SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 17, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

4255-
4255A-
4255B-
4255C

Index 602353/08

OFSI Fund II, LLC, et al.,
Plaintiffs-Appellants,

-against-

Canadian Imperial Bank of Commerce, etc., et al.,
Defendants-Respondents.

_____

Ressler & Ressler, New York (Ellen R. Werther of counsel), for appellants.

Mayer Brown LLP, New York (Christopher J. Houpt of counsel), for Canadian Imperial Bank of Commerce and CIBC, Inc., respondents.

Levi Lubarsky & Feigenbaum LLP, New York (J. Kelley Nevling, Jr. of counsel), for Bear Stearns Investments Products, Inc., Bear, Stearns & Co., Inc., and JP Morgan Chase & Co., respondents.

Akerman Senterfitt LLP, Fort Lauderdale, FL (Dee Dee Fischer of the Bar of the State of Florida, admitted pro hac vice, of counsel), for Bayside respondents.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered November 9, 2009, insofar as appealed from as limited by the briefs, dismissing the complaint in its entirety

as against defendants Canadian Imperial Bank of Commerce and CIBC, Inc. (the CIBC defendants) and dismissing the breach of fiduciary claims as against Bear Stearns Investment Products, Inc., Bear, Stearns & Co., Inc., and JP Morgan Chase & Co. (the Bear Stearns defendants) and defendant Bayside Capital, Inc., a/k/a Bayside Capital, LLC, and Bayside Recovery I, Inc., unanimously affirmed, with costs. Appeal from order, same court and Justice, entered October 14, 2009, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Orders, same court and Justice, entered June 8, 2010 and June 10, 2010, respectively, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for renewal, unanimously affirmed, without costs.

Sections 9.6, 10.6, and 10.14 of the Credit and Note Agreements are unambiguous. Therefore, we do not consider the affidavit of plaintiff Orchard First Source Capital, Inc.'s managing director about industry custom (*see e.g. Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Read together, the above-cited sections show that Canadian Imperial Bank of Commerce, as Administrative and Collateral Agent, did not breach the agreements by releasing a lien on collateral that was the subject of a sale; the Requisite Lenders had consented to such

sale. We decline to consider plaintiffs' contention – not raised until oral argument on their motion to renew and reargue – that Canadian Imperial Bank of Commerce failed to establish that it had complied with section 10.14. Similarly, we decline to consider plaintiffs' argument – made for the first time in a footnote in their appellate reply brief – that Canadian Imperial Bank of Commerce breached section 2.4 of the agreements by failing to distribute Net Asset Sale Proceeds in accordance with that section (*see e.g. Shia v McFarlane*, 46 AD3d 320 [2007]).

Plaintiffs are correct that a tort claim is not always duplicative of a contract claim (*see e.g. Sommer v Federal Signal Corp.*, 79 NY2d 540, 550-553 [1992]). However, their claims for gross negligence/willful misconduct sound in contract rather than tort. First, absent the Credit and Note Agreements, Canadian Imperial Bank of Commerce would have had no duty to plaintiffs to refrain from releasing a lien on collateral (*see id.* at 551; *Alitalia Linee Aeree Italiane, S.P.A. v Airline Tariff Publ. Co.*, 580 F Supp 2d 285, 293 [SD NY 2008]). Contrary to plaintiffs' contention, Canadian Imperial Bank of Commerce did not assume all the duties of an agent under New York law. Section 9.2(A) of the Credit and Note Agreements explicitly limits the duties of the Administrative Agent and Collateral Agent (*see G.K. Alan Assoc.*,

Inc. v Lazzari, 44 AD3d 95, 101 [2007], *affd* 10 NY3d 941 [2008]). Second, the injury is "not personal injury or property damage; there was no abrupt, cataclysmic occurrence . . . plaintiff is essentially seeking enforcement of the bargain" (*see Sommer*, 79 NY2d at 552). With respect to plaintiffs' willful misconduct claim, merely alleging that a breach of contract was "maliciously intended" does not give the breach of contract claim a separate and independent identity as a tort claim (*La Fleur v Montgomery*, 70 AD2d 545, 546 [1979]).

Plaintiffs submitted a series of e-mails on the motion to renew. While these e-mails may have been newly discovered by plaintiffs, they would not have changed the prior determination (*see* CPLR 2221[e]). Plaintiffs could not use the emails to create an ambiguity in the clear and unambiguous Credit and Note Agreements. These agreements were the basis for dismissing the contract claims (*see e.g. W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990]). Similarly, the e-mails would not have affected the dismissal of the gross negligence/willful misconduct claim.

On appeal, plaintiffs do not explain why New York rather than Delaware law should apply to their claim that the directors of Protocol (a Delaware corporation) breached their fiduciary duty to the corporation. The motion court correctly found that

plaintiffs, as creditors, could not assert breach of fiduciary duty as a direct claim, even if Protocol was insolvent (*see North Am. Catholic Educ. Programming Found., Inc. v Gheewalla*, 930 A2d 92, 94 [Del 2007]). In both the amended complaint and the proposed second amended complaint, plaintiffs assert claims as creditors rather than shareholders. Moreover, at oral argument, plaintiffs conceded that they were suing because Canadian Imperial Bank of Commerce had released the *creditors'* lien.

Plaintiffs' contention that the court's decision conflicts with *Edgewater Growth Capital Partners, L.P. v H.I.G. Capital, Inc.* (2010 Del Ch LEXIS 42, 2010 WL 720150 [2010]) is without merit. The Delaware Chancery Court denied the defendants' motion to dismiss "largely" because of the "great deal of evidence outside of the pleadings" that they submitted (2010 Del Ch LEXIS 42, *3, 2010 WL 720150, *1), not because it agreed with the plaintiffs' substantive arguments.

Plaintiffs never requested leave of the motion court to replead their breach of fiduciary duty claim as a derivative claim, and thus waived the argument that they should be permitted to do so (*see Gheewalla*, 930 A2d at 97). As there is no breach of fiduciary duty claim, there can be no claim for aiding and abetting breach of fiduciary duty. This is true regardless of

whether Delaware or New York law applies (*see e.g. Trenwick Am. Litig. Trust v Ernst & Young, L.L.P.*, 906 A2d 168, 215 [Del Ch 2006], *affd* 931 A2d 438 [2007]; *Fiala v Metropolitan Life Ins. Co.*, 6 AD3d 320, 323 [2004]).

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

ENTERED: MARCH 17, 2011

CLERK

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

4263 Jennifer Peck-Barnett, Index 350337/04
Plaintiff-Appellant,

-against-

Craig Barnett,
Defendant-Respondent.

_____

Teitler & Teitler, LLP, New York (Nicholas W. Lobenthal of counsel), for appellant.

Frederic P. Schneider, New York, attorney for the child.

_____

Order, Supreme Court, New York County (Saralee Evans, J.), entered July 9, 2010, which designated defendant father the temporary custodial parent with the authority to decide where the subject child would attend camp in the summer of 2010 and school in the 2010-2011 school year, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, and the order vacated.

The court erred in ordering a radical change in custody via an interim order, without the benefit of a full evidentiary record (*see Scotto v Scotto*, 66 AD2d 839 [1978]). The propriety of the order has been undermined by the child's improvement during the time the order was stayed by this Court pending this appeal. Proper resolution of the custody issue requires a prompt

trial, at which a full evidentiary record is developed, so that the court is armed with the facts sufficient determine the best interests of the child.

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

ENTERED: MARCH 17, 2011

CLERK

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4545-
4545A The People of the State of New York, Respondent,

Ind. 6518/01
6888/01

-against-

Jarrid Barnes,
Defendant-Appellant.

_____

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

_____

Judgments, Supreme Court, New York County (Michael J. Obus, J.), rendered November 13, 2008, resentencing defendant to an aggregate term of 3½ years, with 2½ years' postrelease supervision unanimously reversed, on the law, the resentences vacated and the original sentences without postrelease supervision reinstated.

As the People concede, defendant is entitled to relief under *People v Williams* (14 NY3d 198 [2010]), which invalidates the imposition of postrelease supervision upon resentencing of

defendants who have been released after completing their terms of imprisonment.

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

ENTERED: MARCH 17, 2011

CLERK

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4546 Monique Pillard, Index 109317/08
Plaintiff-Respondent,

-against-

Robert Goodman, et al.,
Defendants-Appellants,

Janet Neschis,
Defendant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Joseph L. Francoeur and Thomas W. Hyland of counsel), for appellants.

