SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 28, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

6059 Bianca Langer, et al., Index 100614/08
Plaintiffs-Appellants,

-against-

116 Lexington Avenue, Inc., et al.,
Defendants-Respondents.

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Julien & Schlesinger, P.C., New York (Mary Elizabeth Burns of counsel), for appellants.

Kral Clerkin Redmond Ryan Perry & Van Etten, LLP, New York (James V. Derenze of counsel), for respondents.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered August 5, 2010, which, in an action for personal injuries, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff Bianca Langer was injured on November 10, 2007, when she fell on a five-inch single step transition at the entrance to a second-floor banquet room at a restaurant in midtown Manhattan. By summons and complaint dated January 15, 2008, plaintiff and her husband commenced a personal injury suit against the restaurant, the building owner, and two individual defendants, who are officers of the owner and co-managed the

restaurant. Plaintiffs allege, inter alia, that the step was a dangerous condition that defendants negligently allowed to persist and of which defendants failed to warn. They further argued that the step violated sections of the New York City Building Code, including Administrative Code of the City of N.Y. § 27-375(d)(2) and (f) (requiring a handrail for step[s] having less than two risers in succession), and § 27-370(d) (requiring a "ramp" in an "exit passageway" where there are fewer than two risers).

At the conclusion of discovery, defendants moved for summary judgment dismissing the complaint. Defendants argued, inter alia, that the step was not a latent dangerous condition, and even if it was, adequate warnings of the step were provided. In support of their motion, defendants submitted the affidavit of an engineering expert who opined that the step was clearly visible, and that the injury occurred as a result of plaintiff wife's carelessness in failing to make normal and expected observations of the area in front of her including the step. Plaintiffs' engineering expert countered in his affidavit that the similarity in the flooring of the hallway and the banquet room obscured the step.

In a decision and order dated August 3, 2010, the motion court granted defendants summary judgment and dismissed the

complaint. The motion court found that plaintiffs failed to raise a triable issue of fact as to the existence of a latent defective condition, and disagreed with plaintiffs' contention that the step violated the Building Code. Since plaintiffs did not oppose defendants' motion as to the individual defendants, the court dismissed the complaint against them. On appeal, plaintiffs argue that the motion court erred in dismissing their complaint against the restaurant and building owner because the conditions of the step area created "optical confusion," rendering the step dangerous.

For the reasons set forth below we find that the step was not a latent defective condition. There is no evidence of "optical confusion" and defendants did not violate the Building Code.

It is well established that owners and lessees have a duty to maintain their property in a reasonably safe condition (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]). A defendant moving for summary judgment has the initial burden of showing that it did not create a dangerous condition, or have actual or constructive notice of a dangerous condition (*Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518 [2010]).

Defendants demonstrated their prima facie entitlement to summary judgment. Defendant restaurant manager testified that

the step existed at the time the building was purchased by defendants. Defendants refinished the floor prior to opening the restaurant and affixed strips of reflector tape to the hallway floor leading to the step at the entrance to the banquet room. Furthermore, the manager testified there had been no prior accidents in the step area in the 28 years since the restaurant opened (*see e.g. Remes v 513 W. 26th Realty, LLC*, 73 AD3d 665 [2010] [the defendants granted summary judgment because the deposition testimony established that no prior similar incidents had occurred and that bright lights illuminated the stairway area, and photographs showed an obvious drop in elevation and trimmings against the wall outlining the steps]; *Burke v Canyon Rd. Rest.*, 60 AD3d 558 [2009] [the defendants granted summary judgment because deposition testimony established that the area of the step was illuminated, and that the general manager of the restaurant for the last several years was not aware of any complaints or accidents]).

In opposition, plaintiffs fail to raise a triable issue of fact as to the dangerous condition of the step. A condition that is visible to one "reasonably using his or her senses" is not inherently dangerous (*Tagle*, 97 NY2d at 170). However, a step may be dangerous where the conditions create "optical confusion" -- the illusion of a flat surface, visually obscuring the step

(*Brooks v Bergdorf-Goodman Co.*, 5 AD2d 162, 163 [1958]. "[F]indings of liability have typically turned on factors, such as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition" (*Schreiber v Philip & Morris Rest. Corp.*, 25 AD2d 262, 263 [1966], *affd*, 19 NY2d 786 [1967]).

More recently, this Court examined these factors and found that the plaintiff raised a triable issue of fact as to whether the condition of a five-inch transition step outside of a store created "optical confusion." In *Saretsky v 85 Kenmare Realty Corp.* (85 AD3d 89 [2011]), the plaintiff presented evidence that the concrete surface of the step and the sidewalk at the bottom of the step were similar shades of gray and that the painted line marking the top edge of the transition step was very worn. The similarity in surface colors and failure to demarcate the edge of the step created the illusion of a level surface and there were no signs warning of the step (*id.* at 92-93).

This case presents an entirely different scenario. Photographs in the record indicate that four reflective strips are positioned parallel to the step and each other, spaced two to three inches apart, and graduated in size with the longest strip placed on the top edge of the step. During deposition,

plaintiffs described the strips as "bright" and the lighting in the hallway and banquet room as "ordinary" and "well-lit." As the motion court noted, a sign, which read "Step Down" with an arrow pointing diagonally downward toward the step, was placed on the wall near the entrance to the banquet room and visible to anyone walking down the hallway (*see e.g. Broodie v Gibco Enters., Ltd.*, 67 AD3d 418 [2009] [summary judgment granted to the defendant because photographs depicted the step as clearly painted in white and black so as to be visible, and black and yellow "CAUTION WATCH YOUR STEP" signs were posted nearby]).

Furthermore, unlike the plaintiff in *Saretsky*, plaintiff's testimony establishes that she was "not looking." She testified that she was looking "straight ahead" into the banquet room at the bartender (*compare Saretsky*, 85 AD3d at 92 [the plaintiff testified that she "didn't see" the step, not that she was "not looking"]).

Plaintiffs' reliance upon Administrative Code §§ 27-217, 27-232, 27-370(d) and § 27-375(f) to argue that the single step constituted a negligent design, and that a ramp and handrail were warranted for the banquet entranceway, is misplaced. The step in question does not fit within the definition of "interior stairs" (*see* Administrative Code § 27-232; § 27-375[f]), since it does not serve as a "required exit." The step was located on the

building's second floor and was separated by a common hallway and a flight of stairs from an exit door on the first floor (*see e.g. Cusumano v City of New York*, 15 NY3d 319, 324 [2010] [the stairs where plaintiff fell did not serve as an "exit," but rather as a means of walking from the first floor to the basement]; *Remes*, 73 AD3d at 666 [2010] [subject stairs did not serve as an exit to the building]). The step also did not fit within the definition of an "exit passageway" (*see* Administrative Code § 27-232; § 27-370[d]), since an exit passageway does not include corridors, or corridor doors, which, in this case, exist between the step and the exit door on the first floor.

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

ENTERED: FEBRUARY 28, 2012

CLERK

Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6440 Teresa Sanchez, Index 102115/08
Plaintiff-Appellant,

-against-

National Railroad Passenger Corp., et al.,
Defendants-Respondents,

"ABC" Corp., etc.,
Defendant.

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Arnold E. DiJoseph, New York, for appellant.

Jeffrey Samel & Partners, New York (David Samel of counsel), for respondents.

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Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered July 2, 2010, dismissing the complaint, affirmed, without costs.

Plaintiff's complaint, filed February 6, 2008, seeks damages for injuries she sustained from a fall that allegedly occurred on February 10, 2005, while she was doing cleaning work at Penn Station. Defendant moved for summary judgment, dismissing the complaint as time barred. It was defendant's position that the accident occurred on February 5th not February 10th. In support, defendant submitted an affidavit by Angela Mendez, plaintiff's supervisor in February 2005. Mendez stated that it was her job at the time to keep an attendance log for all employees who

worked plaintiff's shift. Attached to Mendez's affidavit were three exhibits: (1) a Supervisor's Report of Injury completed by Mendez on February 6, 2005; (2) an Employer's Report of a Work Related Accident/Occupational Disease on February 5, 2005 (Form C-2); and (3) the Payroll Timesheet for the first week in February 2005. The three documents, generated within days of plaintiff's accident, are consistent as to the decisive fact on the motion, that plaintiff was injured at work on February 5, 2005.

Mendez stated that in February 2005, plaintiff worked five days a week (Saturday, Sunday, Monday, Tuesday, and Wednesday), and was off on Thursdays and Fridays. The payroll timesheet demonstrates that plaintiff worked on both Saturday, February 5th and Sunday, February 6th, 2005, but not on Thursday, February 10, 2005. At her deposition, plaintiff testified that she could not remember the exact date of her accident. However, her testimony was clear that she reported the incident to her supervisor on the day after it occurred, which is consistent with the February 6, 2005 reporting date referenced in Mendez's exhibits.

Contrary to plaintiff's initial argument in opposition to summary judgment, that the documentary evidence submitted with Mendez's affidavit was inadmissible hearsay, her own deposition testimony and the supervisor's affidavit provide an adequate

foundation for a finding that the report and payroll documents were prepared in the ordinary course of business, pursuant to the supervisor's business duty to do so, and within a reasonable time after the accident (CPLR 4518[a]; *see Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 480 [2007]).

Plaintiff's complaint fails to raise a question of fact as to whether the accident occurred, as she contends, on February 10, 2005. It conflicts with unequivocal documentary evidence, completed within days of plaintiff's accident by an objective third party, that the accident occurred on February 5th, rendering the action time-barred. Plaintiff's deposition testimony is similarly insufficient to raise a triable issue of fact since it is both equivocal and self-contradictory as to the date of the accident (*see e.g. Garcia-Martinez v City of New York*, 68 AD3d 428, 429 [2009]). The totality of plaintiff's submissions create only a feigned issue of fact, and they are therefore insufficient to defeat defendant's motion.

In sum, plaintiff's naked allegation, in her pleadings, that her accident occurred on February 10, 2005, is insufficient, as a matter of law to refute the objective admissible documentary evidence conclusively establishing that the accident occurred on February 5th. No credibility determinations need be made to reach this conclusion.

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

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

DeGRASSE, J. (dissenting)

I respectfully dissent. This motion was made pursuant to CPLR 3211(a)(5) and 3212 on the ground that this action is time-barred. The specific issue is whether plaintiff's accident occurred on February 5, 2005, as defendants contend, or on February 10, 2005, as plaintiff alleges. In the complaint and bill of particulars, which plaintiff herself verified in January and April 2008 respectively, the date of occurrence is recited as February 10, 2005. Nevertheless, the motion court granted the motion mostly on the basis of an accident report that was prepared by plaintiff's employer.

Citing CPLR 105(u), this Court has held on a number of occasions that a verified pleading is the statutory equivalent of a responsive affidavit for purposes of a motion for summary judgment (*see e. g. Talansky v Schulman*, 2 AD3d 355, 361 n 6 [2003]; *Travis v Allstate Ins. Co.*, 280 AD2d 394, 394-395 [2001]). Accordingly, the verified complaint and bill of particulars suffice to raise an issue of fact as to the date of the occurrence.

As stated in defendants' brief, plaintiff "expressed great uncertainty" as to the date of the accident when deposed in August 2009. That uncertainty at the deposition does not invalidate plaintiff's verified pleading as the statutory

equivalent of an affidavit. Moreover, a lapse of memory four years after an occurrence is hardly unusual and does not eliminate an existing issue of fact. The majority improperly engages in a credibility determination by rejecting plaintiff's verified pleadings simply because they conflict with documents generated by her employer. On a motion for summary judgment, a court's function is issue finding, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Issues of credibility are best resolved by the trier of fact (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 340 [1974]). I therefore disagree with the majority's conclusion that plaintiff failed to raise an issue of fact as to when the accident occurred. I would reverse the order entered below and remand this matter for an immediate trial on the issue of when the cause of action accrued (*see* CPLR 3211[c] and CPLR 3212[c]).

