon & Cunningham, LLP, White Plains (Jeffrey A. Lesser of counsel), for appellant.

Frankfort & Koltun, Deer Park (Robert D. Frankfort of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered July 2, 2010, which, to the extent appealed from as limited by the briefs, denied defendant The Signature Group, LLC's motion to sever plaintiff's insurance procurement claim against it from the property damage claim against the other defendants, unanimously affirmed, with costs.

The motion court providently exercised its discretion in denying the motion, since Signature failed to demonstrate that a joint trial would result in substantial prejudice (*see* CPLR 603; *Geneva Temps, Inc. v New York World Communities, Inc.*, 24 AD3d 332, 334 [2005]). An insurance company or broker would be prejudiced if an insurance-coverage claim and a negligence claim

were tried before the same jury (*see Kelly v Yannotti*, 4 NY2d 603 [1958]; *Hoffman v Kew Gardens Hills Assoc.*, 187 AD2d 379 [1992]; *Transamerica Ins. Co. v Tolis Inn*, 129 AD2d 512 [1987]; *see also Taylor v Fazio*, 291 AD2d 293 [2002]). However, this case does not involve a dispute about insurance coverage. Rather, it involves the failure to procure insurance coverage. Further, there is no claim that additional discovery is required, or that the trial would otherwise be delayed if the motion is denied (*see Neckles v VW Credit, Inc.*, 23 AD3d 191, 192 [2005]). Nor is there any alleged "threat of jury confusion" based on the number of issues or witnesses (*Witherspoon v New York City Hous. Auth.*, 238 AD2d 276, 276 [1997]). Lastly, plaintiff would be prejudiced by severance. Indeed, Signature filed its motion after the note of issue was filed and more than a year after the issuance of an order consolidating this action with another related action (*cf. Kelly*, 4 NY2d at 605, 607-608).

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

ENTERED: JUNE 28, 2011

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Manzanet-Daniels, Román, JJ.

5458 The People of the State of New York, Ind. 4816/08
Respondent,

-against-

Kiani Henderson,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J. at hearing; Lewis Bart Stone, J. at plea and sentencing), rendered June 25, 2009, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of 5 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The police officers had a reasonable, objective basis for concluding that the object they saw in defendant's waistband was a pistol. The officers saw a bulge, which they described in detail. Although the officers did not see the outline of an entire weapon, the shape of the bulge resembled the outline of the grip of a pistol. In addition, defendant made repeated motions that the officers recognized, from their experience, as

typical of attempts to adjust a firearm kept in a waistband. Accordingly, the police had reasonable suspicion justifying a stop and frisk (*see e.g. Matter of George G.*, 73 AD3d 624 [2010]; *People v Quan*, 182 AD2d 506 [1992], *lv denied* 80 NY2d 836 [1992]).

Defendant did not preserve his contention that the police officers, at most, should have initially conducted a patdown, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see People v Smith*, 93 AD2d 432, 434 [1983], *lv denied* 60 NY2d 594 [1983]).

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

ENTERED: JUNE 28, 2011

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Manzanet-Daniels, Román, JJ.

5459 Joanne Feaster, Index 308385/08
Plaintiff-Appellant,

-against-

Thami Boulabat, et al.,
Defendants-Respondents.

_____

Shayne, Dachs, Corker, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for appellant.

Harvey Gladstein & Partners LLC, New York (Richard M. Sands of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about February 25, 2011, which, in a personal injury action arising from a motor vehicle accident, granted the motion of defendants Thami Boulabat and Brighton Car Service, Inc. to renew plaintiff's prior motion for partial summary judgment on the issue of liability, previously granted by order, same court and Justice, entered on or about February 20, 2009, and, upon renewal, vacated the prior order and denied the motion, unanimously reversed, on the law, without costs, the motion to renew denied and the order, entered on or about February 20, 2009, reinstated.

Defendants failed to provide a reasonable explanation as to why they did not mention, in opposition to plaintiff's motion for partial summary judgment, that they were experiencing difficulty

in locating Boulabat. Because defendants failed to provide a reasonable excuse for not presenting such facts on the prior motion, the motion to renew should have been denied (*see* CPLR 2221[e][3]; *see also American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473, 476 [2006]).

Defendant's claim that Boulabat is entitled to a stay pursuant to Military Law § 304 is unavailing in that his tour with the US Merchant Marine does not qualify as Active Military Service under Military Law § 1, and he has not demonstrated that his being away at sea "materially affected" his ability to defend for two years this action as § 304 requires.

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

ENTERED: JUNE 28, 2011

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Manzanet-Daniels, Román, JJ.

5460 The People of the State of New York, Ind. 4510/08
Respondent,

-against-

William Bradford,
Defendant-Appellant.