Kennedy Johnson Gallagher LLC, New York (Peter J. Gallagher of counsel), for respondent.

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Order, Supreme Court, New York County (Edward H. Lehner, J.), entered November 16, 2009, to the extent it denied the motion by defendants Goodman and Curtin to dismiss the complaint as against them, unanimously affirmed, with costs.

This action alleging legal malpractice arose out of defendants' representation of plaintiff in a lawsuit brought by Victoria Gallegos alleging employment discrimination against nonparty Elite Model Management Corp.; plaintiff, a 10% shareholder; and Elite's majority shareholder, director of finance and co-president. A bifurcated trial resulted in a verdict of liability against the Elite defendants and an award to

Gallegos of approximately $2.6 million in compensatory damages and $2.6 million in punitive damages against the corporate defendant. On appeal, this Court affirmed the liability verdict but vacated the damages award and remanded the matter for a new trial on the issue of damages (*see Gallegos v Elite Model Mgt. Corp.*, 28 AD3d 50 [2005]).

The instant complaint states a cause of action for legal malpractice by alleging that defendants were negligent in failing to proffer evidence at trial that plaintiff was no longer president of Elite when Gallegos's employment commenced, had limited authority to respond to Gallegos's complaints, and did not approve of or participate in the termination of Gallegos's employment, and that but for this negligence plaintiff would have been exonerated of liability and would not have incurred damages (*see InKine Pharm. Co. v Coleman*, 305 AD2d 151 [2003]). Plaintiff also alleges sufficiently that Curtin mishandled the Gallegos in-house complaint and failed to apprise her of Gallegos's early settlement demand in the amount of $50,000 (*see Boglia v Greenberg*, 63 AD3d 973, 975 [2009]).

The complaint further alleges that defendants' joint representation of all the Elite defendants in the Gallegos

action, in violation of Code of Professional Responsibility DR 5-105 (22 NYCRR 1200.24) (effective through March 31, 2009), divided their loyalties and prevented them from asserting the defense that plaintiff's co-defendants were the primary, if not the sole, actors in the decision to terminate Gallegos's employment; because of their joint representation, defendants could not request that the jury apportion liability among plaintiff and her co-defendants, resulting in the automatic imposition of joint and several liability on her (*see* CPLR 1601). While these allegations of a conflict of interest or a violation of attorney disciplinary rules alone could not support a cause of action, liability can follow where the divided loyalty results in malpractice (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 8 [2008]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [2004]).

Nor is the defense of the attorney judgment rule available to defendants on this record. Defendants have offered no reasonable strategic explanation for the failure to introduce arguably exculpatory evidence.

The breach of fiduciary duty cause of action is not duplicative of the malpractice cause of action since it is

asserted against Curtin in his capacity as a corporate director, not as an attorney.

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

ENTERED: MARCH 17, 2011

CLERK

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4547- Index 301630/05
4547A-
4547B-
4547C Ronald Fields,
Petitioner-Appellant,

-against-

Lucille Fields,
Defendant-Respondent.

_____

Arnold Davis, New York, for appellant.

Hoffman, Polland & Furman, PLLC, New York (Elliot R. Polland of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Matthew F. Cooper, J.), entered January 14, 2010, awarding defendant the principal amount of $20,000 plus interest and fees, pursuant to an order, same court and Justice, entered on or about December 9, 2009, and order, same court (Deborah A. Kaplan, J.), entered September 9, 2009, which granted defendant's application for appellate counsel fees, unanimously affirmed, without costs. Appeals from aforesaid orders unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

When plaintiff appealed the judgment of divorce and a subsequent judgment to this Court (*see* 65 AD3d 297 [2009], *affd* 15 NY3d 158 [2010]), he had not yet paid defendant the

distributive award and therefore still controlled the majority of the marital estate. Accordingly, since plaintiff's respective financial position gave him a distinct advantage over defendant, the court providently exercised its discretion in directing him to pay her appellate counsel fees (*see Silverman v Silverman*, 304 AD2d 41, 48-49 [2003]).

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

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

ENTERED: MARCH 17, 2011

CLERK

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4549 Mary Riviello, Index 8906/06
Plaintiff-Appellant,

-against-

Kujarge Kambasi, et al.,
Defendants-Respondents.

_____

Alpert & Kaufman, LLP, New York (Morton Alpert of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered December 18, 2009, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established prima facie that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) by submitting a radiologist's affirmed report that plaintiff's MRI films revealed evidence of degenerative disc disease predating the accident and no evidence of post-traumatic injury to the disc structures (*see Valentin v Pomilla*, 59 AD3d 184, 186 [2009]).

In opposition, plaintiff failed to raise a triable issue of fact (*id.*; *see also Jimenez v Rojas*, 26 AD3d 256, 257 [2006], *Diaz v Anasco*, 38 AD3d 295 [2007]) by not refuting defendants' evidence of the preexisting degenerative condition of the lumbar and cervical spine. In fact, some of plaintiff's experts also identify the degenerative condition. Although one of plaintiff's experts, Dr. Shein, identifies the cervical spine degeneration as having been aggravated by the accident, his failure to explain why he ruled out degenerative changes as the cause of plaintiff's spinal injuries renders his opinion that they were caused by the accident speculative (*see Valentin*, 59 AD3d at 186).

Moreover, absent any objective medical evidence that her injuries were caused by the accident, plaintiff's statements that she was limited in her ability to perform the normal activities of her life were insufficient to establish her 90/180-day claim. Further, despite plaintiff's claim that she was confined to bed and home from the date of the accident until ten weeks after the accident, plaintiff fails to offer competent medical proof that she could not perform substantially all her daily activities for 90 of the first 180 days following the accident because of an injury or impairment caused by the accident (*Linton v Nawaz*, 62 AD3d 434 [2009], *affd* 14 NY3d 821 [2010]; *see also Hutchinson v*

Beth Cab Corp., 207 AD2d 283 [1994]).

We have considered plaintiff's remaining arguments and find them without merit.

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

ENTERED: MARCH 17, 2011

CLERK

Gonzalez, P.J., Tom, Acosta, Richter, JJ.

4550 In re Kevin J. Kelly, Index 109540/09
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.
Respondents-Respondents.

_____

Daniel M. Bauso, Garden City, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Keith M. Snow of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen B. Rakower, J.), entered November 6, 2009, which denied the petition seeking, inter alia, to annul respondents' determination denying petitioner's application for accidental disability retirement benefits, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Credible medical evidence exists in the record rebutting the presumption that petitioner's disability was proximately caused by his work at the World Trade Center site (*see Matter of Jefferson v Kelly*, 51 AD3d 536, 537 [2008]; Administrative Code of the City of New York § 13-252.1[1][a]). It was determined that petitioner's psychological disability, resulting in part from stress unrelated to his work at the World Trade Center, did

not constitute an accidental injury within the meaning of Administrative Code § 13-252, and "[t]he Board of Trustees was entitled to rely upon the opinion of the Medical Board with respect to causation, notwithstanding conflicts in the medical testimony" (*see Matter of Casiano v Brown*, 209 AD2d 182, 183 [1994], *lv denied* 85 NY2d 804 [1995]).

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

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

ENTERED: MARCH 17, 2011

CLERK

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4552 The People of the State of New York, Ind. 3676/07
Respondent,

-against-

Norman Cajigas,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered February 21, 2008, convicting defendant, after a jury trial, of attempted burglary in the second degree and three counts of criminal contempt in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 6½ to 8 years, unanimously affirmed.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]), in which he asserted the prosecutor discriminated against male panelists. Defendant's claim that the court improperly applied the step-two standard of gender neutrality at step three, where the issue is pretextuality, is unpreserved (*see e.g. People v Jenkins*, 302 AD2d 247, 248 [2003], *lv denied* 100 NY2d 583 [2003]), 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 Hameed*, 88 NY2d 232, 237 [1996], *cert denied* 519 US 1065 [1997]). Regardless of whether "the court may have used the wrong nomenclature in describing its step-three ruling," (*People v Washington*, 56 AD3d 258, 259 [2008], *lv denied* 11 NY3d 931 [2009]), it implicitly credited the prosecutor's explanations and concluded that the nondiscriminatory reasons provided by the prosecutor for the challenges in question were not pretextual. This finding is supported by the record and is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]).