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

ENTERED: FEBRUARY 28, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, JJ.

6471 In re Shirley Saunders, Index 402300/10
Petitioner-Appellant,

-against-

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

_____

Steven Banks, The Legal Aid Society, Brooklyn (Kimberly M. Skadan of counsel), for appellant.

Sonya M. Kaloyanides, New York (Melissa R. Renwick of counsel), for respondents.

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Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about April 29, 2011, denying the petition seeking, inter alia, to annul the determination by defendant New York City Housing Authority (NYCHA) to terminate petitioner's tenancy, and dismissing the proceeding brought pursuant to CPLR article 78, affirmed, without costs.

The article 78 petition was untimely under CPLR 217(1), which provides a four-month limitation period for review of administrative determinations. Petitioner's later correspondence with NYCHA, which was denominated a motion to vacate the settlement stipulation into which petitioner had entered with NYCHA, did not extend or toll her time to initiate an article 78 proceeding (*see Matter of M & D Contrs. v New York City Dept. of Health*, 233 AD2d 230, 231 [1996].

The dissent's reliance on *Matter of Yarbough v Franco* (95 NY2d 342 [2000]) is misplaced. *Yarbough* dealt with a motion to vacate a default judgment -- one which was not even served on movant for several months after it was entered. Her commencement of an article 78 proceeding to challenge the denial of her motion to vacate was clearly timely. That is completely the opposite of our matter where petitioner was presumably aware of the stipulation when it was signed, thereby commencing the four month limitation period. Unlike in *Yarbough*, there is no procedure to appeal the refusal to vacate a stipulation, hence no basis to toll or extend the statute of limitations.

Furthermore, since the proceeding is time-barred, petitioner's argument that her right to due process was violated cannot be addressed (*see Matter of M & D Contrs.* at 231).

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

Petitioner Shirley Saunders, 76 years old and legally blind, had been the tenant of record for approximately 37 years at 395 Fountain Avenue, Apartment 7A in NYCHA's Cypress Hills Houses in Brooklyn. Petitioner's son, John Saunders, lived with her in the apartment, with NYCHA's knowledge.

By letter dated June 29, 2009, NYCHA notified petitioner of a Tenancy Termination Hearing; the hearing was to be based on charges that petitioner was violating her lease by allowing Lloyd Saunders, another of her sons, to live with her without NYCHA's permission.

Petitioner appeared without an attorney at NYCHA's hearing office on August 25, 2009; on that day, the hearing was adjourned to October 22, 2009. On October 22, 2009, petitioner returned to NYCHA's offices and met with a NYCHA attorney. According to petitioner, she explained to the NYCHA attorney that her son Lloyd had not lived with her in 30 years, but could not then offer proof of an alternate address for him.

On October 22, 2009, petitioner signed a stipulation of settlement that the NYCHA attorney had prepared. The stipulation provided that petitioner admitted to the charges – that is, that Lloyd Saunders lived with petitioner in violation of NYCHA rules – and required that petitioner vacate her apartment by March 31,

2010. The stipulation by its terms was not final, and explicitly provided that it was subject to the approval of NYCHA. On November 10, 2009, NYCHA approved the stipulation of settlement, including the termination of tenancy, and on November 18, 2009, mailed notice to petitioner.

On April 9, 2010, petitioner's counsel submitted to NYCHA a motion to vacate the stipulation of settlement and set the matter down for a hearing on the factual issue of whether, in fact, Lloyd Saunders lived with petitioner. In support of the request, petitioner submitted an affidavit stating that she had been confused, intimidated, and frightened when she went the NYCHA's offices on October 22, 2009, and was not thinking clearly because of her medication. Moreover, petitioner stated that she had not understood, in signing the stipulation, that she was agreeing that Lloyd lived with her and that she would vacate the apartment. Had she so understood, petitioner stated, she would not have signed the stipulation.

In further support of the request, petitioner attached an affidavit from her son Lloyd Saunders. In his affidavit, Saunders stated that he did not, in fact, live with petitioner, and had not lived with her since the late 1970s.

While the motion was pending, petitioner commenced an article 78 proceeding by petition dated August 17, 2010. In the

petition, petitioner sought vacatur of the stipulation, or, in the alternative, an order compelling NYCHA to make a determination on petitioner's request to vacate the stipulation. Petitioner asserted that the four-month statute of limitations had not yet run since she had yet to receive notice that NYCHA had denied the request to vacate the stipulation of settlement.

The court denied the petition and dismissed the proceeding. The court found that the statute of limitations had expired on March 23, 2010, four months and five days after NYCHA had mailed notice that it had approved the stipulation of settlement. The court accordingly did not address the merits of petitioner's claims.

I would reverse, and find that the petition is not barred by the four-month statute of limitations applicable to article 78 proceedings. Petitioner cannot be said to have been "aggrieved" by the adverse determination of an agency until such time as the agency has acted upon her motion to vacate the stipulation of settlement. Before such time, there was no unambiguously final determination which would commence the running of the statute of limitations.

In *Matter of Yarbough v Franco* (95 NY2d 342 [2000]), the Court held that a tenant's application to vacate a default judgment extended the four-month limitations period. I would

similarly find, in this case, that the tenant's motion to vacate the stipulation extended the statute of limitations. Although there is a factual record in this case, it is an incomplete one, and the matter cannot be deemed "final and binding" in the absence of a determination as to the validity of the parties' stipulation. Petitioner was not "aggrieved" until such time as her motion to vacate the stipulation had been decided. The motion to vacate the stipulation cannot be likened to a motion for reconsideration (which would not toll the limitations period), but rather, presented a "fresh situation" that warranted an extension of the limitations period (*Yarbough*, 95 NY2d at 348 [internal quotation marks omitted]). The motion to vacate the settlement was akin, if anything, to a motion to renew. Indeed, petitioner could not appeal the stipulation of settlement, but was limited to moving to set aside the stipulation in the tribunal where it was entered into (*see Cooper v Number 535 Park Ave.*, 73 AD3d 433, 434 [2010]). Until such time as the motion is decided, there is no final determination for purposes of judicial review.[1] The Court of Appeals has cautioned that if an agency has created ambiguity or uncertainty as to whether a final and

[1]Petitioner also notes that the stipulation lacks the typical language stating that the agreement has the "same force and effect" as though issued by a hearing officer.

binding decision has been issued, "[petitioners] and their counsel should not have to risk dismissal for prematurity or untimeliness by necessarily guessing" and "the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his day in court" (*Mundy v Nassau County Civ. Serv. Commn.*, 44 NY2d 352, 358 [1978] [internal quotation marks omitted] [statute of limitations ran not from date of initial, withdrawn certification of eligibility lists, but from date of recertification; noting that withdrawn lists could have no impact on the petitioners' rights until those results were recertified]). I would accordingly reverse, and allow the petition to be heard on the merits.

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

ENTERED: FEBRUARY 28, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6758- Index 104020/07
6759- 591147/07
6760N Marisol Luciano,
Plaintiff-Respondent-Appellant,

-against-

Deco Towers Associates LLC, et al.,
Defendants-Appellants-Respondents.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise Cherkis of counsel), for Deco Towers Associates LLC, appellant-respondent.

Gottlieb, Siegel & Schwartz, Bronx (Shane M. Biffar of counsel), for World Elevator Co., Inc., and New World Elevator, LLC, appellants-respondents.

Pollack, Pollack, Isaac & De Cicco, New York (Kenneth J. Gorman of counsel), for respondent.

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Orders, Supreme Court, New York County (Debra A. James, J.), entered March 30, 2011, which denied defendants' respective motions for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly. Appeal from order, same court, Justice, and entry date, which denied plaintiff's motion to amend her bill of particulars, unanimously dismissed as academic, without costs.

Defendants' respective moving papers satisfied their initial burdens of establishing prima facie their lack of knowledge of

the alleged defective condition. Defendants submitted evidence that the elevator was regularly inspected and maintained, and that they had no notice of a defective condition.

In opposition to the motions, plaintiff failed to raise a triable issue of fact. Additionally, plaintiff's expert's affidavit was lacking any specificity, misstated the nature of the alleged misleveling, and was wholly conclusory (*Gjonaj v Otis Elevator Co.*, 38 AD3d 384 [2007]; *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 715 [2005]). In view of this disposition, plaintiff's appeal on the question of the amendment to the bill of particulars is dismissed as academic.

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6822 The People of the State of New York, Respondent, Ind. 4911/09

-against-

Martin Calderon, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert 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 (Laura A. Ward, J.), rendered March 16, 2010, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 2½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant argues that the police lacked the necessary predicate for requesting permission to search the car in which he was riding. At the suppression hearing, defendant raised other issues relating to the driver's consent. However, he never alerted the court to the particular issue raised on appeal, and the court did not "expressly decide[ ]" (CPL 470.05[2]) that issue (*see People v Turriago*, 90 NY2d 77, 83-84 [1997]; *see also People v Colon*, 46 AD3d 260, 263 [2007]). Accordingly, we

decline to review this claim in the interest of justice. As an alternative holding, we find that the police had, at least, a sufficient basis to ask the driver of the car for permission to search (*see People v Brooks*, 23 AD3d 847, 849 [2005], *lv denied* 6 NY3d 810 [2006]; *People v Martin,* 50 AD3d 1169[2008]). Defendant complains that some of the People's arguments are raised for the first time on appeal. However, this is a consequence of the procedural posture of the case, in which defendant did not litigate the present issue. In any event, the People's arguments are supported by the hearing evidence.

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6912 Michael Madison, Index 103066/08
Plaintiff-Respondent,

-against-

Andrew A. Sama, M.D., et al.,
Defendants-Appellants.

_____

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

Arthur G. Nevins, Jr., New York, for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered July 29, 2011, which, after directing plaintiff to amend his bill of particulars to include new injuries and a new theory of the case, granted plaintiff's motion to further depose defendant Sama, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff requested leave to conduct a further deposition of defendant Sama after filing a note of issue and certificate of readiness for trial. The only reason that plaintiff proffered for this request was that the expert engaged by his new counsel to review the file had discovered areas of inquiry that his former counsel had failed to pursue. This is insufficient to

establish that "unusual or unanticipated circumstances" had developed requiring further discovery "to prevent substantial prejudice" (*see* 22 NYCRR 202.21[d]; *Schroeder v IESI NY Corp.*, 24 AD3d 180 [2005]).

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6913 Iris Ayala, Index 400271/10
Petitioner-Appellant,

-against-

Elizabeth R. Berlin, etc., et al.,
Respondents-Respondents.

_____

Urban Justice Center, New York (Megan Stuart of counsel), for appellant.

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

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for municipal respondent.

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Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered December 17, 2010, which granted respondents' cross motions to dismiss the petition seeking, among other things, to annul New York City Human Resources Administration's determination, dated October 9, 2009, that petitioner is not entitled to childcare benefits, and dismissed, without prejudice, the proceeding brought pursuant to CPLR article 78 for failure to exhaust administrative remedies, unanimously affirmed, without costs.

Filing a compliance complaint was not an appropriate remedy following the agency's determination; indeed, the agency had complied with the fair hearing decision ordering it to determine

petitioner's eligibility for childcare benefits (*see* 18 NYCRR 358-6.4[c]). However, before commencing this proceeding, petitioner should have sought a fair hearing of the agency's determination that she was ineligible for such benefits (*see* Social Services Law § 22[5][a],[d]). Because petitioner's claims involve factual questions reviewable at the administrative level, her failure to exhaust her administrative remedies cannot be excused by the mere assertion of futility or a constitutional violation (*see Matter of Schulz v State of New York*, 86 NY2d 225, 232 [1995], *cert denied* 516 US 944 [1995]; *Matter of Wilkins v Babbar*, 294 AD2d 186, 187 [2002]). Accordingly, rather than dismiss the proceeding without prejudice to the filing of a compliance complaint, the court should have dismissed the proceeding without prejudice to seeking a fair hearing.