_____

Gordon & Gordon, PC, Forest Hills (Peter S. Gordon of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ruth E. Smith, J.), rendered July 16, 2010, convicting defendant, after a nonjury trial, of auto stripping in the first degree, three counts of criminal mischief in the second degree, eight counts of criminal mischief in the third degree, and eleven counts of auto stripping in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed. The matter is remitted to Supreme Court, Bronx County, for further proceedings pursuant to CPL 460.50(5).

Since defendant improperly challenged his jury trial waiver for the first time in a postverdict motion (*see People v Padro*, 75 NY2d 820 [1990]), he failed to preserve that challenge (*see People v Johnson*, 51 NY2d 986, 987 [1980]), and we decline to review it in the interest of justice. As an alternative holding,

we find that defendant's claim is unreviewable on direct appeal to the extent it implicates counsel's advice (*see id.* at 988), and without merit in any event. The trial court was not required to ask defendant why he was waiving a jury trial, as "no particular catechism is required to establish the validity of a jury trial waiver" (*People v Smith*, 6 NY3d 827, 828 [2006], *cert denied* 548 US 905 [2006]).

Defendant's ineffective assistance of counsel claims, including his claim that counsel provided inappropriate advice to waive a jury, are unreviewable on direct appeal because they involve matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Defendant's attempt to make factual assertions outside the record by way of a CPL 330.30(1) motion to set aside the verdict was procedurally defective (*see People v Ai Hiang*, 62 AD3d 515, 516 [2009], *lv denied* 14 NY3d 769 [2010]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

We have considered and rejected defendant's challenges to the legal sufficiency of the evidence, and his claims relating to his sentence.

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

ENTERED: JUNE 28, 2011

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Manzanet-Daniels, Román, JJ.

5461 HBK Master Fund L.P., et al., Plaintiffs-Respondents, Index 600765/10

-against-

Troika Dialog USA, Inc., et al., Defendants-Appellants.

- - - - - - -

5462-5463 VR Global Partners, L.P., Plaintiff-Respondent, Index 602539/09

-against-

Troika Dialog USA, Inc., et al., Defendants-Appellants.

_____

Dewey & LeBoeuf LLP, New York (Jonathan D. Siegfried of counsel), for appellants.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Andrew J. Rossman of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered December 2, 2010, which denied defendants' motions to dismiss the complaints without prejudice to renew after completion of jurisdictional discovery, and order, same court and Justice, entered January 12, 2011, which granted plaintiff VR Global Partners, L.P.'s motion to compel additional jurisdictional discovery, unanimously affirmed, with costs.

Plaintiffs made a "sufficient start" in demonstrating that the Russian defendants were doing business in New York through their direct or indirect subsidiaries to warrant further

discovery on the issue of personal jurisdiction, including whether the parents exercised control over the subsidiaries and are therefore subject to New York's long-arm jurisdiction (*see Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]; *Edelman v Taittinger, S.A.*, 298 AD2d 301, 302 [2002]).

VR Global's second discovery requests were tailored to elicit information related to the jurisdictional and forum non conveniens issues raised by defendants.

The other issues raised by appellants are not ripe for review at this time.

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

ENTERED: JUNE 28, 2011

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Manzanet-Daniels, Román, JJ.

5464 In re Kelvin V.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

_____

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about March 16, 2010, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, and menacing in the third degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

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

ample opportunity to observe appellant during the robbery, and that he identified him only a few minutes later.

To the extent appellant is challenging the court's denial of his motion to suppress identification testimony, we find that the prompt, on-the-scene showup was not unduly suggestive (*see e.g. People v Tramble*, 60 AD3d 443 [2009], *lv denied* 12 NY3d 822 [2009]).

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

ENTERED: JUNE 28, 2011

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Manzanet-Daniels, Román, JJ.

5465 The People of the State of New York, Ind. 983/07
Respondent,

-against-

Christian Alvarez,
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 (John B.F. Martin of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about January 9, 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 28, 2011

CLERK

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

Mazzarelli, J.P., Sweeny, Freedman, Manzanet-Daniels, Román, JJ.

5466- 905 5th Associates, Inc., et al., Index 100662/06
5467- Plaintiffs-Appellants,
5468

-against-

Richard Weintraub, et al.,
Defendants-Respondents,

My Home Remodeling, Inc., et al.,
Defendants-Appellants.

_____

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of counsel), for 905 5th Associates, Inc. and Pamela Lipkin, M.D., appellants.

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

Ahmuty Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for RDM Renovation Corp., appellant.

Cuomo LLC, New York (Matthew A. Cuomo of counsel), for Weintraub respondents.

Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains (James F. O'Brien of counsel), for Rick Kramer, respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 2, 2010, which, insofar as appealed from, granted defendants Richard Weintraub and Liane Weintraub's motion for summary judgment to the extent of dismissing the action against Liane and dismissing the second through fifth causes of action against Richard, denied plaintiffs' motion for partial summary judgment against Richard on the seventh cause of action and

ordered that any damages against Richard thereunder would be limited to property damage, and granted defendant Rick Kramer's motion for summary judgment dismissing the amended complaint as against him, unanimously modified, on the law and the facts, to the extent of reinstating the second, third and fourth causes of action as against the Weintraubs, and the eighth cause of action and the cross claims asserted against Kramer, and otherwise affirmed, without costs.

Plaintiff Pamela Lipkin, M.D. seeks to recovery for property damage and economic loss sustained as a result of the Weintraubs' renovation of their apartment, which is located directly above plaintiffs' medical office. In connection with this renovation, the Weintraubs retained Rick Kramer as their architect and My Home Remodeling, Inc. and/or My Home LLC, as the contractor. My Home, in turn, subcontracted the demolition work to RDM Renovation Corp.

While a party who employs an independent contractor is generally not liable for the negligent acts of that contractor (*see Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992]), plaintiffs have established the existence of triable issues of fact as to the applicability of an exception to this general rule, where the employer's duty is non-delegable (*id.*).

As property owners, the Weintraubs had a duty of care which extended to those who suffered property damage as a result of construction on their property and included a duty to take reasonable precautions to avoid injuring persons on adjoining premises (*see 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 290 [2001]*; Dunlop Tire & Rubber Corp. v FMC Corp.*, 53 AD2d 150 [1976]). This duty was reinforced by the Proprietary Lease and Alteration Agreement, both of which recognized the need to protect other shareholders from damages caused by the Weintraubs' use of their unit. Accordingly, plaintiffs' negligence claims against the Weintraubs, the second through fourth causes of action, should not have been dismissed.

In the absence of a relationship approaching privity, plaintiffs' claim against Kramer for architectural malpractice was properly dismissed (*see Board of Mgrs. of Yardarm Beach Condominium v Vector Yardarm Corp.*, 109 AD2d 684 [1985], *appeal dismissed* 65 NY2d 998 [1985]). However, the lack of privity does not affect plaintiffs' ability to bring a general negligence claim against the architect for property damage sustained by them (*see generally id.*). As the parties' testimony created triable issues of fact as to the whether Kramer directed or controlled the work which is alleged to have created the injury, plaintiffs' eighth cause of action, for general negligence against the

architect, should not have been dismissed (*see Hussain v Try, 3 Bldg. Servs.*, 308 AD2d 371 [2003]; *Deyo v County of Broome*, 225 AD2d 865 [1996]; *cf. Davis v Lenox School*, 151 AD2d 230 [1989]).

Finally, we find that summary judgment on Dr. Lipkin's claim for contractual indemnification against Richard was properly denied based on the existence of triable issues of fact as to whether a condition precedent to liability was established. In addition, the court properly limited damages under this claim to property damage as indemnity provisions must be strictly construed so as to avoid reading unintended duties into them (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

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

ENTERED: JUNE 28, 2011

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Manzanet-Daniels, Román, JJ.

5470-
5471 Universal Communications Network, Inc., Plaintiff-Appellant-Respondent, Index 600067/10

-against-

229 West 28th Owner, LLC, Defendant-Respondent-Appellant,

Anglo Irish Bank Corporation Limited, Defendant.

_____

Wilk Auslander LLP, New York (M. William Scherer of counsel), for appellant-respondent.

Pryor Cashman LLP, New York (Todd E. Soloway of counsel), for respondent-appellant.

_____

Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered January 7, 2011, which granted defendant 229 West 28th Owner, LLC's CPLR 3211 (a)(1) and (7) motion and dismissed, with prejudice, the amended complaint, granted 229 West's motion to vacate a previously entered *Yellowstone* injunction and awarded judgment to 229 West of disputed rent being held in escrow by the parties' law firms, denied plaintiff's cross motion for a voluntary discontinuance without prejudice pursuant to CPLR 3217(b), and denied 229 West's motion for attorneys' fees, unanimously modified, on the law, the application for attorneys' fees granted and the matter remanded

for calculation of said award, and otherwise affirmed, without costs.

Having accorded the complaint a liberal construction, accepted the facts as true, and made all inferences in plaintiff's favor (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the motion court correctly dismissed it. Initially, the obligation to pay rent pursuant to a commercial lease is an independent covenant, and thus, cannot be relieved by allegations of a landlord's breach, absent an express provision to the contrary (*see Westchester County Indus. Dev. Agency v Morris Indus. Bldrs.*, 278 AD2d 232, 232-233 [2000], *lv dismissed* 96 NY2d 792 [2001]; *see also Towers Org. v Glockhurst Corp.*, 160 AD2d 597 [1990]). Here, the claims asserted are also barred by the express language of the lease between the parties.