Defendant challenges the sufficiency and weight of the evidence supporting the attempted burglary conviction, with respect to the element of criminal intent. We reject those challenges (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant engaged in a pattern of violent and hostile conduct toward the victim, his former girlfriend, both before and after she obtained an order of protection barring defendant from any contact with her. The evidence establishes that when defendant attempted to enter the victim's apartment he did so with intent to commit a crime other than the unlawful entry itself. When an

order of protection is in effect, the unlawful entry itself cannot be used as the sole predicate crime to establish the intent element of burglary; however, the intent element will be satisfied if the defendant entered the premises with the intent to violate another provision of the order of protection, distinct from the trespass (*People v Lewis*, 5 NY3d 546, 551-552 [2005]). Here, the evidence permitted the inference that, beyond the attempted unlawful entry, defendant intended to violate the provision of the order requiring that he stay away from the victim, or intended to engage in other conduct prohibited by the order (*see People v Carpio*, 39 AD3d 433 [2007], *lv denied* 9 NY2d 873 [2007]). In any event, the totality of the evidence, including defendant's past conduct toward the victim, also permitted the jury to infer that he attempted to enter the apartment for the purpose of assaulting her or committing some other act that was criminal even without the order of protection.

The court's main charge and supplemental charges properly instructed the jury that intending to trespass, without more, would not establish the criminal intent element of second-degree burglary, but that the jury also had to determine that defendant intended to commit a crime inside the apartment, which could include violating another provision of the order of protection

(*see Lewis*, 5 NY3d at 552). The court correctly declined to charge that the criminal intent element could not be satisfied by an intent to commit an act that would be innocuous if the order of protection did not prohibit it. We find nothing in *Lewis* that would require such an instruction.

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

ENTERED: MARCH 17, 2011

CLERK

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4553 Diane Alston, et al., Index 17071/06
Plaintiffs-Respondents,

-against-

American Transit, Inc., et al.,
Defendants-Appellants,

CCY Limo, Inc., et al.,
Defendants-Respondents.

_____

Gallo Vitucci & Klar, New York (Yolanda L. Ayala of counsel), for appellants.

Jeffrey J. Shapiro & Associates, LLC, New York (Steven E. Millon of counsel), for Diane Alston and Regina Gilchrist, respondents.

Kornfeld, Rew, Newman & Simeone, Suffern (William S. Badura of counsel), for CCY Limo, Inc. and Jesus Colon, respondents.

_____

Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered December 4, 2009, which, in an action for personal injuries sustained in a car accident, denied the motion of defendants American Transit, Inc. and Michael Barcene for summary judgment dismissing the complaint and all cross claims as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The record demonstrates that defendant Barcene, the driver of an ambulette, was headed south and stopped in the left lane of a two-lane avenue waiting for the traffic light to change. Immediately in front of Barcene was a double-parked truck, in a position that straddled the parking lane adjacent to the curb and extended slightly into the left traffic lane in which Barcene was waiting. When the light changed, Barcene passed the truck without having to leave the left traffic lane. Having completely passed the truck, and still driving in the left lane, Barcene's vehicle was struck on the driver's side by a cab driven by defendant Colon, which was pulling out from the curb after picking up plaintiffs as passengers.

The motion court erred in denying summary judgment to the driver and owner of the ambulette based on the representation of plaintiff Alston that the ambulette "struck the entire right side" of the cab. This allegation, even if fully credited despite physical evidence to the contrary, does not raise a triable issue of fact. Barcene, who testified without contradiction that he proceeded in the left traffic lane and did not veer from that lane, "had the right-of-way and was entitled to anticipate that [Colon] would obey traffic laws which required

[him] to yield" (*Jacino v Sugerman*, 10 AD3d 593, 595 [2004]). Alston's speculation that Barcene was speeding is insufficient to defeat the motion (*see Murchison v Incognoli*, 5 AD3d 271 [2004]).

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

ENTERED: MARCH 17, 2011

CLERK

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4554 Todd Gabette, Index 106695/07
Plaintiff,

-against-

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

King Concrete Cutting & Drilling, Inc.,
Defendant-Respondent,

Long Island Concrete, Inc.,
Defendant.

_____

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

Maloof, Lebowitz, Connahan & Oleske, P.A., New York (Jerald F. Oleske of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered May 28, 2010, which denied the motion of defendants New York University and F.J. Sciame Construction Co., Inc. for summary judgment on their cross claims for contractual indemnification against defendant King Concrete Cutting & Drilling, Inc., unanimously affirmed, without costs.

Plaintiff seeks to recover damages for personal injuries allegedly sustained on January 19, 2007, when, while engaged in renovation work, he fell through an unsecured opening in a building owned by NYU. Sciame was the general contractor for the

renovation project. Pursuant to a work order dated January 16, 2007, Sciame hired King to create floor openings, including the opening through which plaintiff allegedly fell.

King's president submitted an affidavit stating that several weeks after King's work was completed, he received and signed a purchase order, dated January 16, 2007, containing an indemnification rider requiring King to indemnify NYU and Sciame against any and all claims arising out of the performance of King's work. King's president averred that he did not intend or expect that his signature on the purchase order would retroactively bind King to provide contractual indemnity to Sciame or NYU for plaintiff's accident.

The court properly determined that the affidavit of King's president raises triable issues of fact as to whether the indemnification provision was in effect on the date of plaintiff's accident (*see Temmel v 1515 Broadway Assoc., L.P.*, 18 AD3d 364 [2005]).

The court also properly determined that an issue of fact exists as to whether plaintiff's accident was caused solely by Sciame's negligence, thus rendering the indemnification provision unenforceable (*see* General Obligations Law § 5-322.1; *Gulotta v Bechtel Corp.*, 245 AD2d 75 [1997]). The work order provides that

"[a]ll openings will be secured immediately by others," and Sciame's senior project manager averred that it was "the practice and procedure" for Sciame to secure openings. Further, the King employee who cut the hole through which plaintiff allegedly fell stated that Sciame directed his work and that he was never told of the need to inform Sciame of the completion of his work.

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

ENTERED: MARCH 17, 2011

CLERK

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4555 Eric Benn, Index 102344/07
Plaintiff-Appellant,

-against-

Stefan Benn, et al.,
Defendants-Respondents,

Board of Managers of Le Toulouse Condominium,
Defendant.

_____

Annette G. Hasapidis, South Salem, for appellant.

Beckmann & Associates LLC, New York (Bruce H. Beckmann of counsel), for respondents.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered December 30, 2009, which, to the extent appealed from as limited by the briefs, granted respondents' motion to dismiss the complaint pursuant to CPLR 3211, unanimously reversed, on the law, without costs, and the first, second, third, fifth, sixth, and seventh causes of action reinstated.

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences

in favor of the plaintiff" (*Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2008] [internal citations omitted]). Further, plaintiff's submissions in response to the motion "must be given their most favorable intendment" (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982], *cert denied* 459 US 1146 [1983]).

Plaintiff alleged that he and his brother, Stefan, had an oral agreement which provided that in exchange for money and labor, plaintiff would receive title to the subject condominium unit, and that plaintiff paid a sum of money and provided labor for the renovation of the building. In response to the motion, plaintiff supplemented his complaint by averring that while he and Stefan argued over his shortfall of labor, they never disagreed whether plaintiff was entitled to ownership of the unit and only disputed how plaintiff should compensate Stefan for his insufficient contribution to the project. Plaintiff also stated that Bennco never held title to the apartment adversely until it transferred it to Stefan in 2004. Moreover, plaintiff maintained that prior to 2005 Stefan never stated that he would not deliver title to plaintiff and that plaintiff never demanded title until 2005.

Since plaintiff's claims are not based on Bennco wrongfully acquiring the apartment, but rather on defendants wrongfully refusing to transfer it to plaintiff, the statute of limitations began to run at the earliest in 2004, when Bennco transferred the deed to plaintiff's unit to Stefan, and at the latest when in 2005 plaintiff demanded title to his apartment and defendants refused (*see Morando v Morando*, 41 AD3d 559, 561 [2007]; *Maric Piping v Maric*, 271 AD2d 507, 508 [2000]). Indeed, the transfer of the title to Stefan was the only "identifiable, wrongful act" demonstrating Stefan's refusal to convey title to plaintiff (*Sitkowski v Petzing*, 175 AD2d 801, 802 [1991]).