Given petitioner's failure to exhaust administrative remedies, we need not reach her argument that the regulation at issue (18 NYCRR 385.4[a][1][ii]) is invalid.

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6914 In re Kenneth M. Colao, Petitioner, Index 113979/10

-against-

New York State Department of Motor Vehicles Appeals Board, Respondent.

_____

Bauman Katz & Grill, New York (Daniel E. Katz of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Richard Dearing of counsel), for respondent.

_____

Determination of respondent, dated August 20, 2010, which, after a hearing, suspended petitioner's driver's license for 31 days and imposed a $180 fine, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Saliann Scarpulla, J.], entered March 24, 2011), dismissed, without costs.

Respondent's determination that petitioner violated Vehicle & Traffic Law § 1180(d) by operating his vehicle in excess of 81 miles per hour in a 35 mile-per-hour zone is supported by substantial evidence. The ticketing officer testified that when he clocked petitioner's vehicle, it was traveling more than 81 mph in a 35-mph zone. Furthermore, at the time he ticketed

petitioner, all of the signs in the area stated that the speed limit was 35 mph. Although petitioner submitted photographs showing that the signs stated that the speed limit was 50 mph, petitioner testified that he had taken the photographs at least one year after he was ticketed for speeding. There exists no basis on which to disturb the Administrative Law Judge's decision to credit the officer's testimony, including his testimony that he spoke with an official at the Department of Transportation and was told that the speed-limit signs in the subject area had recently been changed from 35 mph to 50 mph (*see Matter of Nelke v Department of Motor Vehs. of the State of N.Y.*, 79 AD3d 433, 434 [2010]; *see also Matter of Gray v Adduci*, 73 NY2d 741, 742 [1988]).

Moreover, the evidence submitted by petitioner in connection with his administrative appeal was properly rejected. The evidence had not been considered by the ALJ as required by 15

NYCRR 126.2(g), which bars the Appeals Board from considering evidence that was not submitted at the hearing.

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

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6915 Louis Limmer, et al., Index 303380/08
Plaintiffs-Appellants,

-against-

Nathan S. Rosenfeld, M.D.,
Defendant,

The Winifred Masterson Burke
Rehabilitation Hospital, Inc., et al.,
Defendants-Respondents.

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Philip Newman, Bronx, for appellants.

Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains (Rory L. Lubin of counsel), for respondents.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered May 17, 2011, which granted defendants The Winifred Masterson Burke Rehabilitation Hospital, Inc. and Richard S. Novitch's (defendants) motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established prima facie that they did not depart from good and accepted medical practice in their treatment of plaintiff Louis Limmer (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). Plaintiff failed to rebut this showing. Initially, we note that the court erred in rejecting the affirmation of plaintiff's expert on the grounds, inter alia, that the expert had not demonstrated "his expertise or

familiarity in treating this kind of [infection] . . . " "[A] physician need not be a specialist in a particular field if he nevertheless possesses the requisite knowledge necessary to make a determination on the issues presented" (*Joswick v Lenox Hill Hosp.*, 161 AD2d 352, 355 [1990]). Once the expert professes such knowledge, the issue of the expert's qualifications to render such opinion must be left to trial (*id.; see also Ocasio-Gary v Lawrence Hosp.*, 69 AD3d 403, 404-405 [2010]). To the extent that our prior holding in *Browder v New York City Health & Hosps. Corp.* (37 AD3d 375 [2007]) could be interpreted as imposing a stricter standard, we decline to follow it. However, plaintiffs nonetheless failed to raise an issue of fact with their expert's affirmation (*see id.* at 324-325; *Abalola v Flower Hosp.*, 44 AD3d 522 [2007]; *Feliz v Beth Israel Med. Ctr.*, 38 AD3d 396 [2007]. In the affirmation, the expert failed to address the conclusion of defendants' experts that plaintiff exhibited no symptoms that should have caused defendant Novitch to suspect osteomyelitis

(*see id.* at 376; *Collymore v Montefiore Med. Ctr.*, 39 AD3d 237, 238 [2007]).

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

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6916 Janet Chang, etc., Index 2242/86
Plaintiff-Respondent,

-against-

Laraine Botsacos, etc.,
Defendant-Appellant.

_____

Maroney O'Connor LLP, New York (Ross T. Herman of counsel), for appellant.

Daniel R. Wotman & Associates, PLLC, Great Neck (Daniel R. Wotman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Louise Gruner Gans, J.), entered August 10, 2010, after a jury trial, awarding plaintiff the total amount of $8,708,490, unanimously affirmed, without costs.

Defendant failed to preserve her arguments that entry of the judgment was untimely pursuant to 22 NYCRR 202.48(a) (*see McCue v McCue*, 225 AD2d 975, 976 [1996]), and that plaintiff abandoned the action pursuant to 22 NYCRR 202.48(b) (*see Meldrim v Hill*, 260 AD2d 836, 839 [1999]). Were we to reach these arguments, we would find that the 60-day time limit in 22 NYCRR 202.48(a) "applies only where the court explicitly directs that the proposed judgment or order be settled or submitted for signature" (*Funk v Barry*, 89 NY2d 364, 365 [1996]). Here, there was no such explicit direction (*see Meldrim* at 839; *McCue* at 976-977).

Defendant Thomas Cartelli was deposed before trial but had died by the time of trial. Contrary to defendant's contention, plaintiff's reading of Cartelli's deposition testimony at the trial did not violate the Dead Man's Statute (CPLR 4519; *see Tepper v Tannenbaum*, 87 Misc 2d 829, 838 [1976], *revd on other grounds* 65 AD2d 359 [1978]; CPLR 3117[a][3][i]).

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6919 The People of the State of New York, Respondent, Ind. 1805/07

-against-

Melville Powell, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Maxwell T. Wiley, J. at motions; Arlene R. Silverman, J. at jury trial and sentencing), rendered October 22, 2008, convicting defendant of criminal possession of a controlled substance in the third and fifth degrees and two counts of assault in the second degree, and sentencing him to an aggregate term of one year, unanimously reversed, on the law, and the matter remanded for a new trial.

The trial court erred when it granted the People's reverse-*Batson* application (*see Batson v Kentucky*, 476 US 79 [1986]; *People v Kern*, 75 NY2d 638 [1990], *cert denied* 498 US 824 [1990]), and seated three jurors despite defendant's peremptory challenges. Even after according great deference to the court's determination, we find that the record fails in all

respects to support the court's finding that the nondiscriminatory reasons provided by defense counsel for the challenges in question were pretextual.

Defense counsel provided ethnicity-neutral explanations for challenging the three jurors at issue. Counsel explained that she usually "kick[ed] off people with technical type jobs or finance. I find they are not favorable to the defense because they have more income and I believe typically they are not favorable." Two of the jurors were investment bankers, and one had a "technical-type" job as an interface developer. Counsel also explained that the juror with a technical job had prior jury service, which counsel viewed as a negative factor for the defense.

The court erroneously found these explanations to be pretextual. Notably, the court remarked that it "did not hear . . . anything about [the challenged jurors] in particular that would render them unfair or fit." However, counsel was not required to provide an explanation that would have sustained a challenge for cause (*see People v Allen*, 86 NY2d 101, 109 [1995]). The court's determination that persons in the finance industry were a "class" of people entitled to protection was erroneous. A particular profession, as opposed to race or gender, is not a class entitled to constitutional protection

against discrimination.

Furthermore, there was no evidence of disparate treatment by defense counsel of similarly situated panelists. We note that the court based its finding of pretext, in part, on the fact that defense counsel did not challenge a juror whose wife was in finance. However, the characteristics of a spouse should not be attributed to a prospective juror (*see People v Minton*, 52 AD3d 234, 235 [2008], *lv denied* 11 NY3d 791 [2008]).

In addition, counsel explained that she challenged the interface developer on the basis of her prior jury service as well as her technical job. Nevertheless, neither the prosecutor nor the court addressed this explanation.

We find it unnecessary to reach defendant's remaining claims of error, except that we find that the motion court properly denied defendant's suppression motion without granting a hearing. The People provided detailed information about the factual predicate for defendant's arrest, and defendant's

simple assertion of innocent behavior at the time of his arrest failed to dispute the People's allegations (*see People v France*, 12 NY3d 790 [2009]).

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6920- Index 113952/06
6921- 591135/06
6922 Robert Kittelstad, et al.,
Plaintiffs-Appellants-Respondents,

-against-

The Losco Group, Inc.,
Defendant,

Clean Air Quality Service, Inc.,
Defendant-Respondent-Appellant,

Jacobs Facilities Inc.,
Defendant-Respondent.

- - - - -

Clean Air Quality Service, Inc.,
Third-Party
Plaintiff-Respondent-Appellant,

-against-

Campbell Insulation Corp.,
Third-Party Defendant-Respondent.

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Calano & Culhane, LLP, New York (Thomas A. Culhane of counsel), for appellants-respondents.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for respondent-appellant.

Zetlin & De Chiara LLP, New York (Lori Samet Schwarz of counsel), for Jacobs Facilities Inc., respondent.

Cascone & Kluepfel, LLP, Garden City (Michael T. Reagan of counsel), for Campbell Insulation Corp., respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered November 10, 2010, which, to the extent appealed

from as limited by the briefs, granted defendant Jacobs Facilities Inc.'s motion for summary judgment dismissing the Labor Law § 240(1) and § 241(6) causes of action as against it, granted Clean Air Quality Services, Inc.'s motion for summary judgment dismissing the Labor Law § 240(1) and § 241(6) causes of action as against it and denied its motion as to the Labor Law § 200 and common-law negligence causes of action, and denied Clean Air's motion for summary judgment on its cause of action for contractual indemnification against third-party defendant Campbell Insulation Corp., unanimously modified, on the law, Jacobs's and Clean Air's motions for summary judgment dismissing the Labor Law § 240(1) and § 241(6) causes of action as against them denied, and otherwise affirmed, without costs.

Neither Jacobs nor Clean Air conclusively demonstrated that it was not a statutory agent of the property owner (the State) under Labor Law § 240(1) and § 241(6) (*see Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]; *Barraco v First Lenox Terrace Assoc.*, 25 AD3d 427 [2006]). Jacobs contends that defendant Losco Group was the general contractor. However, that issue cannot be determined conclusively on this record. Indeed, there are indications in the project meeting minutes that Losco bore no responsibility for HVAC work. While Jacobs's contract with the State did not contain an explicit agency provision, Jacobs's contractual

obligations with respect to oversight of the work were comprehensive. It was required to monitor the individual performance of each trade contractor, coordinate work between the trades, and "resolve disputes." At the peak of the project, Jacobs had six employees, including three on-site inspectors, each with his own trade specialty. Jacobs's superintendent conceded that he had the authority to address unsafe conditions, to stop work if there was an "imminent dangerous situation," and otherwise to report unsafe conditions to the trade foremen.

Clean Air retained the authority under its subcontract with Campbell, the HVAC insulation subcontractor and the injured plaintiff's employer, to order Campbell to stop work if it was engaging in unsafe practices, to make changes, additions or omissions in Campbell's work, and to demand that Campbell remedy defective, unsound or improper work. It had nearly unfettered authority to remove a Campbell employee and bar the employee from the project. The record shows moreover that Campbell did not attend site safety meetings with the other trades; it only attended the meetings run by Clean Air. This evidence establishes that Clean Air had supervisory authority over Campbell (*see Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [2011]). Clean Air argues that its contract with the State did not give it any authority to exercise control over

other independent contractors at the site. However, the portions of the contract that it submitted – which do not include the scope of work – fail to raise an issue of fact as to its supervisory authority over Campbell.