Plaintiff failed to allege an actual eviction because it did not plead that it was "wrongfully oust[ed] . . . from physical possession of the leased premises" (*see Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82 [1970]; *see also Sapp v Propeller Co.*, 5 AD3d 181, 182 [2004]). In fact, plaintiff admits that it retained possession and continued to perform construction therein. For this reason, plaintiff's constructive

eviction claim must also fail (*Barash*, 26 NY2d at 83; *see also Pacific Coast Silks, LLC v 247 Realty LLC*, 76 AD3d 167, 172-173 [2010]).

The court properly vacated the *Yellowstone* injunction and awarded defendant the *Yellowstone* escrow funds, which represented a portion of the rent that had been improperly withheld by plaintiff. The sole purpose of a *Yellowstone* injunction is to "maintain[] the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture" (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]). *Yellowstone* injunctions, however, also protect landlords like defendant because, "much like a bond, [the *Yellowstone* injunction] ensure[s] that [a landlord gets] paid when the day of reckoning finally arrive[s] in [] protracted litigation" (*Graubard*, 93 NY2d at 515). Plaintiff's day of reckoning is upon it.

Because the lease provided for payment of reasonable attorneys' fees, the court erred in failing to grant defendant's

application for such an award (*see Sun Mei Inc. v Chen*, 21 AD3d 265, 266 [2005], *lv denied* 6 NY3d 711 [2006]), and the matter should be remanded for calculation of attorneys' fees.

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 28, 2011

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Manzanet-Daniels, Román, JJ.

5472 Richard Miller, Index 603020/08
Plaintiff-Respondent,

-against-

New York University, et al.,
Defendants-Appellants,

NYU Medical Center, et al.,
Defendants.

_____

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Ricki E. Roer of counsel), for appellants.

Kraus & Zuchlewski LLP, New York (Robert D. Kraus of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered September 28, 2010, which, to the extent appealed from as limited by the briefs, denied defendants New York University and NYU Hospitals Center's motion for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs.

Defendants failed to demonstrate that the reassignment of plaintiff from the position of sole chief financial officer of NYU Hospitals Center (NYUHC) to one of three vice presidents of finance did not constitute a termination from the CFO position, in violation of the parties' retention agreement, as memorialized in the "Transition Stabilization Plan." The record shows that

plaintiff's position as finance VP was materially different from his position as CFO (*see Rudman v Cowles Communications*, 30 NY2d 1, 10 [1972]). After his reassignment, plaintiff was no longer considered part of NYUHC's senior leadership team, and he had lost his CFO responsibilities and retained only part of his responsibility for oversight of the Hospital for Joint Diseases and the Clinical Cancer Center. While as CFO plaintiff had significant responsibility for policy making and management, as one of three VPs of finance he appeared to have decreased responsibility, and many of his former responsibilities as CFO were assumed by other finance VPs or by the Senior Vice President of Financial Affairs.

We have considered defendants' argument that this is a case of constructive discharge and find it without merit.

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

ENTERED: JUNE 28, 2011

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Manzanet-Daniels, Román, JJ.

5475 Thomas P. Ivanyi, Index 350019/09
Plaintiff-Appellant,

-against-

Marlin S. Potash,
Defendant-Respondent.

_____

Chemtob Moss Forman & Talbert, LLP, New York (Paul M. Talbert of counsel), for appellant.

Berkman Bottger Newman & Rodd, LLP, New York (Richard A. Abrams of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saralee Evans, J.), entered June 8, 2010, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion to vacate, in part, an arbitration award, unanimously affirmed, without costs.

Plaintiff seeks to vacate the portions of the arbitration award that rejected his claims for $54,992, for his contribution to the closing costs on the marital home, and $113,867, for payments he allegedly made in excess of his obligation, pursuant to the parties' prenuptial agreement, with respect to the mortgage on the marital home. He contends that the arbitrators' failure to award him these amounts renders the award not final and definite (*see* CPLR 7511[b][iii]). The record shows that the arbitrators specifically identified the issues of plaintiff's financial interest in the marital residence and whether he made

excess mortgage payments, evaluated the evidence presented at the hearing, and expressly declined to award the amounts plaintiff sought. Thus, there is no basis for a conclusion that the award was not final and definite (*see Matter of Chaindom Enters., Inc. [Furgang & Adwar, L.L.P.]*, 10 AD3d 495, 497 [2004], *lv denied* 4 NY3d 709 [2005]).

Moreover, the award cannot be vacated because there exists a plausible basis for it (*see Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368 [2004]). The prenuptial agreement provided that plaintiff would contribute $220,000 in cash at the closing on the parties' cooperative apartment. The agreement further provided, in a separate and independent provision, that if a marital action was commenced plaintiff would be paid $220,000 to relinquish his interest in the apartment. Notwithstanding that plaintiff contributed only $54,992 toward the $2 million purchase price, the arbitrators awarded him $220,000 for his interest in the apartment, in accordance with the agreement.