There is no basis to conclude that the statute of limitations began to run in 1997, when defendants were legally able to convey the unit, especially since Bennco retained title to both plaintiff and Stefan's units until 2004, and such retention of title was not adverse to plaintiff. Further, we find that the reliance on e-mails written from plaintiff to Stefan in 2006 and 2007 was erroneous because the e-mails were ambiguous and did not expressly acknowledge that Stefan had refused to give plaintiff title to his apartment ten years before the commencement of this action, as defendants claim. In fact,

in construing the e-mails in a light most favorable to plaintiff, the conclusion to be drawn is that plaintiff was acknowledging that he and Stefan had been fighting over the value of his labor and not over whether or not plaintiff would receive title to the apartment.

To the extent the motion court found certain of the causes of action barred by the statute of frauds, we find that at a minimum, plaintiff's allegations raise triable issues of fact as to whether his behavior "constituted partial performance 'unequivocally referable' to the oral [agreement], and, as such, [are] sufficient to take the alleged agreement out of the statute of frauds" (*H.P.P. Ice Rink v New York Islanders*, 251 AD2d 249, 249 [1998] [citations omitted]).

On appeal, plaintiff does not seek relief from the dismissal of the fourth cause of action. He also concedes that the eighth cause of action for unjust enrichment is duplicative of the breach of contract claim, and thus that claim is not reinstated (*see Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski*, 14 AD3d 644, 645 [2005]). Further, to the extent the fifth cause of action for conversion is reinstated, it is limited to the portion

which alleged conversion of monies, since, as plaintiff acknowledges, "'an action sounding in conversion does not lie where the property involved is real property'" (*see Dickinson v Igoni*, 76 AD3d 943, 945 [2010] [citations omitted]).

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

ENTERED: MARCH 17, 2011

CLERK

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4556 The People of the State of New York, Ind. 47500C/05
Respondent,

-against-

Christian Burgos,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered September 17, 2007, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

Any error in declining defendant's request for a consciousness of guilt charge does not warrant reversal, since the court's charge as a whole gave the jury appropriate guidance and because any consciousness of guilt evidence was a minor component of the People's case in light of the overwhelming evidence of defendant's guilt (*see e.g. People v Valtin*, 284 AD2d 203 [2001] *lv denied* 97 NY2d 643 [2001]). There is no reasonable

possibility that a consciousness of guilt charge would have resulted in a different verdict.

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

ENTERED: MARCH 17, 2011

CLERK

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4557-
4558 Prime Income Asset Management, Inc., et al., Plaintiffs-Appellants,

-against-

American Real Estate Holdings L.P., et al., Defendants-Respondents.

[And A Third-Party Action]

Index 603164/05
590118/09

_____

Guzov Ofsink, LLC, New York (Gregory P. Vidler of counsel), for appellants.

Cozen O'Connor, New York (Kenneth G. Roberts of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 29, 2010, awarding defendants the sum of $916,754.10 on the first counterclaim pursuant to an order, same court and Justice, entered December 22, 2008, which, inter alia, granted defendants' motion for summary judgment on the first counterclaim, and order, same court and Justice, entered May 11, 2010, which, insofar as appealed from, denied plaintiffs' motion for leave to renew, unanimously affirmed, with costs.

Supreme Court properly determined that plaintiffs failed to

raise an issue of fact regarding defendants' alleged waiver of their entitlement to the liquidated damages set forth in paragraph 12(b) of the contract. Even if, as plaintiffs contend, the letter dated June 15, 2005 could rise to the level of a waiver of defendants' contractual right to seek liquidated damages, or constitute a written amendment to the contract vitiating defendants' right to seek the liquidated damages, the satisfaction of the condition set forth in section 12(b)(iii) occurred on April 18, 2005, two months earlier. Supreme Court and this Court have already determined that the contract terminated then, and, under the law of the case doctrine, this is a determination which cannot be revisited (41 AD3d 176 [2007], *lv dismissed* 10 NY3d 740 [2008]; *see People v Evans*, 94 NY2d 499, 502-504 [2000]).

In any event, the letter does not rise to the level of "affirmative conduct" evincing a waiver of defendants' right to seek liquidated damages under section 12(b) of the contract because it specifically invokes an entirely different contractual provision – section 5(b) – and never mentions section 12(b)(*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]). The letter cannot be construed as a "voluntary and intentional abandonment" of the

contractual right to seek liquidated damages (*Matter of Lamberti v Angiolillo*, 73 AD3d 463, 463 [2010], *lv denied* 15 NY3d 711 [2010], quoting *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]).

Equally unavailing are plaintiffs' arguments that the letter constituted a written amendment to the contract thereby waiving defendants' entitlement to liquidated damages. Section 18 of the contract requires amendments to be in writing and to be consented to in writing. No such consent is alleged to have existed. Therefore, the letter cannot constitute a contractual amendment. Moreover, it is undisputed that the letter was sent via e-mail, and section 17 requires that any such notices or amendments be "either delivered personally or sent by a nationally recognized overnight courier service" to specified addresses.

Supreme Court also properly denied plaintiffs' motion to renew for three reasons. First, it was not based upon "new facts" and therefore was actually a motion to reargue, the denial of which is not appealable (CPLR 2221 [e][2]; see *McCoy v Metropolitan Transp. Auth.*, 75 AD3d 428, 430 [2010]). Second, plaintiffs' purported "justification" for not presenting the motion court with the allegedly new facts was not "reasonable" pursuant to CPLR 2221 (e)(3). Plaintiffs are charged with the

duty to "exercise[] due diligence in making their first factual presentation" on a motion, and their own failure to apprise the motion court that they had received the deposits, which amounted to nearly one million dollars, well over two years earlier, was unjustified and unreasonable (*Sobin v Tylutki*, 59 AD3d 701, 702 [2009]; *see* CPLR 2221 [e][3]). Third, even if the facts were deemed "new" and plaintiffs had presented a "reasonable justification" for not offering them, those facts would still not "change the prior determination" (CPLR 2221 [e][2]).

We have considered appellants' other contentions and find them unpersuasive.

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

ENTERED: MARCH 17, 2011

CLERK

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4560 The People of the State of New York, Ind. 5070/08
Respondent,

-against-

Robert Snead,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jaime Bachrach 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 (Juan M. Merchan, J.), rendered on or about October 13, 2009,

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

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

ENTERED: MARCH 17, 2011

_____
CLERK

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

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4561-
4562N Eric Berrios,
Plaintiff-Respondent,

Index 21193/06

-against-

735 Avenue of the Americas, LLC, et al.,
Defendants-Appellants.

_____

Malapero & Prisco, LLP, New York (Frank J. Lombardo of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered July 8, 2010, which granted plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), unanimously affirmed, without costs. Appeal from order, same court (Laura G. Douglas, J.), entered on or about July 2, 2010, unanimously withdrawn pursuant to the parties' signed stipulation.

Defendants argue, for the first time on appeal, that Labor Law § 240(1) is inapplicable to the facts of this case because there was no collapse of a scaffold. However, even if plaintiff was working on what would become a permanent part of the building, he was exposed to an elevation-related hazard; he is

therefore entitled to the protection of the statute (*see e.g. John v Baharestani*, 281 AD2d 114, 119 [2001]). The I-beams, ribs, and plywood that, together with concrete, would become the second floor "served, conceptually and functionally, as an elevated platform or scaffold" (*Becerra v City of New York*, 261 AD2d 188, 189 [1999]). Since "sound scaffolds . . . do not simply break apart" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]), plaintiff met his initial burden on his motion by showing that the I-beam flipped, causing him to fall (*see Szpakowski v Shelby Realty, LLC*, 48 AD3d 268, 269 [2008], *lv denied* 12 NY3d 708 [2009]; *Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1994]). In addition, it is undisputed that there were no safety rails or netting on the day and at the site of plaintiff's accident (*see Laquidara v HRH Constr. Corp.*, 283 AD2d 169 [2001]).

Defendants argue that there is a triable issue of fact as to the availability of safety harnesses (*see Gallagher v New York Post*, 55 AD3d 488, 490 [2008], *revd* 14 NY3d 83 [2010]; *but see Milewski v Caiola*, 236 AD2d 320 [1997]). However, defendant general contractor admitted that there was no location to which a harness could have been tied. Therefore, defendants failed to raise the inference that plaintiff's failure to use a safety

harness was the sole proximate cause of his injury (*see Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 564-565 [2008]). The affirmation of defendants' attorney, asserting that there were places to which a safety harness could have been tied, is entitled to no evidentiary weight (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Finally, even if plaintiff could be found recalcitrant for failing to use a harness, defendants' "failure to provide proper safety [equipment] was a more proximate cause of the accident" (*see Milewski*, 236 AD2d at 320; *see also Blake*, 1 NY3d at 290).