Industrial Code (12 NYCRR) § 23-1.7(b) is sufficiently specific to support a Labor Law § 241(6) claim, and is applicable to the facts of this case (*see e.g. Gallagher v Levien & Co.*, 72 AD3d 407 [2010]; *Keegan v Swissotel N.Y.*, 262 AD2d 111, 113-114 [1999], *lv dismissed* 94 NY2d 858 [1999]).

Both plaintiff and his supervisor testified that the only way to reach the pipes that needed to be insulated was to walk across the air handler unit, which included walking over planks covering a two-foot-by-three-foot area of the unit where the duct work was not complete. In light of this testimony, defendants' argument that plaintiff was either a recalcitrant worker or the sole proximate cause of his own accident are without merit.

There is a question of fact as to whether Clean Air created the dangerous condition in the air handler unit, or whether it had notice of the condition. Thus, the Labor Law § 200 and common-law negligence causes of action should not have been dismissed as against it (*see Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 591-592 [2009]).

Based on our disposition of the Labor Law § 200 and common-

law negligence causes of action, Clean Air is not entitled to summary judgment on its cause of action for contractual indemnification against Campbell (*see Callan v Structure Tone, Inc.*, 52 AD3d 334, 335 [2008]).

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6923 NAMA Holdings, LLC, etc., Index 601054/08
Plaintiff-Respondent,

-against-

Greenberg Traurig, LLP, etc., et al.,
Defendants,

Shawn Samson, et al.,
Defendants-Appellants.

_____

Dorsey & Whitney LLP, New York (Roger J. Magnuson of the bar of the state of Minnesota admitted pro hac vice, of counsel), for appellants.

Berger & Webb, LLP, New York (Ronald C. Cohen of the bar of the state of California admitted pro hac vice, of counsel), for respondent.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered December 2, 2010, which, insofar as appealed from, denied defendants Shawn Samson and Jack Kashani's (defendants) motion to dismiss the second amended complaint, unanimously affirmed, with costs.

We start with the necessary observation that defendants' arguments are, in the main, frivolous. "'An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as the appellate court . . . [and] operates to foreclose reexamination of [the] question absent a showing of subsequent evidence or

change in law'" (*Kenney v City of New York*, 74 AD3d 630, 630-31 [2010] [citations omitted]). In our order entered September 7, 2010, we held "that the determinations of the arbitration support, more than preclude, the plaintiffs' claims here" (76 AD3d 804, 805 [2010]). In that order, we also agreed with the California District Court that defendants were engaged in "bad faith and procedural gamesmanship" designed to frustrate plaintiff's attempts to hold them accountable in any forum (*id.*). There has not been a showing of subsequently developed evidence or a change in law since we made such pronouncements to warrant a reexamination of the preclusion question.

Defendants contend that the arbitration award precludes this action against them. However, the award specifically stated that it was "not intended to adjudicate or settle any claims of the parties not subject to this panel's jurisdiction and being pursued in another forum, or any claims by or against entities or persons who are not parties to this arbitration." That provision of the arbitration award was not mere verbiage, as the arbitrators were personally aware of the dismissal of defendants from the arbitration, and of the related litigation which had been brought against them.

The motion court correctly rejected defendants' argument that the second amended complaint was barred on the ground that

plaintiff is unfit to derivatively represent Alliance Network, LLC and its other members. The motion court correctly cited to our order entered May 26, 2009, in which we previously ruled that plaintiff had standing to bring this derivative action (62 AD3d 578 [2009]).

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

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6924 Ivonne Cruz, Index 22153/05
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant,

The City of New York,
Defendant.

_____

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for appellant.

William J. Rita, New York (Wayne M. Rubin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Diane A. Lebedeff, J.), entered June 13, 2011, which denied the motion of defendant New York City Housing Authority for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff was riding in an elevator when it stopped halfway between the eleventh and twelfth floors of her building. When she jumped out of the elevator to the eleventh floor several feet below, she fell and sustained injuries to her right side. The misleveling of the elevator was attributed to a metal bed frame that had apparently been discarded down the elevator shaft. The

frame impacted the roof of the elevator car and damaged the mechanism responsible for causing the car to properly level at each floor.

Defendant NYCHA established its entitlement to judgment as a matter of law by showing there had been no complaints about the misleveling condition prior to the accident. The record shows that NYCHA, which serviced the elevator on a regular basis, had recorded no problems with the elevator misleveling (*see Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458 [2011], *lv denied* 17 NY3d 708 [2011]; *Parris v Port of N.Y. Auth.*, 47 AD3d 460, 461 [2008]). Nor did it have notice of the misleveling of the elevator due to debris being discarded down the elevator shaft.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff did not provide evidence demonstrating that there were prior accidents involving a similar malfunctioning of the elevator at issue (*see Narvaez v New York City Hous. Auth.*, 62 AD3d 419 [2009], *lv denied* 13 NY3d 703 [2009]; *Lapin v Atlantic Realty Apts. Co., LLC*, 48 AD3d 337, 338 [2008]).

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

ENTERED: FEBRUARY 28, 2012

CLERK

CORRECTED ORDER - MAY 30, 2012

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

6925 Leroy D. West, Sr.,
Petitioner-Appellant,

-against-

Racquel Vanderhorst,
Respondent-Respondent.

Norman A. Olch, New York, for appellant.

Brian K. Robinson, New York, for respondent.

Rosemary Rivieccio, New York, attorney for the child.

Order, Family Court, New York County (Elizabeth Barnett, Referee), entered on or about April 22, 2010, which, after a trial, among other things, awarded respondent mother sole legal and physical custody of the parties' child, with visitation to petitioner father, unanimously affirmed, without costs.

The Referee's determination, that it was in the child's best interests to modify the parties' joint custody agreement and award respondent sole legal and physical custody, has a sound and substantial basis in the record (*Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). Indeed, the record shows that, following entry of the parties' judgment of divorce, which incorporated their stipulation providing for joint custody, there was a complete breakdown in communication between the parties and an incident of

domestic violence in the child's presence, thereby rendering joint custody infeasible (*see Trapp v Trapp*, 136 AD2d 178, 181 [1988]). The record also shows that petitioner violated the parties' stipulation by prohibiting respondent from contacting the child when he was with petitioner, and twice refused to alert respondent to the fact that the child had been hospitalized. Accordingly, unlike respondent, petitioner's conduct and attitude indicated an unwillingness to support and encourage a relationship between the child and respondent (*see Gregory L.B. v Magdelena G.*, 68 AD3d 478, 479 [2009]). The Referee also properly determined that relocation to respondent's home in New Jersey, which was permitted under the parties' stipulation, and modification of petitioner's visitation schedule, was in the child's best interests (*see Matter of Lionel E. v Shaquana R.B.*, 73 AD3d 434, 434 [2010]). Contrary to petitioner's contention, the parties' stipulation does not require the child to attend a religious school.

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6928 The People of the State of New York, Ind. 2050/10
Respondent,

-against-

Elijah Heppard,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about June 16, 2010, unanimously affirmed.

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

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6929 Laara Raynier, Index 111901/09
Plaintiff-Appellant,

-against-

159 Eluji Associates, LLC,
Defendant-Respondent.

_____

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for appellant.

Roger D. Olson, New York, for respondent.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 1, 2011, which, upon converting defendant's motion to dismiss the complaint pursuant to CPLR 3211 to one for summary judgment pursuant to CPLR 3212, granted defendant's motion and dismissed the complaint, unanimously affirmed, without costs.

The motion court correctly determined that neither Real Property Law § 234 nor the plain terms of the lease provided for recovery of attorneys' fees incurred as a result of an

administrative application before the New York State Division of Housing and Community Renewal (*see e.g. Matter of Chessin v New York City Conciliation & Appeals Bd.*, 100 AD2d 297, 305-306 [1984]).

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6930 The People of the State of New York, Respondent, Ind. 6504/01

-against-

David Lattimore, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Cleary Gottlieb Steen & Hamilton LLP, New York (Megan M. St. Ledger of counsel), for appellant.

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

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Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about May 21, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, as a matter of discretion in the interest of justice, the motion granted, the order replaced by an order specifying and informing defendant of a proposed sentence of two years plus 1½ years' postrelease supervision, and the matter remanded for further proceedings.

Substantial justice does not dictate denial of resentencing, and we exercise our discretion to specify an appropriate resentence (*see e.g. People v Milton*, 86 AD3d 478 [2011]). Under the circumstances presented, the mitigating factors cited by defendant were not outweighed by the extent of his criminal

history.

In 2006, defendant received a prison sentence for the underlying 2001 offense after he failed to complete the drug treatment alternative program to which he was originally diverted. However, defendant stayed in treatment for two and one-half years, successfully completing the residential phase of the treatment program, and his single relapse was satisfactorily explained.

During defendant's imprisonment on the underlying offense he had an exemplary record, he finally completed substance abuse treatment as well as several work programs, he counseled other inmates, and he received positive letters of recommendations from corrections officials. Although defendant has a long criminal history, his last violent felonies occurred over 40 years ago and he has no record of drug trafficking other than at the lowest level.

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6933 Narcita G. Marte, Index 101769/09
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

New York City Transit Authority, et al.,
Defendants-Respondents.

_____

Law Offices of Elizabeth Eilender, New York (Norman Frowley of counsel), for appellant.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for respondents.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered September 21, 2011, which denied plaintiff's motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

An issue of fact exists as to whether plaintiff had the right-of-way when she was hit by a bus (*see* Vehicle and Traffic Law § 1111[a][1]; § 1112[a]; *see also Calcano v Rodriguez*, __ AD3d __,__, 2012 NY Slip Op 00110, *1 [2012]). Although a nonparty witness asserted in an affidavit that plaintiff "had the green/walk signal and was walking within the crosswalk" when she was hit by the bus, defendant bus driver testified that she was about a car length south of the crosswalk when she was hit. At

this procedural posture, the truth of the bus driver's testimony is presumed "where the court's duty is to find issues rather than determine them" (*see Arias v Skyline Windows, Inc.*, 89 AD3d 460, 460 [2011]), citing *Powell v HIS Contrs., Inc.*, 75 AD3d 463, 465 [2010]).

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: FEBRUARY 28, 2012

CLERK

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

6934 2470 Cadillac Resources, Inc., et al., Index 603613/08
Plaintiffs-Appellants,

-against-

DHL Express (USA), Inc.,
Defendant-Respondent,

Deutsche Post AG,
Defendant.

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Einbinder & Dunn, LLP, New York (Michael Einbinder of counsel), and Phillips Nizer, LLP, New York (Jeremy Richardson of counsel), for appellants.

Dechert LLP, New York (Edwin V. Woodsome of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 21, 2010, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion to renew defendant-respondent's motion to dismiss plaintiffs' first cause of action, for breach of contract, unanimously affirmed, with costs.

The IAS court properly determined that defendant's counterclaims are not new evidence that would alter its prior determination (CPLR 2221[e][2]). Indeed, the counterclaims restate allegations that were before the court on the prior

motion and do not constitute an admission, or evidence, that plaintiffs are third-party beneficiaries of the reseller agreement (*see 2470 Cadillac Resources, Inc. v DHL Express (USA), Inc.*, 84 AD3d 697, 698 [2011]).

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6935N Sandra Gonzalez, Index 108216/10
Plaintiff-Respondent,

-against-

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

New York City Housing Authority, et al.,
Defendants-Appellants.