The agreement provided that plaintiff would make mortgage payments based on the $600,000 debt initially agreed to. However, at the time of the closing, the parties jointly assumed a $750,000 mortgage. The arbitrators rejected plaintiff's claim that he was obligated to make mortgage payments only on the basis

of the $600,000 debt. Moreover, to the extent plaintiff made additional lump sum payments in the amount of $80,000 from his own personal funds to reduce the mortgage principle, his claim to this amount is unavailing, since the agreement only preserved claims resulting from "the unintentional transmutation of separate or non-marital property into marital property." In any event, plaintiff received a benefit more favorable than provided for in the agreement since he was awarded $220,000 for his interest in the apartment, despite the fact that at the closing he paid $165,000 less than he was obligated to contribute.

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

ENTERED: JUNE 28, 2011

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Manzanet-Daniels, Román, JJ.

5476-5477 The People of the State of New York, Respondent,

-against-

David Wesley, Defendant-Appellant.

Ind. 6221/06

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

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

Judgment, Supreme Court, New York County (Renee A. White, J. at severance motion; John Cataldo, J. at jury trial and sentencing), rendered August 14, 2007, as amended August 24, 2007, convicting defendant of robbery in the first degree (two counts), robbery in the second degree, sexual abuse in the first degree and forcible touching, and sentencing him, as a persistent violent felony offender, to an aggregate term of 50 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences be served concurrently, resulting in a new an aggregate term of 25 years to life, and otherwise affirmed. Judgment, same court (Renee A. White, J.), rendered November 27, 2007, convicting defendant, after a separate jury trial, of forcible touching and sexual abuse in the third degree, and sentencing him

to concurrent terms of 1 year and 90 days, respectively, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility.

The motion court properly exercised its discretion in granting defendant only a limited severance of the counts of the indictment. The court permitted the joint trial of the counts relating to three robbery incidents, including the sex offenses that were part of the same transaction as one of the robberies. The court ordered a separate trial of sex charges arising from two additional incidents not involving robbery. Defendant did not establish good cause for a further severance of these properly joined counts (*see People v Ford*, 11 NY3d 875, 879 [2008]).

Defendant did not provide a record sufficient to permit review of his claim that the court failed to disclose the contents of a jury note to defense counsel. In any event, unlike the situation in *People v Tabb* (13 NY3d 852 [2009]), there is record proof that warrants an inescapable inference that in an unrecorded conversation, defense counsel was apprised of the

contents of the note (*see e.g. People v Fishon*, 47 AD3d 591 [2008], *lv denied* 10 NY3d 958 [2008]). There was a recorded interchange between the court, the prosecutor and the defense attorney, in which the prosecutor made several references to the contents of the note, and both counsel expressly declined to be heard on the jury's request. This interchange makes no sense unless defense counsel was aware of the contents of the note. Accordingly, the court fulfilled its core responsibilities under *People v O'Rama* (78 NY2d 270, 277 [1991]). Defendant's remaining *O'Rama* claim does not warrant reversal.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record, including counsel's reasons for not calling an identification expert (*see People v Logan*, 58 AD3d 439 [2009], *lv denied* 12 NY3d 926 [2009]). Regardless of whether the trial evidence indicates that expert testimony on identification might have been appropriate, that evidence is not enough to resolve the issue of whether counsel's decision to forgo such expert testimony was a reasonable strategic choice. On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant

has not shown that the acts or omissions of counsel that defendant challenges on appeal fell below an "objective standard of reasonableness" (*Strickland*, 466 US at 688). In any event, we also conclude that none of these acts or omissions, viewed individually or collectively, had a reasonable probability of affecting the outcome or depriving defendant of a fair trial (*id.* at 694).

We find the sentence excessive to the extent indicated.

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

ENTERED: JUNE 28, 2011

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Manzanet-Daniels, Román, JJ.

5478N Sara Kinberg, Index 1628/06
Plaintiff-Appellant,

-against-

Yoram Kinberg,
Defendant,

Jane Bevans,
Defendant-Respondent.

_____

Sara Kinberg, appellant pro se.

Jane Bevans, New York, respondent pro se.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered June 21, 2010, which denied plaintiff's motion to sever the action against defendant Jane Bevans, unanimously affirmed. without costs.

Supreme Court appears to have inadvertently mistaken the order entered June 22, 2009, which was the subject of a prior appeal (77 AD3d 422 [2010]), with the order dated June 30, 2009 and entered August 26, 2009. However, this factual oversight is of no consequence because plaintiff failed to demonstrate that she would be prejudiced if severance was not granted (*see Williams v Property Servs.*, 6 AD3d 255 [2004]). Indeed, where the consolidated actions at issue are not merely "all ready for trial" (*Kent v Papert Cos.*, 289 AD2d 127, 127 [2001]), but have

already been tried and judgment entered accordingly, severance would be futile and "the interests of convenience and avoidance of prejudice" is best served by denying the motion (*Radiology Resource Network, P.C. v Fireman's Fund Ins. Co.*, 12 AD3d 185, 186 [2004]; *see Shanley v Callanan Indus.*, 54 NY2d 52, 57 [1981]).