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

ENTERED: MARCH 17, 2011

CLERK

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4563N Global Business Institute, Index 104918/06
Plaintiff-Appellant,

-against-

Rivkin Radler, LLP,
Defendant-Respondent.

_____

Heller, Horowitz & Feit, P.C., New York (Martin Stein of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 14, 2010, which, in an action alleging legal malpractice, denied plaintiff's motion for leave to amend the complaint to assert additional allegations of malpractice and to increase the ad damnum clause, and to transfer the action back from the Civil Court of the City of New York to Supreme Court, unanimously reversed, on the law, without costs, and the motion granted.

The motion court improvidently exercised its discretion in denying plaintiff's motion. Leave to amend the pleadings is freely granted, absent prejudice (*see Mandel, Resnik & Kaiser, P.C. v E.I. Elecs., Inc.*, 41 AD3d 386, 388 [2007]; *see also Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18 [1981]), and

plaintiff has stated, at this juncture, a cognizable claim against defendant law firm for failure to sufficiently advise it of the consequences of the tax escalation clause in the lease it eventually executed with its landlord several months after retaining defendant (*see Escape Airports (USA), Inc. v Kent, Beatty & Gordon, LLP*, 79 AD3d 437 [2010]). Furthermore, in view of the foregoing and the additional damages sought, the matter should be transferred to Supreme Court (*see Firequench, Inc. v Kaplan*, 256 AD2d 213 [1998]).

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

ENTERED: MARCH 17, 2011

CLERK

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

2378 OneBeacon America Insurance Index 601382/08
Company, etc., et al.,
Plaintiffs,

-against-

Newmont Mining Corporation, et al.,
Defendants-Respondents,

American Home Assurance, Company, et al.,
Defendants-Appellants,

Allstate Insurance Company, etc., et al.,
Defendants.

- - - - -

2379 OneBeacon America Insurance
Company, etc., et al.,
Plaintiffs-Appellants-Respondents,

Seaton Insurance Company, etc.,
Plaintiff,

-against-

Newmont Mining Corporation, et al.,
Defendants,

Allstate Insurance
Company, etc., et al.,
Defendants-Respondents,

Certain Underwriters at Lloyd's,
London, et al.,
Defendants-Respondents-Respondents.

_____

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Timothy R. Capowski of counsel), for American Home Assurance Company, Granite State Insurance Company, Insurance Company of the State of Pennsylvania and National Union Fire Insurance Company of Pittsburgh, PA, appellants.

Christie Pabarue Mortensen & Young, Philadelphia, PA (Ralph J. Luongo of the bar of the State of Pennsylvania, admitted pro hac vice, of counsel), for appellants-respondents.

Clausen Miller P.C., Chicago, IL (Michael Baughman of the bar of the State of Illinois, admitted pro hac vice of counsel), for Insurance Company of North America and Century Indemnity Company, respondents-appellants.

Rivkin Radler LLP, Uniondale (Frank A. Valverde of counsel), for Allstate Insurance Company, etc., and Fireman's Fund Insurance Company, respondents.

Tofel & Partners, LLP, New York (Robert L. Tofel and Mark A. Lopeman of counsel), for Newmont Mining Corporation and Dawn Mining Company, respondents.

_____

Order, Supreme Court, New York County (Charles Edward Ramos, J.), entered May 15, 2009, which, to the extent appealed from and not hereby rendered academic, granted the motion of defendant Dawn Mining Company to dismiss the complaint as against it for lack of personal jurisdiction, unanimously affirmed, without costs. Order, same court and Justice, entered October 23, 2009, which denied defendant Newmont Mining Corporation's motion to renew its motion to dismiss the action on grounds of forum non conveniens, unanimously reversed, on the law, the motion for renewal granted, and upon renewal, the motion to dismiss on grounds of forum non conveniens granted, without costs. Appeals by OneBeacon America Insurance Company and Stonewall Insurance Company and Continental Casualty Company and the Continental

Assurance Company from the order, unanimously withdrawn pursuant to the stipulations of the parties.

With regard to the first order under review, assuming arguendo that New York has general jurisdiction over Newmont, it does not have jurisdiction over Dawn as a mere department of Newmont. As stated in the case on which plaintiffs and the insurer defendants primarily rely, "New York courts regard one factor as essential to the assertion of jurisdiction over a foreign related corporation . . . Th[at] essential factor is common ownership . . . [N]early identical ownership interests must exist before one corporation can be considered a department of another corporation for jurisdictional purposes" (*Volkswagenwerk A.G. v Beech Aircraft Corp.*, 751 F2d 117, 120 [2d Cir 1984]). It is undisputed that Newmont owns only 51% of Dawn and that the other 49% is owned by a corporation independent of Newmont. This does not constitute common ownership (*see e.g. Antares Aircraft v Total C.F.P.*, 1991 WL 19997, *4, 1991 US Dist LEXIS 1511, *10 [SD NY 1991], *affd* 948 F2d 1275 [2d Cir 1991] [51.8% not enough]; *Levy v Plastocks, Inc.*, 744 F Supp 570, 572 [SD NY 1990] [50% not enough]).

New York does not have long-arm jurisdiction over Dawn pursuant to CPLR 302(a)(1) on the theory that Newmont was acting

as Dawn's agent when it purchased the insurance policies at issue (*see Insurance Co. of N. Am. v EMCOR Group, Inc.*, 9 AD3d 319 [2004]). There is no evidence that Dawn exercised control over Newmont with respect to Newmont's purchase of insurance (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]).

The motion court properly exercised its discretion in denying the insurers' request for jurisdictional discovery. As the court noted, the relationship between Newmont and Dawn has been thoroughly explored in a trial in another case. Furthermore, no amount of jurisdictional discovery will change the fact that Newmont owns only 51% of Dawn or that Newmont controlled Dawn, and not the other way around (*see generally Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 554 [2006]).

With regard to the second order under review, Newmont was entitled to renewal of its motion to dismiss on grounds of forum non conveniens. In support of renewal, Newmont presented the new fact that the federal court presiding over the substantially parallel action in the State of Washington had determined not to dismiss or stay that action in favor of this one. Upon consideration of the pendency of the Washington action and all other relevant circumstances, we find that the motion court improvidently exercised its discretion in retaining jurisdiction,

since Newmont established that New York is an inconvenient forum (*see e.g. Anagnostou v Stifel*, 204 AD2d 61 [1994]).

The subject matter of both this action and the Washington action -- insurance coverage for environmental liability relating to a uranium mine (the Midnite Mine) in the State of Washington -- has no substantial connection to New York. Of the 11 insurers seeking to litigate in New York, only three excess insurers, neither of which is a plaintiff, have their principal places of business in New York and only one is a New York corporation. Newmont, the insured, is a Delaware corporation, headquartered in Colorado, which has no offices in New York and has had no presence in New York since 1989. Dawn, the Newmont subsidiary that operated the Midnite Mine, is not even subject to jurisdiction in New York, as discussed above; hence, all interested parties cannot be joined in this action. It is undisputed that, in prior coverage litigation it was held that Colorado law applies to virtually all of the policies at issue. Further, the underlying CERCLA action is being litigated in Washington State federal court, before the same judge presiding over the parallel coverage action.

The Washington federal court is a superior forum for resolution of this coverage dispute because all necessary parties

are before that court; by contrast, Dawn, as noted, cannot be compelled to litigate in New York. Accordingly, our responsibility to promote judicial efficiency and to discourage duplicative and piecemeal litigation warrants our deference to the coverage action in Washington.

The superiority of the Washington forum is undiminished by the purported coverage disputes having nothing to do with the Midnite Mine raised by plaintiffs and by one defendant, Insurance Company of North America (INA), in a cross claim. The claims for declaratory relief based on these "disputes", relating to mining activities at three other mines (in California, Arizona and Peru), have no substantial connection to New York, and reduce to little more than notices sent by Newmont's broker, with perfunctory responses by some of the insurers, which then slept languidly for some 10 years before being roused by plaintiffs and INA. Even assuming these alleged disputes are justiciable, they are plainly unrelated makeweights that lend no credence to the notion that there is more to this action than a coverage dispute concerning a mine in Washington. Moreover, the insurers raising these issues have not given us any reason to conclude they could not raise their claims in their responsive pleadings in the Washington action.