_____

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for appellants.

Helen F. Dalton & Associates, Forest Hills (Roman Avshalumov of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered January 28, 2011, which granted plaintiff's motion to file a late notice of claim, and denied defendants New York City Housing Authority and Nathan Strauss Housing's (defendants) cross motion to dismiss the complaint as against them, unanimously reversed, on the law and the facts, without costs, the motion denied and the cross motion granted. The Clerk is directed to enter judgment dismissing the complaint as against said defendants.

Plaintiff failed to establish any of the relevant statutory factors that would warrant leave to serve a late notice of claim (General Municipal § 50-e[5]; *Matter of Kelley v New York City*

Health & Hosps. Corp., 76 AD3d 824 [2010]). Her claimed injury was a broken bone in her ankle, which was treated in the emergency room. There was no showing that the injury was so incapacitating as to prevent the service of a timely notice of claim (*see Matter of Montanez v City of New York*, 156 AD2d 185, 185 [1989]). There was no showing that defendants acquired actual knowledge of the facts and circumstances constituting the claim within the statutory 90-day service period (*see Quinn v Manhattan & Bronx Surface Tr. Operating Auth.*, 273 AD2d 144 [2000]). There was no showing that a defense on the merits would not be prejudiced by the late service, given the subsequent repair of the alleged sidewalk defect (*see Matter of Gitis v City of New York*, 68 AD3d 489 [2009], *lv denied* 14 NY3d 712 [2010]).

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

ENTERED: FEBRUARY 28, 2012

CLERK

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

6936 Ind. 4565/00
[M-148] In re Echo Westley Dixon, etc., 2370/01
Petitioner,

-against-

State of New York, et al.,
Respondents.

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Echo Westley Dixon, petitioner se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), and Cyrus R. Vance, District Attorney, New York (Nicole A. Coviello of counsel), and Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondents.

_____

Application for an order pursuant to article 78 of the Civil Practice Law and Rules denied and the petition dismissed, without costs or disbursements. All concur. No opinion. Order filed.

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5112- Index 601306/09
5113-
5114 Howard Kagan,
Plaintiff-Appellant-Respondent/Appellant,

-against-

HMC-New York, Inc., et al.,
Defendants-Respondents-Appellants/Respondents.

_____

Lowenstein Sandler PC, New York (David L. Harris of the bar of the State of New Jersey and Commonwealth of Pennsylvania admitted pro hac vice, of counsel), for appellant-respondent/appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Walter Rieman of counsel), for respondents-appellants/respondents.

_____

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered June 7, 2010, modified, on the law, to the extent of granting the motion to dismiss plaintiff's breach of contract claims as against the defendants HML Investors, LLC, HMC-New York, Inc., and Harbinger Holdings, LLC., and otherwise affirmed, with costs. The Clerk is directed to enter judgment dismissing the complaint as against these defendants. Order, same court and Justice, entered September 22, 2010, affirmed, with costs.

Opinion by Catterson, J. All concur except Tom, J.P. and Moskowitz, J. who dissent in part in an Opinion by Moskowitz, J.

Order filed.

CORRECTED ORDER - MARCH 14, 2012

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
James M. Catterson
Karla Moskowitz
Sallie Manzanet-Daniels, JJ.

5112-
5113-
5114
Index 601306/09

_____x

Howard Kagan,
Plaintiff-Appellant-Respondent/Appellant,

-against-

HMC-New York, Inc., et al.,
Defendants-Respondents-Appellants/Respondents.

_____x

Cross appeals from an order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered June 7, 2010, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss plaintiff's claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty and denied the motion seeking dismissal of plaintiff's breach of contract claims against HMC Investors, LLC, HMC-New York, Inc. and Harbinger Holdings, LLC., and an order, same court and Justice, entered September 22, 2010, which, insofar as appealed from, denied plaintiff's motion for leave to renew defendants' motion to dismiss.

Lowenstein Sandler PC, New York (David L. Harris of the bar of the State of New Jersey and Commonwealth of Pennsylvania admitted pro hac vice, and Steven M. Hecht of counsel), for appellant-respondent/appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Walter Rieman, Leslie Gordon Fagen and Nathaniel E. Marmon of counsel), for respondents-appellants/respondents.

CATTERSON, J.

In this action, we are asked to determine, inter alia, whether the plaintiff's claims for breach of contract can stand against defendant managers whose potential liability is circumscribed by the language of the contract, and whether his claims for breach of fiduciary duty should be reinstated under Delaware law. The plaintiff, Howard Kagan, seeks to recover amounts allegedly owed in connection with his work for an investment firm, HMC-NY, and his equity holding and membership interest in Harbinger Capital Partners GP, LLC (hereinafter referred to as the "Onshore Manager") and Harbinger Capital Partners Offshore Manager, LLC (hereinafter referred to as the "Offshore Manager") (collectively hereinafter referred to as the "Manager Entities" or "Company"). He alleges that defendants, HMC Investors LLC, HMC-New York Inc., and Harbinger Holdings, LLC., as managers of the Manager Entities, violated the controlling agreements of both entities which are governed by Delaware Law.

Specifically, he alleges breach of sections 4.5(d) and 8.7 of both agreements in that the defendant managers failed to properly calculate the amounts due to him in respect of 2007 withheld amounts, and to pay him such amounts within 30 days after his termination without cause, and that they failed to pay

him his pro-rated share of the Manager Entities' performance compensation for 2008 by no later than March 31, 2009. Additionally, in respect of his equity holding and membership interest in the Offshore Manager, he alleges breach of section 4.6 of the Offshore agreement by defendants HMC Investors (and/or Harbinger Holdings) for making certain unauthorized deferrals of amounts owed to Offshore Manager.

The plaintiff also alleges breach of the implied covenant of good faith and fair dealing in that the defendant managers, inter alia, willfully refused to pay amounts that they allegedly acknowledged are due and owing to him under the terms of the agreements. Lastly, he alleges a breach of fiduciary duty.

As a threshold matter, it is undisputed that the managers, HMC-NY, HMC Investors, and Harbinger Holdings, are not contractually obligated to the plaintiff with respect to the provisions allegedly breached. In each instance, the provisions specify that the obligation rests with the Company, that is, the Manager Entity. However, the plaintiff asserts that, nevertheless, the defendants are not entitled to dismissal of the breach of contract claims. Instead, relying on Kuroda v. SPJS Holdings L.L.C. (971 A.2d 872 (Del. Ch. 2009)), the plaintiff argues that the "defendants have the authority to control the Manager Entities, and the [a]greements do not explicitly exempt

them from liability under the circumstances alleged here."

We disagree. Whatever the extent of their authority and control, the defendants as managers are exempt from liability under the "circumstances alleged here," which are the factual allegations underlying the first and second causes of action in breach of contract.

Section 7.10 ("Limitation of Liability") of the Agreements provides, inter alia:

> *"No Manager* or Officer *shall have any liability* to the Company [the Manager Entities] or *any Member* or Holder for any loss suffered by the Company or any Member or Holder that *arises out of any act or omission by the Manager or Officer,* if such Manager or Officer performs its duty in compliance with the standard set forth in the immediately preceding sentence [to act in good faith, as set forth in §7.9], *except* loss or damage resulting from intentional misconduct, knowing violation of law, gross negligence or a transaction from which the Manager or Officer received a personal benefit in violation or breach of the provisions of this Agreement" (emphasis added).

Section 7.9 of the Agreements sets forth the "[d]uties of [m]anagers," requiring that they "act in good faith and in the best interest of the Company [the Manager Entities] and with such care as an ordinarily prudent person in a like position would use under similar circumstances."

Kuroda involved a similar type of action by an employee of an investment firm. One of the provisions of the operating agreement purporting to limit liability stated that

managers/members will not be held liable for "mistakes, action or inaction [unless they] arise out of . . . gross negligence, willful misconduct or bad faith." Kuroda, 971 A.2d at 882.

The Kuroda court simply found that the defendant managing members "have not argued that they are exculpated from liability under the terms of this section." Kuroda 971 A.2d at 882. This case presents the opposite scenario; the defendant managers argue strenuously that they are exempt from liability under the terms of the limitation of liability provisions of both operating agreements.

The language of the agreements' exculpatory clauses in both Kuroda and this case reflects that, as a matter of public policy and "longstanding general common-law principles" an LLC operating agreement may not limit liability for *tortious* conduct. TIC Holdings v. HR Software Acquisitions Group, 301 A.D.2d 414, 415, 755 N.Y.S.2d 19, 20 (1st Dept. 2003); see also e.g. Limited Liability Company Law § 417[a][1]. But, there is no tortious conduct alleged in this case.

Instead, the defendant managers correctly assert that the plaintiff's allegations in the first and second causes of action are for breach of certain specific contractual provisions dealing with the deferral, withholding and calculation of the plaintiff's payments, and the obligation to make those payments within 30

days of termination. The plaintiff's allegations of a breach of the implied covenant of good faith and fair dealing arise from the same contractual provisions. The plaintiff's allegation is that, based on those contractual provisions, certain of the defendants allegedly acknowledged that they owe the plaintiff a part of the monies he seeks. Therefore, he claims there exists an implied obligation to pay at least that amount by a certain date as well as an implied obligation to ensure a sufficiency of funds to make the payments.

The plaintiff does not allege any breach by the defendants of their duty to "act in good faith and in the best interest of the [c]ompany" pursuant to section 7.9. Absent such an allegation, the defendant managers' liability is limited only to specific tortious acts - intentional misconduct, a knowing violation of the law, gross negligence and self-dealing; none of which the plaintiff alleges against them.

As much as we are obligated to accept all allegations as true on a CPLR 3211 motion to dismiss (Salles v. Chase Manhattan Bank, 300 A.D.2d 226, 228, 754 N.Y.S.2d 236, 238 (1st Dept. 2002)), in this case the plaintiff simply does not make any allegations at all that fall within the exclusions of the liability limitation provision. As the defendants correctly assert, under Delaware law, a breach of contract claim is not an

allegation of intentional misconduct, knowing violation of law, gross negligence or self-dealing. See Nolu Plastics, Inc. v. Ledingham 2005 WL 5654418 at *2 (Del. Ch. 2005) (intentional misconduct refers to acts of wrongdoing such as fraud and conversion and is distinguished from breach of contract). As such, neither the wilful conduct or the bad faith alleged in the first and second breach of contract causes of action constitutes the act of intentional misconduct that is referred to in the "limitation of liability" provision.

The plaintiff's breach of fiduciary duty causes of action were correctly dismissed. As the motion court, relying correctly on Delaware law, noted, when "the same facts that underlie [a plaintiff's] contract claim also form the basis of plaintiff's fiduciary claim, the fiduciary claim is precluded." See Gale v. Bershad, 1998 WL 118022, 1998 Del Ch LEXIS 37 (Del. Ch. 1998); HB Korenvaes Invs., L.P. v. Marriott Corp., 1993 WL 205040, 1993 Del Ch LEXIS 90 (Del. Ch. 1993); accord William Kaufman Org. v. Graham & James, 269 A.D.2d 171, 173, 703 N.Y.S.2d 439, 442 (1st Dept. 2000). As the motion court further correctly observed, the defendant managers' obligation to properly calculate and distribute monies owed to the plaintiff arises out of the LLC agreements. Thus, in this case, the plaintiff's complaint asserts contractual and fiduciary claims that arise from the same

alleged facts and underlying conduct. Since the fiduciary claims are substantially identical to the breach of contract claims they were properly dismissed. See Nemec v. Shrader, 991 A.2d 1120, 1129 (Del. 2010). Moreover, resurrecting them, as the dissent urges, would simply and impermissibly allow the plaintiff to plead his breach of contract claims under a different guise.