Furthermore, plaintiff's argument that the order entered June 30, 2009, which consolidated the fraud action against Bevans with the actions against defendant Kinberg, is void because it was issued sua sponte, is unavailing. Those actions had already been consolidated by an order dated October 5, 2007, which resolved a motion made on notice by plaintiff, as well as a cross motion by Bevans made on notice, specifically requesting such relief. Contrary to plaintiff's contention, judicial notice of the order dated October 5, 2007 is proper since it is an official court record (*see RGH Liquidating Trust v Deloitte & Touche LLP*,

71 AD3d 198, 207 [2009]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JUNE 28, 2011

CLERK

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

4608 Bruckmann, Rosser, Sherrill & Co., L.P., et al., Plaintiffs-Respondents, Index 602738/05

-against-

Marsh USA, Inc., et al., Defendants-Appellants.

_____

Willkie Farr & Gallagher LLP, New York (Christopher J. St. Jeanos of counsel), for appellants.

Anderson Kill & Olick, P.C., New York (Marshall Gilinsky of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 29, 2010, modified, on the law, to grant, upon our search of the record, partial summary judgment to plaintiffs to the extent of determining that the tie-in provision was applicable to limit the coverage afforded under the policy, and otherwise affirmed, without costs.

Opinion by Abdus-Salaam, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
James M. Catterson
Rosalyn H. Richter
Sheila Abdus-Salaam
Nelson S. Román, JJ.

4608
Index 602738/05

_____x

Bruckmann, Rosser, Sherrill & Co., L.P., et al.,
Plaintiffs-Respondents,

-against-

Marsh USA, Inc., et al.,
Defendants-Appellants.
_____x

Defendants appeal from an order of the Supreme Court, New York County (Milton A. Tingling, J.), entered June 29, 2010, which denied its second motion for summary judgment dismissing the complaint.

Willkie Farr & Gallagher LLP, New York (Christopher J. St. Jeanos of counsel), for appellants.

Anderson Kill & Olick, P.C., New York (Marshall Gilinsky, Finley T. Harckham and Diana Shafter Gliedman of counsel), for respondents.

ABDUS-SALAAM, J.

This action, which is before us for the second time on appeal, involves a dispute between plaintiffs-insureds (BRS) and their broker. The remaining causes of action sound in breach of contract and negligence. On this appeal, we are asked to determine, as a matter of law, whether the coverage afforded to BRS by its policy with American International Surplus Lines Insurance Company (AISLIC), placed by defendant Marsh, was limited by a "tie-in" provision, also referred to as an "anti-stacking" provision. We find that there is such a limitation of coverage. Thus, we affirm the motion court's denial of summary judgment to defendants, but for grounds other than those stated by the motion court, which found triable issues of fact.

BRS, a private equity fund, purchases and provides advice about selected business ventures (portfolio companies) for the fund's investors. BRS retained defendant Marsh as insurance broker to place insurance programs for BRS and its portfolio companies. This action arises out of BRS's request of Marsh to place $20 million in excess directors and officers (D&O) insurance for BRS.

According to BRS, it believed that it had such coverage through its policy placed by Marsh with AISLIC, an American Insurance Group (AIG) family company, until a suit was filed in

2001 (the Wells Fargo action) by the creditors' committee for Jitney-Jungle Stores of America, one of the portfolio companies, against, among others, Jitney's directors and BRS. The plaintiffs in that suit sought damages ranging up to $1 billion. Jitney was insured by National Union, an AIG company, for $15 million. When Jitney and BRS notified AIG of the lawsuit and sought coverage under their respective $15 million and $20 million policies, AIG notified BRS that based on a limit of liability clause in BRS's policy with AISLIC (referred to by the parties as a "tie-in provision" or "non-stacking" provision), the combined limit of liability for this claim was $20 million for both policies. AIG took the position that based on this provision, its maximum aggregate limit for all losses arising out of this claim was $20 million (the greater of the limits of the BRS policy and the Jitney policy for $15 million). It is the interpretation of this provision which is the subject of this appeal.