In view of the foregoing, Newmont's appeal of the first order under review is rendered academic.

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

ENTERED: MARCH 17, 2011

CLERK

Tom, J.P., Saxe, Catterson, Degrasse, JJ.

3461 In re Michael Lichtman, Index 106877/10
[M-4352] Petitioner,

-against-

Departmental Disciplinary Committee,
Respondent.

_____

Michael Lichtman, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Roberta L. Martin of counsel), for respondent.

_____

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

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

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

ENTERED: MARCH 17, 2011

CLERK

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

4353 The People of the State of New York, Ind. 3337/04
Respondent,

-against-

James Lanier,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Jean Soo Park of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, Bronx County (Michael A. Gross, J.), rendered February 5, 2009, resentencing defendant to a term of 7 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was lawful in all respects (*see People v Murrell*, 73 AD3d 598 [2010], *lv granted* 15 NY3d 854 [2010]; *People v Thomas*, 68 AD3d 514, 515 [2009], *appeal withdrawn* 14 NY3d 845 [2010]).

The resentencing only involved the imposition of post release supervision and therefore, the sentencing court had no occasion to revisit the original prison sentence. Similarly, the resentencing does not present this Court with such an occasion.

Were we to reach defendant's excessive sentence claim, we would find no basis to reduce defendant's sentence.

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

ENTERED: MARCH 17, 2011

CLERK

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

4372 Arnav Industries, Inc., Index 602491/06
Plaintiff-Appellant,

-against-

Jody Pitari,
Defendant-Respondent.

_____

Morris K. Mitrani, P.C., New York (Morris K. Mitrani of counsel), for appellant.

Grimble & LoGuidice, LLC, New York (Robert Grimble of counsel), for respondent.

_____

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered March 31, 2009, which denied plaintiff's motion to dismiss defendant's second defense and first counterclaim based on Multiple Dwelling Law § 302 and granted defendant's cross motion for summary judgment dismissing any claim for rent that accrued six years prior to the commencement of the action, unanimously modified, on the law, to grant plaintiff's motion, and otherwise affirmed, without costs.

Defendant's second defense and first counterclaim alleges that plaintiff is barred by Multiple Dwelling Law § 302 from collecting the rent defendant has withheld because the building has no certificate of occupancy and her apartment has no second means of fire egress. Plaintiff established prima facie

entitlement to summary judgment on the MDL § 302 defense. In an affidavit in support of the motion, plaintiff's architect stated that no new permanent certificate of occupancy had been issued because the Department of Buildings (DOB) will not issue a new permanent C of O so long as there is work being done in a building. The architect further stated that there is work being done unrelated to defendant's apartment. This delay in obtaining a new C of O for the building is not because plaintiff engaged in any "illegality" (*see Chatsworth 72nd St. Corp. v Rigai*, 71 Misc 2d 647, 651-652 [1972], *affd* 74 Misc 2d 298 [1973], *affd* 43 AD2d 685 [1973], *affd* 35 NY2d 984 [1975]). The temporary C of O's issued for defendant's 14th-floor apartment and the 14th floor demonstrate no code violations for construction on the 14th floor (*see* Multiple Dwelling Law § 301.4). Thus, plaintiff established that "the absence of the required certificate of occupancy [did not] adversely affect[] the habitability of the structure or render[] [defendant's] residential occupancy criminal or illegal" (*446 Realty Co. v Higbie*, NYLJ, Nov. 20, 2000, at 28, col 3 [Civ Ct, Richmond County, Hoffman, J.]).

In opposition, defendant failed to present evidence in admissible form that refuted plaintiff's evidence. Defendant submitted only an unsworn letter and an unsworn report from an

architect stating that his investigation revealed numerous defects in plaintiff's application to subdivide defendant's apartment and the other 14th-floor apartments. Defendant also failed to raise an issue of fact as to her claim of breach of the warranty of habitability since she submitted no evidence to support the claim (*see Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 328 [1979], *cert denied* 444 US 992 [1979]).

Plaintiff's claim for rent arrears is governed by a six-year statute of limitations that runs on each payment of rent from the date it becomes due (*see IG Second Generation Partners, LP v Kaygreen Realty Co.*, 22 AD3d 463, 465-466 [2005]; *Lemle 58th LLP v Wolf*, 2008 NY Slip Op 51713[U], *2 [2008]).

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

ENTERED: MARCH 17, 2011

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4527 In re Stephanie Devins, Index 402538/08
Petitioner,

-against-

Tino Hernandez, etc., et al.,
Respondents.

_____

Queens Legal Services Corp., Jamaica (Myrtle Jonas of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Samuel Veytsman of counsel), for respondents.

_____

Determination of respondent New York City Housing Authority (NYCHA), dated July 9, 2008, which, after a hearing, dismissed petitioner from her position with NYCHA's Law Department, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Paul G. Feinman, J.], entered May 29, 2009), dismissed, without costs.

NYCHA's findings that petitioner improperly used her position and the agency's equipment to access information or to persuade others to disclose information regarding the confidential relocation of her former co-tenant who had been designated a "Victim of Domestic Violence" (VDV), and unlawfully held herself out as a Law Department employee purporting to

communicate Law Department orders and directives to others in the agency, is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). The record indicates that petitioner's former co-tenant was properly designated a VDV under NYCHA's procedures. In any event, regardless of the propriety of the VDV designation, there was substantial evidence of petitioner's unlawful and unauthorized conduct, including authenticated e-mails, facsimiles, telephone logs, and the testimony of numerous witnesses.

The disciplinary penalty imposed was not so disproportionate to the offense as to shock one's sense of fairness (*see Matter of Featherstone v Franco*, 95 NY2d 550 [2000]; *see also Matter of Bruce v New York City House. Auth.*, 78 AD3d 414 [2010]).

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

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

ENTERED: MARCH 17, 2011

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4528 Yan Ping Xu, Index 103544/09
Plaintiff-Appellant,

-against-

City of New York, sued herein as
New York City Department of
Health and Mental Hygiene,
Defendant-Respondent.

_____

Yan Ping Xu, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Larry A. Sonnenshein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 14, 2009, which granted defendant's motion to dismiss the complaint and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, without costs.

Plaintiff previously raised her current claim under Civil Service Law § 75-b (Whistleblower Law) in a CPLR article 78 proceeding (*see* 22 Misc 3d 1116[A], 2009 NY Slip Op 50147[U] [2009], *mod* 77 AD3d 40 [2010]). At the time the order under review was decided, the motion court correctly held that the dismissal of the article 78 proceeding collaterally estopped plaintiff from raising the same claim in this action. However, that order ceased to have any preclusive effect once this Court

modified and remanded for further proceedings (*see Neufville v Walton-Seed*, 30 Misc 3d 133[A], 2011 NY Slip Op 50051[U] [2011]). Nevertheless, dismissal of the subject action is warranted pursuant to CPLR 3211(a)(4), because of the pending proceeding, without prejudice to plaintiff moving to amend her petition.

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

ENTERED: MARCH 17, 2011

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4529 Unitrin Advantage Insurance Company, Index 115586/07
Plaintiff-Respondent,

-against-

Bayshore Physical Therapy, PLLC, et al.,
Defendants,

Dr. Martin Bassiur, DDS, doing
business as, NY Craniofacial Pain
Management, et al.,
Defendants-Appellants.

_____

Israel, Israel & Purdy, LLP, Great Neck (William M. Purdy of counsel), for appellants.

Rubin, Fiorella & Friedman LLP, New York (Joseph R. Federici, Jr. of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered March 1, 2010, which denied defendants-appellants' motion for summary judgment dismissing the complaint, granted plaintiff's cross motion for summary judgment on the complaint, and declared that plaintiff does not owe coverage for the No-Fault claims allegedly assigned to defendants, unanimously affirmed, without costs.