In any event, the dissent's view that Delaware law requires *explicit* elimination or restriction of fiduciary duties otherwise such duties apply by default, appears to be based on the belief that "explicit" requires such elimination or restriction to be written into an agreement in haec verba. However, section 7.9 of the agreement sets forth, in relevant part, the duties of the managers as: "The [m]anagers shall act in good faith and in the best interest of the Company." Section 7.10 in turn expressly limits the liability of the Managers who act in accordance with that standard set forth in section 7.9. As the defendants correctly assert, with these provisions the agreement imposes only specific limited contractual obligations on the managers, thus eliminating the traditional fiduciary duties imposed under Delaware law; expressio unius est exclusio alterius.

The dissent's reliance on Kelly v. Blum (2010 WL 629850, 2010 Del Ch LEXIS 37 (Del. Ch. 2010)), is misplaced. Kelly does not stand for the proposition that, without specific elimination,

such contractual provisions cannot eliminate fiduciary duties that would exist under common law. Section 7.9 of the agreement at issue in Kelly, clearly refers to liability arising, inter alia, out of a "willful breach of [the Managers'] contractual *or fiduciary duties*" (emphasis added). It makes sense then that the Kelly court found that "the parties intended traditional fiduciary duties to apply." 2010 WL 629850, *11, 2010 Del Ch LEXIS 37, *47. No such reference to the fiduciary duties of managers appears in the applicable section 7.10 in this case. On the contrary, it is explicitly omitted. Finally, in the absence of a viable claim for breach of fiduciary duty, the related claims of aiding and abetting such a breach were also properly dismissed. It should be noted that, of course, notwithstanding the foregoing, and to the extent that the issue is not raised on appeal, the plaintiff's breach of contract claims against the Manager Entities have survived.

Accordingly, the order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered June 7, 2010, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss plaintiff's claims for breach of fiduciary duty, and aiding and abetting breach of fiduciary duty and denied the motion seeking dismissal of plaintiff's breach of contract claims against HMC Investors, LLC, HMC-New York, Inc. and

Harbinger Holdings, LLC, should be modified, on the law, to the extent of granting the motion to dismiss plaintiff's breach of contract claims as against the foregoing defendants, and otherwise affirmed, with costs. The Clerk is directed to enter judgment dismissing the complaint as against HMC Investors, LLC, HMC-New York, Inc. and Harbinger Holdings, LLC. The order of the same court and Justice, entered September 22, 2010, which, insofar as appealed from, denied plaintiff's motion for leave to renew defendants' motion to dismiss, should be affirmed, with costs.

All concur except Tom, J.P. and Moskowitz, J. who dissent in part in an Opinion by Moskowitz, J.

MOSKOWITZ, J. (dissenting in part)

This appeal requires a detailed examination of Delaware's law on limited liability corporations. While I agree with the majority that it was error for the motion court not to dismiss plaintiff's claims for breach of contract against certain defendants, I would retain the breach of fiduciary duty claims. There is no question that Delaware law controls all issues on this appeal.

This is a dispute between a member of two LLCs and the manager-members of those LLCs. Plaintiff Howard Kagan seeks to recover amounts allegedly owed for his work for an investment firm, HMC-NY and for his equity holding and membership interest in Harbinger Capital Partners GP, LLC (Onshore Manager) and Harbinger Capital Partners Offshore Manager, LLC (Offshore Manager).

Plaintiff aims his complaint at a wide swath of defendants: HMC-NY, Harbinger Capital Partners GP, LLC, Onshore Manager, Offshore Manager, Harbinger Capital Partners Fund I, LP (Onshore Fund), Harbinger Capital Partners Offshore Fund I, Ltd (Offshore Fund), HMC Investors, Harbinger Holdings, LLC, Philip Falcone, Raymond Harbert and Michael Luce, William Brooke, Charles Miller, David Boutwell, Joel Piassick, Michael White, Carole Schafer, Lawrence Clark, Kathleen Murphy, Ian Estus, Raymond Jones Harbert

Accumulation Trust U/A 12/22/99, Mary Kathryn Harbert Accumulation Trust U/A 12/22/99, John Murdoch Harbert II Accumulation Trust U/A 12/22/99, and John and Jane Does.

Plaintiff claims that in March of 2003 he began to provide consulting services to HMC-New York. In November 2004, he became a Vice President and Director of Investments. In 2006, plaintiff became a member of the Onshore Manager and the Offshore Manager. These entities managed the Onshore Fund and the Offshore Fund. In turn, defendants HMC Investors LLC, HMC-New York, Inc. and Harbinger Holdings, LLC (collectively the member managers), were members in and allegedly managed the Offshore Manager and the Onshore Manager.

As a holder of membership interests in the Offshore Manager and the Onshore Manager (collectively the manager entities), plaintiff was to receive a portion of the manager entities' performance compensation. Pursuant to plaintiff's interpretation of the restated and amended limited liability company agreements (the LLC agreements) governing the manager entities, the amount plaintiff was to receive allegedly rose and fell on the performance of the Onshore Fund. Plaintiff alleges that the LLC agreements further provide that these amounts are "fixed and no longer subject to such increase or decrease once such amounts vest in connection with an involuntary termination of plaintiff's

relationship with [the Harbert Defendants][1] without cause." On August 27, 2008, defendant Falcone terminated plaintiff's relationship with the Harbert Defendants.

According to plaintiff, in addition to the amounts that vested in 2007, the LLC agreements also provide that the manager entities "are required to pay to [plaintiff] amounts equal to his pro rated share of the performance compensation of the [m]anager [e]ntities for 2008, the year in which such termination occurred." Plaintiff claims that $62,141,783 is owed to him under the LLC agreements and that defendants have acknowledged they owe plaintiff at least $36.5 million.

Plaintiff asserted the following causes of action in his complaint: (1) and (2) breach of contract and implied covenant of good faith and fair dealing against, inter alia, the member managers, under the LLC Agreements;[2] (3) unjust enrichment against the individual defendants and John and Jane Doe defendants;(4) constructive trust against all defendants; (5) and (6) breach of fiduciary duty against the member managers; and

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[1] HMC-NY, Harbinger Capital Partners GP, LLC, Onshore Manager, Offshore Manager, Onshore Fund, Offshore Fund, HMC Investors and Harbinger Holdings, LLC collectively are the "Harbert Defendants."

[2]Plaintiff has sued the manager entities for breach of contract as well. This claim survives and is not an issue on this appeal.

separate counts, (7), (8) and (9), for aiding and abetting a breach of fiduciary duty against various other defendants.

The contract claims allege that the manager members failed to pay amounts due under the LLC agreements. Plaintiff also complains that defendants claim they have the right to pay plaintiff in the form of illiquid securities valued with allegedly questionable methodology. Finally, plaintiff complains that the member managers have failed to ensure that sufficient assets are available to pay plaintiff.

The breach of fiduciary duty claims are similar in large part. They allege that the member managers (1) purposefully failed to pay plaintiff amounts they acknowledged to be owed; (2) conditioned payment of acknowledged amounts owed on plaintiff's signing a release and waiver of certain rights; (3) claimed to have the right to pay plaintiff more than $12 million in a form of securities which may have had an unrealizable value; (4) failed to properly calculate amounts owed; and (5) failed to ensure that sufficient assets would be available to pay plaintiff.

Defendants moved, inter alia, to dismiss the breach of contract claims as against the member managers, and to dismiss the remainder of the complaint in its entirety. The motion court denied the portion of the motion that sought dismissal of the

breach of contract claims against the member managers. Because the duty plaintiff sought to enforce essentially arose out of the LLC agreements, the motion court dismissed the claims for breach of fiduciary duty as duplicative of the breach of contract claims. The motion court also dismissed the claims for unjust enrichment and constructive trust, but denied that portion of the motion seeking to dismiss the complaint against certain nondomiciliary defendants for lack of personal jurisdiction.

Plaintiff moved for leave to reargue and renew the motion to dismiss in order to reinstate the claims the motion court dismissed. Plaintiff claimed that, through discovery, he learned that in 2009 the manager entities distributed millions of dollars to others while failing to retain sufficient assets to pay plaintiff. Plaintiff contended that this conduct constituted a breach of fiduciary duty. The motion court denied the motion to renew. Plaintiff appealed from that part of the order that granted defendants' motion to dismiss the claims for breach of fiduciary duty. Defendants cross-appealed from that part of the order that denied their motion to dismiss plaintiff's claims for breach of contract against the member managers. Plaintiff also appealed from the denial of his motion for leave to renew.

Because the member managers do not have responsibility for carrying out the provision for which plaintiff claims breach, I

agree with the majority that the motion court erred in not dismissing the claims for breach of contract. However, a Delaware court would not have dismissed the breach of fiduciary duty claims against the member managers, who, as controlling members of the LLC's at issue, clearly had a fiduciary relationship to plaintiff that the LLC agreements did not eliminate.

I. Breach of Contract

I agree that the motion court erred in retaining the claims for breach of contract against the member managers. The member managers do not have an obligation under the specific contract provisions under which plaintiff claims breach and the exceptions to the exculpatory clause do not include a cause of action for breach of contract (*see Data Mgt. Internationalé, Inc. v Saraga*, 2007 WL 2142848, * 5, 2007 Del Super LEXIS 412, *17 [Del Super 2007] ["[p]arties . . . may reasonably anticipate and address the risks associated with negligence through an exculpatory clause without anticipating an intentional tort which violates a duty independent of the contract"]). Accordingly, the motion court erred in retaining the breach of contract claims when it determined that they fell within the exception to the exculpation clause.

Plaintiff argues that *Kuroda v SPJS Holdings, L.L.C.* (971

A2d 872 [Del Ch 2009]) stands for the proposition that managing members who are signatories to LLC agreements and who possess authority to conduct the business affairs of LLCs can be liable for breach of contract for failing to pay a non-managing member amounts owed under the LLC agreement. *Kuroda* is different. The LLC agreement in *Kuroda* contained a section,"§ 1.06," that reads:

> "Except as otherwise expressly provided in the Delaware Act, the debts, obligations and liabilities of the Company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the Company, and no Member shall be obligated personally for any such debt, obligation or liability of the Company *solely by reason of being a Member*" (*id.* at 881) (emphasis supplied).

Delaware Chancellor Chandler reasoned that the language "solely by reason of being a member" did "not limit liability for reasons other than status as a member" (*id.* at 882). The LLC agreements at issue here do not contain language of this sort.

II. Good Faith and Fair Dealing

As discussed, the motion court improperly sustained the breach of contract causes of action against the member managers. This cause of action contained within it a claim for breach of the implied covenant of good faith and fair dealing. The Delaware Limited Liability Company Act prohibits a LLC agreement from eliminating liability "for any act or omission that constitutes a bad faith violation of the implied contractual

covenant of good faith and fair dealing." (6 Del C § 18-1101 [e]). Thus, the limitation of liability provision cannot operate to waive this cause of action.

"The implied covenant [of good faith and fair dealing] functions to protect stockholders' expectations that the company and its board will properly perform the *contractual* obligations they have under the operative organizational agreements" (*Wood v Baum*, 953 A2d 136, 143 [Del 2008]). "To state a claim of breach of the implied covenant of good faith and fair dealing, a party must allege [1] a specific implied contractual obligation, [2] a breach of that obligation by the defendant, and [3] resulting damage to the plaintiff" (*Kelly v Blum*, 2010 WL 629850, *13, 2010 Del Ch LEXIS 31, *59 [Del Ch. 2010] [internal quotation marks omitted]). General allegations of bad faith are insufficient. To state a cognizable claim, "a plaintiff must allege a specific implied contractual obligation and allege how the violation of that obligation denied the plaintiff the fruits of the contract" (*Kuroda* 971 A2d at 888). Despite the inability to waive this cause of action, it is the rare plaintiff who can invoke the implied covenant successfully (*id.*).