BRS settled the Wells Fargo action for $33.5 million, and AIG paid $6.9 million in defending the suit, which was deducted from the limits of the Jitney policy. The total losses for BRS and Jitney thus amounted to $40,400,000. AIG paid the full $15 million policy limit under the Jitney policy, and pursuant to its claim that the tie-in provision capped BRS' coverage at $5

million (the amount remaining out of the $20 million coverage), paid that amount and refused to pay anything more. BRS was then faced with the choice of bringing an action against Marsh for its failure to procure the $20 million in excess insurance coverage that BRS maintains it requested, or, of first trying to obtain the unpaid portion from AIG. BRS offered to settle with Marsh and assign to Marsh its claims against AIG for the unpaid portion of the Wells Fargo claim, but Marsh declined. Accordingly, BRS and Marsh agreed to toll the statute of limitations on any malpractice claims against Marsh and to try to mitigate BRS's losses by suing AIG for the $15 million that BRS maintained it was entitled to under its policy with AISLIC.

BRS filed a suit against AIG and made a motion for partial summary judgment, arguing that because AISLIC was defined as the "insurer" under the policy, the tie-in provision would only be triggered where two policies were issued by AISLIC. The reasoning was that because Jitney was insured by National Union, another AIG company, and not AISLIC, the tie-in provision did not apply to limit AISLIC's liability to less than the $20 million sought by BRS from AISLIC. AIG opposed the motion for summary judgment, arguing that BRS's interpretation of the tie-in provision did not make sense and was contrary to the intent of this and any other type of "anti-stacking" provision, and that

the parties clearly intended for a maximum aggregate liability for multiple policies issued by AIG companies that implicated a single loss or covered event.

After the summary judgment motion was fully briefed, but before it was heard by the court, BRS agreed to settle the coverage action against AIG for $9 million out of the $15 million that it was seeking. As explained by BRS's counsel Mr. Zensky at his deposition, the motion was made before any depositions had been taken and at the very outset of document discovery. He advised BRS that it had the highest point of leverage with AIG in terms of settlement while the motion was pending, and that while he believed BRS had a good chance of prevailing on the summary judgment motion, it was not a slam dunk, and even if they won, there would be an appeal.[1] Zensky was questioned as to whether

[1]Another indication of Mr. Zensky's thoughts regarding settlement is reflected in an e-mail that he wrote to BRS memorializing his discussion with "Marsh's attorney." Although Marsh argues here that this e-mail is inadmissible hearsay and should not be considered by this Court, it may be considered, not for the truth of what is stated in that e-mail, but for what BRS's counsel believed to be the weaknesses in BRS's litigation with AIG. The e-mail states:
"1. Marsh's testimony will not likely be helpful to us. They read the clause as evidencing an intent to tie in the limits of all AIG companies. Further, they think the premium makes sense in that context.
"2. They have not made any further settlement overtures but will try if we want them to. They do not think they can get AIG close to $13M.

he recalled that Marsh had been sued by the New York Attorney General in connection with contingent commission agreements, and whether he had considered that this might be used as leverage against Marsh to settle BRS's claims in this case. Zensky replied that he did so recall, and that he believed it cast Marsh in an extremely bad light after learning from Marsh's counsel that the BRS policy was one of the policies that was in the Marsh unit receiving commissions, and that Marsh had been paid by AIG.

BRS's settlement with AIG left BRS $6 million short of the $20 million of excess D&O coverage that BRS maintained Marsh was supposed to procure. Accordingly, BRS filed this action against Marsh, alleging, among other things, breach of contract and negligence. Following completion of discovery, Marsh moved for summary judgment on two grounds:(1) that BRS could not establish any breach of duty because it could not prove that the tie-in

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"3. I told him about our SJ motion - he agreed that it was sound strategically and could be our best chance to settle (given that the testimony all around will not be helpful in his view), especially while it is pending.
"4. Finally, as to the Marsh incentive agreements with AIG, he said it is almost a certainty that your policy counted towards AIG's payment (i.e. kickback) obligations to Marsh. I was astounded he admitted it to me so readily. So not only did Marsh not have an incentive to beat AIG up over the coverage for you, they had an incentive to stick all of your companies with AIG, even though it obviously was not in your best interests at least once you bought a Fund level policy. If the SJ motion does not succeed it may be time to send a visitor to Marsh with a summons and complaint."

provision applied and (2) BRS could not establish proximate cause because it had settled its action against AIG. The motion court did not decide whether the tie-in provision applied, but granted summary judgment on the reasoning that BRS's settlement with AIG for a lesser amount than the $20 million was the proximate cause of BRS's damages and superseded any breach by Marsh. This Court modified to the extent of reinstating the causes of action for breach of contract and negligence, holding that "[p]laintiffs' settlement of their underlying claim against the insurer, under circumstances in which the merits of the claim for coverage were equivocal, did not break the chain of proximate causation with respect to their claim against their broker for failure to procure appropriate coverage" (65 AD3d 865, 866 [2009]).