The motion court properly determined that plaintiff insurer may retroactively deny claims on the basis of defendants' assignors' failure to appear for independent medical examinations

(IMEs) requested by plaintiff, even though plaintiff initially denied the claims on the ground of lack of medical necessity (*see Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 721-722 [2006]). The failure to appear for IMEs requested by the insurer "when, and as often as, [it] may reasonably require" (Insurance Department Regulations [11 NYCRR] § 65-1.1) is a breach of a condition precedent to coverage under the No-Fault policy, and therefore fits squarely within the exception to the preclusion doctrine, as set forth in *Central Gen. Hosp. v Chubb Group of Ins. Cos.* (90 NY2d 195 [1997]). Accordingly, when defendants' assignors failed to appear for the requested IMEs, plaintiff had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued (*see* Insurance Department Regulations [11 NYCRR] § 65-3.8[c]; *Fogel*, 35 AD3d at 721-22).

It is of no moment that the retroactive denials premised on failure to attend IMEs were embodied in blanket denial forms, or that they were issued based on failure to attend IMEs in a different medical speciality from that which underlies the claims at issue. A denial premised on breach of a condition precedent to coverage voids the policy ab initio and, in such case, the insurer cannot be precluded from asserting a defense premised on

no coverage (*see Chubb*, 90 NY2d at 199).

There is likewise no merit to defendants' contention that the IME request notices were invalid. Plaintiff satisfied its prima facie burden on summary judgment of establishing that it requested IMEs in accordance with the procedures and time-frames set forth in the No-Fault implementing regulations, and that defendants' assignors did not appear. In opposition, defendants failed to raise an issue of fact that the requests were unreasonable (*see generally Celtic Med. P.C. v New York Cent. Mut. Fire Ins. Co.*, 15 Misc 3d 13, 14-15 [2007]; *A.B. Med. Servs. PLLC v USAA Gen. Indem. Co.*, 9 Misc 3d 19, 21 [2005]).

Defendants' argument that plaintiff was required to demonstrate that the assignors' failure to appear for the IMEs was willful is unpreserved and, in any event, without merit. The doctrine of willfulness, as addressed in *Thrasher v United States Liab. Ins. Co.* (19 NY2d 159 [1967]), applies in the context of liability policies, and has no application in the No-Fault context, where the eligible injured party has full control over the requirements and conditions necessary to obtain coverage (*cf. id.* at 168).

Defendants' argument that all IMEs must be conducted by physicians is unavailing. Although Insurance Department

Regulations (11 NYCRR) § 65-1.1(d) states that "[t]he eligible injured person shall submit to medical examination *by physicians* selected by, or acceptable to, the [insurer] when, and as often as, the [insurer] may reasonably require," the regulations permit reimbursement for medically necessary treatment services that are rendered by non-physicians, such as chiropractors and acupuncturists, as well (*see Five Boro Psychological Servs., P.C. v AutoOne Ins. Co.*, 22 Misc 3d 978, 979-980 [2008]).

We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: MARCH 17, 2011

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4530 Aileen Johnson, et al., Index 8435/06
Plaintiffs-Respondents,

Denise Giles,
Plaintiff,

-against-

Felix E. Garcia,
Defendant-Appellant.

_____

Feinman & Grossbard, P.C., New York (Steven N. Feinman of counsel), for appellant.

Mitchell Dranow, Sea Cliff, for respondents.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered August 30, 2010, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing the cause of action asserted by plaintiff Aileen Johnson on the threshold issue of serious injury, unanimously modified, on the law, to grant the motion as to the claim of injuries to the cervical spine and the 90/180-day claim, and otherwise affirmed, without costs.

Defendant established prima facie that plaintiff did not sustain a serious injury to her lumbar spine as a result of the March 26, 2003 accident. He submitted the reports of two doctors who concluded, based on their examinations of plaintiff, that the

range of motion in her lumbar spine was normal and that any spinal strain or sprain had been resolved, and the reports of two other doctors, who concluded that the spinal condition was a pre-existing degenerative condition that was not caused by the accident (*see Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]; *Shinn v Catanzaro*, 1 AD3d 195, 197 [2003]).

In opposition, plaintiff submitted objective medical evidence sufficient to raise factual issues as to the "permanent consequential limitation" or "significant limitation" categories of serious injury (Insurance Law § 5102[d]). The affirmed report of Dr. John McGee, who examined plaintiff two days after the accident and noted a limited range of motion in plaintiff's lumbar spine, and the MRI of the spine, taken in May 2003 at Dr. McGee's request, which revealed "L5-S1 annular disc bulges with thecal sac compression," constitute objective medical evidence of a serious injury contemporaneous with the accident (*see Lazarus v Perez*, 73 AD3d 528 [2010]; *Prestol v McKissock*, 50 AD3d 600 [2008]). Dr. McGee's reports, the affirmed operative report of Dr. John Houten, who performed a discectomy on the L5-S1 area on March 29, 2007, and the affirmed report of Dr. Paul Lerner, who examined plaintiff in March 2009 and found a limited range of motion in the lumbar spine, provide objective evidence of the

extent or degree of the physical limitation and its duration that is sufficient to defeat summary judgment (*see Noble v Ackerman*, 252 AD2d 392, 394 [1998]). The difference of opinion between Dr. Lerner and defendant's expert, Dr. David Milbauer, as to whether plaintiff's symptoms were proximately caused by the accident or result from a pre-existing degenerative condition also raises triable issues of fact (*see Torain v Bah*, 78 AD3d 588, 588 [2010]).

Plaintiff does not oppose the dismissal of either her claim of serious injury of a permanent nature to the cervical spine or her claim of serious injury of a nonpermanent nature. In any event, as to the latter, the record establishes that plaintiff returned to work one or two days after the accident, and submitted no evidence of a medical determination that she was unable to engage in substantially all her usual and customary daily activities for 90 of the first 180 days after the accident (*see Blake v Portexit Corp.*, 69 AD3d 426, 426-427 [2010]).

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

ENTERED: MARCH 17, 2011

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4531-
4532 Index 111768/06

Harlem Real Estate LLC, et al.,
Plaintiff-Appellants,

-against-

New York City Economic Development
Corporation, et al.,
Defendants-Respondents.

_____

Gleich, Siegel & Farkas, Great Neck (Stephan B. Gleich of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Karen S. Smith, J.), entered June 10, 2009, which granted defendants' motion for summary judgment dismissing the complaint and declaring in their favor on their counterclaims, unanimously modified, on the law, to deny the part of the motion that seeks to dismiss the first cause of action and to declare in defendants' favor on that cause of action, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered October 28, 2009, which, upon reargument of defendants' motion, adhered to the original determination, unanimously dismissed, without costs, as academic.

In opposition to defendants' motion, plaintiffs failed to show that "facts essential to justify opposition may [have]

exist[ed] but [could not] then be stated" so as to warrant the additional disclosure they sought (CPLR 3212[f]). In light of the existing record, it is clear that further discovery would reveal no evidence that would raise an issue of fact as to the validity of the conditions subsequent in the Harlem property contract and deed.

Further, the record presents no issue of fact whether plaintiffs' subsequent lease in the Bronx obviated their obligations with respect to the Harlem property. Indeed, the parties entered into a modification of the original deed to the Harlem property that reaffirmed the original conditions subsequent.

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

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

ENTERED: MARCH 17, 2011

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4533 The People of the State of New York, Ind. 1599/09
Respondent,

-against-

Darrell Williams,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about January 15, 2010,

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: MARCH 17, 2011

CLERK

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

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4534 Gerardo Rodriguez, Index 25385/00
Plaintiff-Appellant,

-against-

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

John Does # 1-5, et al.,
Defendants.

_____

Joseph H. Neiman, Jamaica Estates, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucy Billings, J.), entered December 22, 2009, which, in action for personal injuries sustained when plaintiff spectator was struck in the eye by a baseball as he stood at an open gate in a fence surrounding a baseball field during batting practice, inter alia, granted the motion of defendants City of New York and the City's Department of Parks and Recreation for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was appropriate since plaintiff assumed the risk that resulted in his injury (*see Roberts v Boys & Girls Republic, Inc.*, 51 AD3d 246, 247 [2008], *affd* 10 NY3d 889 [2008]). The record demonstrates that plaintiff was aware that

batting practice was taking place as he was standing at the open gate in an effort to call to his young son who was on the field. Contrary to plaintiff's contention, the City did not have a duty to ensure that the subject gate along the third baseline be equipped with a latch or a self-closing mechanism (*see Akins v Glens Falls City School Dist.*, 53 NY2d 325, 331 [1981]).