Here, plaintiff fails to allege any specific implied contractual obligation or draw a sufficient connection between alleged violations of the covenant and a specific implied

obligation in the contract. Hence, it was proper to dismiss this claim (*see Kelly*, 2010 WL 629850 at *14, 2010 Del Ch LEXIS 31, *59-60; *Kuroda*, 971 A2d at 888).

III. Breach of Fiduciary Duty

Section 7.10 in the LLC Agreements states:

> "No Manager or Officer shall have any liability to the Company or any Member or Holder for any loss suffered by the Company or any Member or Holder that arises out of any act or omission by the Manager or Officer, if such Manager or Officer performs its duty in compliance with the standard set forth in the immediately preceding sentence, except loss or damage resulting from intentional misconduct, knowing violation of law, gross negligence or a transaction from which the Manager or Officer received a personal benefit in violation or breach of the provisions of this Agreement."

The "immediately preceding sentence" § 7.10 refers to is § 7.9, entitled "Duties of Managers":

> "The Managers shall act in good faith and in the best interest of the Company and with such care as an ordinarily prudent person in a like position would use under similar circumstances."

Under the Delaware LLC statute, with the exception of a violation of the implied covenant of good faith and fair dealing, an LLC agreement "may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties)" (6 Del C § 18-1101 [e]). Defendants argue that § 7.9 replaces the managers' fiduciary duty that would otherwise exist under common law with a contractual

one. Hence, according to defendants, plaintiff cannot assert a cause of action for breach of fiduciary duty whatsoever.

Delaware law does not support defendants' interpretation. *Kelly v Blum*, 2010 WL 629850, 2010 Del Ch LEXIS 31 [Del Ch. 2010], *supra* involved similar provisions to the LLC agreement's sections 7.9 and 7.10. The section of the agreement in *Kelly* that paralleled section 7.9's "Duties of Managers," was entitled "Duties" and stated, in pertinent part, "[t]he Board of Managers shall manage the affairs of the Company in a prudent and business-like manner" (2010 WL 629850, *11, 2010 Del Ch LEXIS 31, *46). Similar to the LLC agreements' § 7.10, the limitation of liability provision in *Kelly* stated:

> "in carrying out their duties hereunder, the Managers shall not be liable for money damages for breach of fiduciary duty to the Company nor to any Member for their good faith actions or failure to act . . .but only for their own willful or fraudulent misconduct or willful breach of their contractual or fiduciary duties under this Agreement"

(2010 WL 629850, *11, 2010 Del Ch LEXIS 31, *46-47). The court in *Kelly* held that these provisions failed to eliminate traditional fiduciary duties "[b]ecause no clause in the [contract] explicitly restricts or eliminates the default applicability of fiduciary duties" (2010 WL 629850, *11, 2010 Del Ch LEXIS 31, *48; *see also Pappas v Tzolis*, 87 AD3d 889, 893 [2011]).

Here too, no clause in the LLC agreements explicitly restricts or eliminates the fiduciary duties that exist at common law. The parties do not dispute that member managers would traditionally owe fiduciary duties to non-managing members. Thus, as the LLC agreements do not explicitly eliminate these traditional fiduciary duties, they remain to the extent they do not duplicate a claim for breach of contract or fall within the terms of an exculpatory clause.

Plaintiff alleges that, among other things, defendants purposefully failed to ensure that sufficient assets were available to pay him, primarily by distributing to others assets that defendants should have used to pay plaintiff. These allegations are sufficient to support a claim for breach of fiduciary duty (*see Schuss v Penfield Partners*, 2008 WL 2433842, * 10, 2008 Del Ch LEXIS 73, *34 [Del Ch 2008] [method general partner used to determine distribution amounts may have violated fiduciary duties]); *see also Kelly*, 2010 WL 629850, *11, 2010 Del Ch LEXIS 31, *48 [breach of fiduciary duty to profit from premeditated scheme to squeeze the plaintiff out of the LLC]; *Anglo Am. Sec. Fund, L.P., v SRG Global Intl. Fund, L.P.*, 829 A2d 143, 157 [Del Ch. 2003] [withdrawal made during time fund was sustaining significant losses may indicate bad faith sufficient to sustain a breach of fiduciary duty claim]).

Even if plaintiff alleged facts that, if true, would be sufficient to show that defendants breached their fiduciary duties, these claims would not be sustainable if they merely duplicated a claim for breach of the contractual duties that the LLC agreements place on the manager entities (*see Nemec v Shrader*, 991 A2d 1120, 1129 [Del 2010]). There is some overlap between some of what plaintiff alleges was a breach of fiduciary duties and what he alleges was a breach of contractual duties. However, plaintiff's allegations that the member managers breached their fiduciary duty by failing to ensure sufficient assets were available to pay plaintiff and by transferring assets to other members of the manager entities that they should have used to pay plaintiff are sufficiently outside the contract to sustain a claim for breach of fiduciary duty (*see Schuss*, 2008 WL 2433842, *10, 2008 Del Ch LEXIS 73, *34). These allegations claim manipulation of a position of control to ensure that plaintiff would not receive his due under the contract and a scheme to benefit at plaintiff's expense. At this early pleading stage, considering the nature of the allegations, it would be inappropriate to dismiss this claim as duplicative of claims for breach of contract. Moreover, the allegations, if true, raise the distinct possibility that the member managers have moved enough funds out of the remaining defendant entities to prevent

plaintiff from recovering damages as a practical matter.

However, plaintiff's claims for breach of fiduciary duty face one more hurdle. Even though plaintiff has alleged facts sufficient to show that defendants may have breached their fiduciary duties to him, and even though the allegations do not entirely duplicate plaintiff's claims for breach of contract, defendants might still avoid liability under the exculpatory provision. This provision eliminates liability for everything short of "intentional misconduct, knowing violation of law, gross negligence or a transaction from which the Manager or Officer received a personal benefit in violation or breach of the provisions of this Agreement."

Plaintiff's allegations certainly could fit into the "intentional misconduct" exception to the exculpation provision. Plaintiff has alleged facts suggesting that the member managers knew full well they owed plaintiff considerable amounts under the LLC agreement, but, in response to the economic crisis in late 2008, deliberately withheld or caused the manager entities to withhold payment. These defendants then allegedly used plaintiff's money for themselves and certain other defendants. Because these allegations support a claim that defendants used their position of control over the managing entities to enrich themselves at plaintiff's expense, I would sustain the claims for

breach of fiduciary duty (*see Schuss*, 2008 WL 2433842, *10, 2008 Del Ch LEXIS 73, *34 ["plaintiffs conceivably could prove [d]efendants adopted their interpretation in bad faith or as a result of gross negligence or willful misconduct"]).

IV. Aiding and Abetting Breach of Fiduciary Duty

Because the motion court dismissed the breach of fiduciary duty claims, there was no basis to keep the claims for aiding and abetting breach of fiduciary duty. As I would not have dismissed the breach of fiduciary duty claims, it is necessary to analyze the aiding and abetting claims. However, under applicable Delaware law, these claims are not viable.

There appears to be a conflict between New York and Delaware regarding the particulars of a claim for aiding and abetting breach of fiduciary duty. In Delaware, a fiduciary cannot be liable on an aiding and abetting claim. In New York, there is no requirement that defendant be a nonfiduciary (*compare Gotham Partners, L.P. v Hallwood Realty Partners, L.P.*, 817 A2d 160, 172 [Del 2002], *with Kaufman v Cohen*, 307 AD2d 113, 125 [2003]).

Plaintiff, seeking to escape Delaware's requirement that a defendant on an aiding and abetting claim have nonfiduciary status, insists that New York law applies because the underlying conduct took place in New York. However, application of corporate law and the regulation of internal corporate affairs is

a matter of interest primarily for the state of incorporation, here Delaware (*see In re American Intl. Group, Inc*, 965 A2d 763, 822 [Del Ch 2009] [even though all relevant conduct occurred in New York, Delaware's policy interest would be paramount]). Thus, Delaware law applies and plaintiff's claims for aiding and abetting fail against defendants Falcone, Harbert and Luce because these defendants were officers of the managing members and therefore were fiduciaries as well.

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

ENTERED: FEBRUARY 28, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, DeGrasse, Abdus-Salaam, JJ.

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6348N Index 600352/09

U.S. Bank National Association, etc.,
Plaintiff-Appellant,

Syncora Guarantee, Inc., etc., et al.,
Plaintiffs,

-against-

GreenPoint Mortgage Funding, Inc.,
Defendant-Respondent.

_____

Nixon Peabody LLP, New York (Constance M. Boland of counsel), for appellant.

LeClairRyan, A Professional Corporation, New York (Michael T. Conway of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered October 13, 2010, reversed, on the law, without costs, to direct defendant to bear its own discovery costs, subject to reallocation on a proper showing, and the matter is remanded to the Supreme Court for further proceedings consistent with this opinion. Appeal from order, same court and Justice, entered April 13, 2010, dismissed, without costs, as superseded by the order entered October 13, 2010.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
Rolando T. Acosta
Leland G. DeGrasse
Sheila Abdus-Salaam, JJ.

6347-6348N
Index 600352/09

_____x

U.S. Bank National Association, etc.,
Plaintiff-Appellant,

Syncora Guarantee, Inc., etc., et al.,
Plaintiffs,

-against-

GreenPoint Mortgage Funding, Inc.,
Defendant-Respondent.
_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Bernard J. Fried, J.), entered October 13, 2010, and April 13, 2010, which, insofar as appealed from, required plaintiff to bear the cost incurred in the production of discovery.

Nixon Peabody LLP, New York (Constance M. Boland of counsel), for appellant.

LeClairRyan, A Professional Corporation, New York (Michael T. Conway of counsel), and BuckleySandler LLP, New York (Matthew P. Previn of counsel), for respondent.

ACOSTA, J.,

This case requires us to determine which party is to incur the cost of searching for, retrieving and producing both electronically stored information and physical documents that have been requested as part of the discovery process. Consistent with this Court's recent decision in *Voom HD Holdings LLC v Echostar Satellite LLC* (___ AD3d ___, NY Slip Op 00658 [January 31, 2012]), which adopted the standards articulated by *Zubulake v UBS Warburg LLC* (220 FRD 212 [SD NY 2003]) in the context of preservation and spoliation, we are persuaded that *Zubulake* should be the rule in this Department, requiring the producing party to bear the cost of production to be modified by the IAS court in the exercise of its discretion on a proper motion by the producing party. Accordingly, the matter is remanded to the motion court for further proceedings.

Background

The complaint alleges that prior to August 2007, when its operations were allegedly shut down, defendant GreenPoint Mortgage Funding, Inc. was in the mortgage loan origination business, specializing in what were called "no-doc" and "low-doc" loans, i.e., mortgages for individuals with little to no documentation of income and assets. GreenPoint securitized these loans by pooling them into a trust and then offering for sale

notes that were secured by and to be paid down by the cash flow received from the underlying loans.

In accordance with these practices, from 2005 to 2006, GreenPoint sold notes on approximately 30,000 residential mortgages it had securitized, valued at $1.83 billion, to non-party GMAC Mortgage Corporation. Subsequently, GMAC assigned these notes to Lehman Brothers Bank; which, in turn, subsequently assigned them to its parent company, Lehman Brothers Holding; which, in turn, assigned the notes to an affiliated special purpose entity, the Structured Asset Securities Corporation; which, in turn, assigned them to plaintiff-appellant herein, U.S. Bank, NA, as the Indenture Trustee for the benefit of the insurers and noteholders of GreenPoint Mortgage Funding Trust 2006-HE1, Home Equity Loan Asset-Backed Notes, Series 2006-HE1. In addition, certain payments of the notes were guaranteed by two insurance companies, Syncora Guarantee, formerly known as XL Capital Assurance, Inc., and CIFG Assurance North America (CIFG).