The litigation returned to Supreme Court, and Marsh again moved for summary judgment on the ground that the tie-in provision did not apply to limit BRS's coverage, asserting that it had raised this argument in its first motion, but that it had not been addressed by the court. The motion court found that it had not specifically addressed that issue in its prior decision, and denied the motion, finding that there were issues of fact in dispute concerning whether the stacking exclusion applied. Marsh is back before us, arguing that "now squarely before this Court is the applicability of the Stacking Exclusion." Marsh

argues that BRS cannot establish that the anti-stacking provision applied to limit coverage, and that to the extent there is any ambiguity in the provision, it must be construed in favor of BRS, the insured, to find that there was no limitation of coverage. While we affirm the motion court's denial of summary judgment to defendants, we do so on different grounds, finding that there is no issue of fact as to the applicability of the tie-in provision, that there is no ambiguity in the provision and that the provision clearly limits the liability of AISLIC when it and another AIG company provide coverage for the same claim.

Regarding Marsh's argument that the provision is ambiguous, a reading of the provision by replacing the term "insurer" with AISLIC dispels any ambiguity. The provision, as is relevant here, would read as follows:

> "In the event other insurance is provided to . . . a Portfolio Entity . . . and such other insurance is provided by the Insurer [AISLIC] or any other member company of American International Group, Inc., (AIG) . . . then the Insurer's [AISLIC'S] maximum aggregate Limit of Liability for all Losses combined in connection with a Claim covered, in part or in whole, by this policy and such other insurance policy issued by AIG shall not exceed the greater of the Limit of Liability of this policy or the limit of liability of such other AIG insurance policy."

Put plainly, AISLIC is providing $20 million in coverage to the directors and officers of BRS through this policy. However,

if a Portfolio Entity (in this case Jitney-Jungle) is insured by AISLIC or any other member of AIG (National Union, which is an AIG member), and both BRS and Jitney seek coverage for the same claim, then AISLIC's maximum *aggregate* limit for all losses *combined in connection with a claim covered by this policy and the other AIG policy* will be the greater of either this policy ($20 million) or the Jitney policy ($15 million). If AISLIC's policy is all that matters in this provision, then it would make no sense for the provision to refer to other insurance provided by AISLIC *or any member of AIG,* or to make reference to "a Claim covered, in part or in whole, by this policy and such other insurance policy issued *by AIG"* (emphasis added). For that matter, if AISLIC's policy is the only relevant policy here, then the language about how the insurer's maximum aggregate limit of liability shall not exceed the greater of this policy or the limit of such other AIG policy is meaningless because of course, AISLIC's liability is limited by its policy and there would be no need to include that language absent a tie-in with the coverage afforded by another AIG policy.

Any awkwardness over the use of the word "insurer" does not obscure the intent of the provision, when the word is read in the context of the entire provision. To read the provision as proffered by Marsh would render all references to AIG, AIG

insurance policy, or member company of AIG superfluous and without meaning. "Courts are obliged to interpret a contract so as to give meaning to all of its terms" (*Mionis v Bank Julius Baer & Co.*, 301 AD2d 104, 109 [2002]; *see also Greater N.Y. Mut. Ins. Co. v Mutual Mar. Off.*, 3 AD3d 44, 50 [2003]). Marsh argues that the plain wording of the policy does no more than limit AISLIC's total exposure to a given claim. That is accurate, as far as it goes. But the crux of the matter is the formula, or method, by which AISLIC's total exposure is limited. According to this provision, all losses are combined in connection with a claim under this policy and the same claim under any other AIG policy, and that is how AISLIC's aggregate limit of liability is determined.

The reason that AIG would want to include such a tie-in provision for all policies issued by any of its member companies is clear -- to limit its aggregate liability for the same claim. The reason why this is a problem for BRS is also clear. As is alleged by BRS as the underpinning for its breach of contract and negligence claims:

> "Notwithstanding that Marsh brokered nearly all of the applicable underlying insurance coverage for the portfolio companies, knew that the underlying coverage was purchased from other AIG companies, knew or should have known that other markets could have provided excess D&O coverage to BRS, and knew that a

> non-AIG insurance company had offered to provide excess D&O coverage that was not susceptible to the reduction in limits (since that company did not provide any underlying coverage), Marsh recommended that BRS buy the excess D&O coverage from the AIG company . . .”

Based on the foregoing, we affirm the motion court’s denial of defendant’s motion for summary judgment, and searching the record, we determine that partial summary judgment should be granted in favor of plaintiffs to the extent of determining that the tie-in provision was applicable to limit the coverage afforded under the policy (*see Murphy v RMTS Assoc. LLC*, 71 AD3d 582, 583-589 [2010] [Appellate Division has power to search the record and award summary judgment to a nonmoving party that did not appeal]). Plaintiffs’ request for sanctions is denied.

Accordingly, the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered June 29, 2010, which denied defendants’ second motion for summary judgment dismissing the complaint should be modified, on the law, to grant, upon our search of the record, partial summary judgment to plaintiffs to

the extent of determining that the tie-in provision was applicable to limit the coverage afforded under the policy, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JUNE 28, 2011

CLERK