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

ENTERED: MARCH 17, 2011

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4535 The People of the State of New York, Ind. 3157/06
Respondent,

-against-

Thomas A. Doyle,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.) rendered March 1, 2007 convicting defendant, upon his plea of guilty, of grand larceny in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal. The waiver forecloses defendant's claim that he was deprived of the right to retain counsel of his own choosing (*see People v Whitfield*, 52 AD3d 748 [2008], *lv denied* 11 NY3d 858 [2008]). That claim does not go to the voluntariness of defendant's plea (*cf. People v Parilla*, 8 NY3d 654, 660 [2007]). Defendant's claim that the court's denial of a further adjournment for the purpose of raising funds to hire private counsel "precipitated"

his plea and appeal waiver is conclusory and unsupported by the record.

As an alternative holding, we find that the court providently exercised its discretion in denying defendant's request for additional time to attempt to hire an attorney (*see People v Arroyave*, 49 NY2d 264, 270-271 [1980]). The court had previously afforded defendant reasonable opportunities to retain private counsel. In light of defendant's previous inability to secure the necessary funds despite purported attempts to do so, the court properly concluded that further delay was unwarranted.

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

ENTERED: MARCH 17, 2011

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4536 Steven Tanger, Index 116838/05
Plaintiff, 590531/08

-against-

Alfred Ferrer III, et al.,
Defendants/Third-Party
Plaintiffs-Appellants,

-against-

DLA Piper US LLP formerly known
as Piper & Marbury L.L.P.,
Third-Party Defendant-Respondent.

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

Kramon & Graham, P.A., Baltimore, MD (James P. Ulwick of the Bar of the State of Maryland, admitted pro hac vice of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 1, 2010, which, to the extent appealed from, as limited by the briefs, granted third-party defendant's motion to dismiss the third-party complaint asserting a claim for contribution, unanimously affirmed, with costs.

In this legal malpractice action, plaintiff alleges that defendant Alfred Ferrer III, when serving as a lawyer for him and his wife, negligently prepared three settlement tenders. Ferrer was employed by third-party defendant DLA Piper US LLP f/k/a

Piper & Marbury LLP when he prepared the first two tenders, and by defendant Eaton & Van Winkle, LLP (EV) when he prepared the third tender. Ferrer and EV instituted a third-party action for, among other things, contribution against DLA Piper. DLA Piper moved to dismiss the third-party complaint against it, arguing, in pertinent part, that EV, as a successive tortfeasor, had no right to contribution from it, as prior tortfeasor. We agree.

Where, as here, "the injuries caused by the original and successive tortfeasor are capable of being separated from or divided between one another, the successive tortfeasor, being liable only for the injuries that tortfeasor caused, has no right of contribution from the original tortfeasor" (*Cohen v New York City Health & Hosps. Corp.*, 293 AD2d 702, 703 [2002]).

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

ENTERED: MARCH 17, 2011

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4537 Geneva Johnson, Index 15929/06
Plaintiff-Appellant,

-against-

Karnail Singh, et al.,
Defendants-Respondents.

_____

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

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

Gallo, Vitucci & Klar LLP, New York (Yolanda L. Ayala of counsel), for William Mercado and American Transit, Inc., respondents.

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Order, Supreme Court, Bronx County (Nelson S. Román, J.), entered June 16, 2009, granting the motion of defendants Mercado and American Transit, Inc., and the cross motion of defendant Singh, for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants met their burden of establishing that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d). Defendants' orthopedist and radiologist concluded that plaintiff's injuries were preexisting and were not caused by the accident. Their conclusions regarding causation were

supported by objective medical proof, namely MRIs and surgical reports indicating that plaintiff had degenerative conditions in her knees (*compare Torres v Knight*, 63 AD3d 450 [2009], *with Rodriguez v Abdallah*, 51 AD3d 590 [2008]).

Plaintiff failed to submit sufficient evidence to raise an issue of fact as to her alleged injuries. Her treating physician failed to address the findings of degenerative change by defendants' radiologist and provided no support for his conclusion that plaintiff's arthritis was exacerbated by the accident (*see Depena v Sylla,* 63 AD3d 504, 505 [2009], *lv denied* 13 NY3d 706 [2009]).

Plaintiff has also failed to raise an issue of fact concerning her inability to perform substantially all of her routine activities for at least 90 of the first 180 days following the accident. Plaintiff testified that she was confined to bed for only a week after the accident, and there is no competent medical evidence that she was unable to perform her

usual and customary activities for the relevant time period (*see* *Lopez v American United Transp., Inc.*, 66 AD3d 407 [2009]).

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

ENTERED: MARCH 17, 2011

CLERK

Andrias, J.P., Friedman, Moskowitz, Richter, JJ.

4539 Rui Zhang, Index 115171/07
Plaintiff-Appellant,

-against-

20 East 80th Street Corp., et al.,
Defendants-Respondents,

Maria Twomey, etc.,
Defendant.

_____

Godosky & Gentile, P.C., New York (Jillian Rosen of counsel), for appellant.

Law Offices of James J. Toomey, New York (Eric P. Tosca of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 21, 2009, which, in an action for personal injuries allegedly sustained when plaintiff fell out of a bed and through an opening in a loft structure to the floor below, granted defendants-respondents' motion for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Respondents, the owner and manager of the building, established their prima facie entitlement to judgment as a matter of law by demonstrating that the loft structure and the ladder used to climb up to the loft, which had been there for more than

30 years without incident, were reasonably safe, and that they had no notice of a dangerous condition. Plaintiff's opposition fails to raise a triable issue of fact as to these matters. We note that there is no showing by plaintiff that the loft and ladder violate any statutory or common-law safety standard.

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

ENTERED: MARCH 17, 2011

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4540 The People of the State of New York, Ind. 2019/04
Respondent,

-against-

Anonymous,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about December 2, 2009,

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

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

ENTERED: MARCH 17, 2011

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CLERK

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

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4542N Macquarie Holdings (USA) Inc., Index 108542/09
Petitioner-Respondent,

-against-

Robert Song,
Respondent-Appellant.

_____

Liddle & Robinson, LLP, New York (James A. Batson of counsel), for appellant.

Jackson Lewis LLP, White Plains (Ian H. Hlawati of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 3, 2009, which granted the petition to stay arbitration before the Financial Industry Regulatory Authority (FINRA), unanimously reversed, on the law, without costs, the petition denied, and the proceeding dismissed.

When respondent became an employee of petitioner, he signed a Uniform Application for Securities Industry Registration or Transfer form (Form U-4), in which he agreed to arbitrate any disputes arising with petitioner under the rules of FINRA. He subsequently executed a letter agreement (Agreement), which requires arbitration of all claims arising from the employment relationship with petitioner under the Employment Dispute Resolution Rules of the American Arbitration Association, except

for, in pertinent part, "a claim that would otherwise be covered under a U4 agreement."

Since respondent's claims in this wrongful termination action are covered under the Form U-4, they fall within the "carve out" provision of the Agreement and therefore are not subject to petitioner's mandatory arbitration procedures (*see Credit Suisse First Boston Corp. v Pitofsky*, 4 NY3d 149 [2005]). The Agreement does not unambiguously supplant the Form U-4, and any ambiguity in the Agreement must be construed against petitioner as the drafter thereof (*see generally Yudell v Israel & Assoc.*, 248 AD2d 189, 189-190 [1998]).

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

ENTERED: MARCH 17, 2011

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4543N PSKW, LLC, etc., Index 602921/07
Plaintiff-Appellant,

-against-

McKesson Specialty Arizona, Inc.,
Defendant-Respondent.

_____

David A. Robinson, New York, for appellant.

Fish & Richardson, P.C., New York (J.P. Smith of counsel for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 23, 2010, which, to the extent appealed from, denied plaintiff's motion to modify the referee's report sustaining defendant's assertion of the attorney-client privilege as to certain documents, unanimously affirmed, with costs.

Defendant having made a threshold showing of its entitlement to the protection of the attorney-client privilege, the court, in

its discretion, was free to conduct an in camera review of the withheld documents.

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

ENTERED: MARCH 17, 2011

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4544 In re Keith Agard, etc., Ind. 4234/09
[M-460] Petitioner,

-against-

Hon. Judge Renee A. White, et al.,
Respondents.

_____

Kenith Agard, petitioner pro se.

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

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

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

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

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

ENTERED: MARCH 17, 2011

CLERK