According to U.S. Bank, less than two years after the transaction closed, approximately $530 million worth of the loans had been completely charged off as a total loss, or were severely delinquent. U.S. Bank now acts for the benefit of the noteholders and the insurers, which have been making payments to the noteholders.

The Litigation

U.S. Bank, by summons and complaint dated February 5, 2009, brought this action against GreenPoint for what it alleged were "gross violations" of the representations and warranties regarding the attributes of the loans and the policies and practices under which the loans were originated, underwritten and serviced. U.S. Bank further alleged that in its original agreement to sell the loans, GreenPoint promised it would cure any breaches of its representations and warranties that materially and adversely affected the value of the loans by repurchasing and replacing the non-complying loans at agreed-to prices. U.S. Bank also alleged that GreenPoint agreed that if the breaches were severe enough, GreenPoint would buy back all 30,000 mortgages.[1]

Discovery Motion

Concurrently with its original complaint in February 2009, U.S. Bank served its first request for the production of documents. In response, GreenPoint did not produce documents, but rather, on April 28, 2009, submitted a letter to the court pursuant to rules 11, 14 and 24 of the Rules of the Commercial Division of the Supreme Court (22 NYCRR § 202.70), as well as

[1]The insurers, which were originally included as plaintiffs, were dismissed from the case for lack of standing.

CPLR 3214(b) and 3103, seeking a ruling on whether discovery should be stayed pending the motion to dismiss, whether or not a protective order should issue governing the confidentiality and scope of disclosure, and whether production should be conditioned on U.S. Bank's confirmation it would pay the cost of production. GreenPoint advised the court that it had attempted to resolve these issues with U.S. Bank, but to no avail. U.S. Bank did not respond to GreenPoint's letter.

By notice of motion dated December 11, 2009, GreenPoint moved to stay discovery and for a protective order conditioning production of discovery on compliance with a proposed discovery protocol that provided, among other things, that each party would pay for its own discovery requests (i.e., U.S. Bank would pay the costs associated with its requests to GreenPoint and GreenPoint would pay the costs associated with its request to U.S. Bank) and that U.S. Bank would pay for GreenPoint's pre-production attorney review time for the purposes of privilege and confidentiality assertions.

In opposition, U.S. Bank argued that the merits of its allegations in this action, the relevance of its document request, and the likely asymmetry between GreenPoint's document production to it and U.S. Bank's likely document production to Greenpoint militated in favor of denying the motion. U.S. Bank

contended that because it was injured by a widespread pattern of GreenPoint's misrepresentations and warranties and its violations of its underwriting guidelines and practices concerning the 30,000 underlying loans, the anticipated document discovery from GreenPoint was expected to be vast, as were the resulting costs. U.S. Bank noted that the costs of production could run into the millions of dollars.

Orders on Appeal

In an order entered April 13, 2010, the motion court denied GreenPoint's request for a protective order approving its discovery protocol. However, in so doing, it endorsed GreenPoint's contention that "the well-settled rule in New York State" was that the "party seeking discovery bears the costs incurred in its production" and stated that it would not deviate from this rule in the instant action. The court, however, rejected GreenPoint's request that the party seeking discovery also bear the cost of compensating the attorneys engaged by the producing party to determine whether the demanded documents are responsive and not privileged.

Subsequently, U.S. Bank's counsel wrote to the court seeking clarification of the April 13 order, seeking an order that specifically directed the requesting party to pay the reasonable costs of the producing party (excluding attorneys' fees) –

counsel wanted to make sure that for purposes of pursuing an appeal, it was deemed an aggrieved party. The court held a conference on September 28, 2010, wherein it reiterated that in this state, the party requesting discovery bears the costs incurred in its production and that the parties were not required to pay each other's attorneys' fees. The court noted that its ruling did not preclude either party from making any further application regarding the allocation of discovery costs at such later date if it becomes clear that such application is meritorious.

We disagree with the motion court's conclusion that the requesting party bears the cost of discovery that is responsive to its document requests. Rather, it is the producing party that is to bear the cost of the searching for, retrieving, and producing documents, including electronically stored information.

Analysis

The question of which party is responsible for the cost of searching for, retrieving and producing discovery has become unsettled because of the high cost of locating and producing electronically stored information (ESI). The CPLR is silent on the topic. Moreover, while our courts have attempted to provide working guidelines directing how parties and counsel should prepare for discovery, including ESI, these guidelines generally

abstain from recommendations concerning the issue of cost allocation. Even the Rules of the Commercial Division for Supreme Court, Nassau County, previously recognized by this Court as the most sophisticated rules concerning discovery, including ESI, in the state (*see, Tener v Cremer*, 89 AD3d 75[2011]), are largely silent on the issue of cost allocation, merely noting that the law in New York on cost shifting is "still developing" and referring counsel to decisions of the Nassau County Commercial Division (Commercial Division, Nassau County, Guidelines for Discovery of ESI, Section V, Costs).

Indeed, the courts that have spoken on the issue of cost allocation have not done so with one voice. For example, at least one court has held that the requesting party should bear the entire cost of searching for, retrieving and producing discovery that included ESI (*see e.g. Lipco Elec Corp. v ASG Consulting Corp.*, 4 Misc 3d 1019[A], 2004 NY Slip Op 50967[u] [2004]). This Court has previously acknowledged the requestor's obligation to pay for discovery and ESI costs (*see e.g. Response Personnel, Inc. v Aschenbrenner*, 77 AD3d 518 [2010]), but has allowed for an exception requiring the producer to pay where the cost of ESI production is less significant, such as where the ESI is readily available (*Waltzer v Tradescape, LLC*, 31 AD3d 302, 304 [2006]).

By contrast, there has been a movement among other courts, where the cost of discovery production is significant, to adopt the standards articulated by the United States District Court in *Zubulake v UBS Warburg, LLC* (217 FRD 309, 317-318 [SD NY 2003]), and to place the cost of discovery, including searching for, retrieving and producing ESI, at least initially, on the producing party (*see e.g. MBIA Ins Corp. v Countrywide Home Loans, Inc.*, 27 Misc 3d 1061, 1075-76 [2010]; *see also Silverman v Shaoul*, 30 Misc 3d 491, 496 [2010]; *T.D. Bank, N.A. v J&T Hobby*, LLC, 2010 NY Slip Op 32481[U][2010]; *cf. Clarendon Natl. Ins. Co. v Atlantic Risk Mgt, Inc.*, 59 AD3d 284, 286 [2009] [the general rule is that "during the course of the action, each party should bear the expenses it incurs in responding to discovery requests"]).

We are now persuaded that the courts adopting the *Zubulake* standard are moving discovery, in all contexts, in the proper direction. *Zubulake* presents the most practical framework for allocating all costs in discovery, including document production and searching for, retrieving and producing ESI. As noted, *Zubulake* requires, consistent with the Federal Rules of Civil Procedure, the producing party to bear the initial cost of searching for, retrieving and producing discovery, but permits the shifting of costs between the parties. When evaluating

whether costs should be shifted, the IAS courts, in the exercise of their broad discretion under article 31 of the CPLR (*see e.g. Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]), may follow the seven factors set forth in *Zubulake*:

> "(1) [t]he extent to which the request is specifically tailored to discover relevant information; (2) [t]he availability of such information from other sources; (3) [t]he total cost of production, compared to the amount in controversy; (4) [t]he total cost of production, compared to the resources available to each party; (5) [t]he relative ability of each party to control costs and its incentive to do so; (6) [t]he importance of the issues at stake in the litigation; and, (7) [t]he relative benefits to the parties of obtaining the information" (*Zubulake*, 217 FRD at 322).

The motion courts should not follow these factors as a checklist, but rather, should use them as a guide to the exercise of their discretion in determining whether or not the request constitutes an undue burden or expense on the responding party (*id.* at 322-23).

Defendant argues against adopting the *Zubulake* standard, contending that requiring the requesting party to pay all costs associated with discovery is a sounder judicial practice and policy. Defendant contends that it "encourages parties to self-regulate the scope of their discovery demands and discourages parties from placing unnecessary and oppressive (even prohibitive) costs upon an opponent," *quoting T. A. Ahern Contrs. Corp. v Dormitory Auth. of State of N.Y.* (24 Misc 3d 416, 423

[2009]). Defendant asserts that the rule promotes judicial efficiency by removing the court from determining whether the information being sought is worth the cost of the search and would help the courts of this state avoid the "discovery wrangles" notoriously common in federal courts.

We find these arguments unavailing. First, requiring the producing party to bear its own cost of discovery, including the searching, retrieving and producing of ESI, supports "the strong public policy favoring resolving disputes on their merits" (*Zubulake*, 217 FRD at 318). The alternative of having the requestor pay "may ultimately deter the filing of potentially meritorious claims" particularly in circumstances where the requesting party is an individual *(Zubulake* at 318).

Second, we note, with some concern, that commentators and courts have called into question the underpinning of the requestor pays rule (*see e.g. MBIA Insurance Corp. v Countrywide Home Loans, Inc.* 27 Misc 3d 1061 [2010], *supra* and Connors, *Which Party Pays the Cost of Document Disclosure?* 29 Pace L. Rev. 441, 450 [2009]). In *Countrywide*, for example, the motion court examined the holding of *Lipco Electrical Corp. v ASG Consulting Corp.* (4 Misc 3d 1019[A], 2004 NY Slip Op 50967 [U][2004], *supra*), the leading "requestor pays" case, and found it to be

unsupported by the precedent it cited.

Finally, the adoption of the *Zubulake* standard is consistent with the long-standing rule in New York that the expenses incurred in connection with disclosure are to be paid by the respective producing parties and said expenses may be taxed as disbursements by the prevailing litigant (*see Wiseman v American Motors* Sales Corp., 103 AD2d 230, 241 [1984]; *see also* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3108:5, p 379; C3103:5, p 301).

Applying these standards to the instant motion for a protective order, we find that the motion by defendant was premature. The more prudent course of action would have been for defendant to first make a motion to limit or strike the discovery requests initiated by plaintiff that it found to be overbroad, irrelevant, or unduly burdensome. If, following the resolution of that motion, defendant still believed the costs associated with searching for, retrieving, and producing ESI to be prohibitive, defendant could then file a motion for the costs to be shifted to plaintiff.

There is no occasion, however, for us to opine on the propriety of shifting costs in this matter. There is simply no

evidence in the record supporting the fee structure proposed by defendant. There is no indication, for example, as to what experts, if any, will be used to restore deleted or missing documents, or even if there are deleted or missing documents that need to be restored. Indeed, it is unclear how defendant arrived at the retrieval costs it cited. While it may be, as the motion court noted, that defendant demonstrates a reason for either limiting or narrowing plaintiff's discovery requests and shifting some or all of the cost to plaintiff, it has simply not done so on the record to date.

Accordingly, the order of the Supreme Court, New York County (Bernard J. Fried, J.), entered October 13, 2010, which, insofar as appealed from, required plaintiff to bear the cost incurred in the production of discovery, should be reversed, on the law, without costs, and defendant is directed to bear its own discovery costs, subject to the reallocation on a proper showing, and the matter is remanded to the Supreme Court for further proceedings consistent with this opinion. The appeal from the

order of the same court and Justice, entered April 13, 2010, should be dismissed, without costs, as superseded by the order entered October 13, 2010.

All concur.

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

ENTERED: FEBRUARY 28, 2012

CLERK