SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 4, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

9112 The People of the State of New York, Respondent, Ind. 3973/08

-against-

Noel Diaz,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Andrew C. Fine of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Jeremy A. Benjamin of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Richard J. Ramsay of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Darcel D. Clark, J.), rendered July 9, 2010, convicting defendant, after a jury trial, of burglary in the third degree, possession of burglar's tools (four counts), and criminal mischief in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously reversed, on the law, the judgment vacated, the burglar's tools counts of the indictment dismissed, and the matter remanded for a new trial on the burglary and criminal mischief charges.

The search of defendant's backpack following his arrest was

unlawful because he was handcuffed at the time of the search and it was no longer in his control (*see People v De Santis*, 46 NY2d 82, 89 [1978], *cert denied* 443 US 912 [1979]). The contents of the backpack, which included a pair of pliers and unused garbage bags, should have been suppressed because even where a container is not in the exclusive control of the police, exigency justifying its search incident to arrest is not established in the absence of "some reasonable basis for the belief that the contents of those containers might pose a danger to the arresting officers or when there is legitimate concern for the preservation of evidence which might reasonably be thought to reside within the containers" (*People v Rosado*, 214 AD2d 375, 376 [1st Dept 1995], *lv denied* 86 NY2d 740 [1995]).

Here, the People did not meet their burden of establishing a reasonable basis for such a belief. The officer who appeared at the suppression hearing did not testify about any concern regarding the presence of a weapon, or any other exigency. While such testimony is not required, exigency is not demonstrated unless it is supported by circumstances giving rise to an objectively reasonable suspicion (*see People v Bowden*, 87 AD3d 402, 405 [1st Dept 2011], *appeal dismissed* 18 NY3d 980 [2012]). In this case, there were no indications that defendant might be armed, that he posed any threat of violence, or that the backpack

contained any evidence. Because the burglar's tools charges are based on the evidence obtained by means of the unlawful search of the backpack, those counts of the indictment must be dismissed. Moreover, the prejudice that accrued to defendant from the admission of the unlawfully obtained evidence requires that he be retried on the burglary and criminal mischief charges.

We reject defendant's argument that the evidence established only an attempt to commit burglary in the third degree, not the completed offense of burglary in the third degree. The police arrested defendant as he emerged from a hollow space over a store's entrance, under an awning. Before the incident for which defendant was arrested, the space had been enclosed, bounded on the outside by a metal plate and on the inside by the store's interior wall. The hollow space between the metal plate and the wall was large enough to accommodate a human being. The police saw defendant reach the area over the store entrance by climbing atop a telephone kiosk beside the doorframe. The metal plate covering the space had been "pried down," affording access to the hollow space within. The day after the arrest, the store manager discovered that a hole had been chiseled in the store's interior wall behind the hollow space where defendant had been the night before.

The enclosed hollow space over the store's entrance, between

the metal plate and the store's interior wall, plainly was a part of the building. The space was closed to the public by virtue of the metal plate that covered it on the outside (*cf. People v Sanchez*, 209 AD2d 265, 266 [1st Dept 1994], *lv denied* 85 NY2d 866 [1995] [the evidence was insufficient to support a burglary conviction where the unlocked vestibule where the defendant was arrested was not "closed to the public, and neither the owner nor the residents of this building took steps to restrict access to the vestibule, or to instruct the defendant that he was not allowed in this area"] [citation omitted]). Any space physically closed off from public access constitutes a "building" within the meaning of Penal Law § 140.00(2) (*see People v King*, 61 NY2d 550, 552 [1984] ["the recessed entry area of a store abutting the sidewalk, enclosed by display windows, a door, a roof and a security gate at the sidewalk line may be deemed part of a 'building' under the Penal Law"]). To prove the commission of a completed burglary, the People were required to show only that "[defendant] or any part of his body intrude[d] within the building" (*id.*). Such an intrusion was unquestionably demonstrated here, as the evidence showed that defendant intruded his entire body into the hollow space over the store's entrance. The metal plate covering the space had been pried back, and the jury was entitled to infer that defendant had twisted back the

plate to gain access to the space within.

For purposes of determining whether the evidence supports defendant's burglary conviction, it is of no moment that, despite the hole he chiseled in the store's interior wall, he apparently did not succeed in intruding beyond that wall into the main room of the store. "Where a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and part of the main building" (Penal Law § 140.00[2]). Thus, the evidence was sufficient to support a finding that defendant completed the crime of burglary in the third degree when he unlawfully entered the hollow space between the metal plate and the store's interior wall, knowing that such entry was unlawful, with the intent to commit a crime while within that space (*see* Penal Law § 140.20).

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

ENTERED: JUNE 4, 2013

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Gische, JJ.

9192 In re Chelsea Business & Property Owners' Association, LLC, doing business as Chelsea Flatiron Coalition, Petitioner-Appellant, Index 113194/10

-against-

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

127 west 25th LLC, et al., Respondents.

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The Council of the City of New York, Intervenor-Petitioner-Appellant.

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Greenberg Traurig, LLP, Albany (Henry M. Greenberg of counsel), for Chelsea Business & Property Owners' Association, LLC, appellant.

Elizabeth R. Fine, New York (Lauren G. Axelrod of counsel), for The Council of the City of New York, appellant.

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

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for Bowery Residents' Committee, respondent.

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Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered December 7, 2011, denying the petition and dismissing the proceeding, brought pursuant to CPLR article 78, which challenged a determination by respondent Board of Standards and Appeals of the City of New York (BSA), dated April 5, 2011,

which affirmed the determination of respondent Commissioner of the New York City Department of Buildings (DOB), denying petitioner's request to revoke certain permits and approvals issued to respondent Bowery Residents' Committee, Inc. (BRC), unanimously affirmed, without costs.

Petitioner challenges the municipal respondents' determinations, approvals and permits allowing respondent BRC to convert and operate a 12-story building at 127-131 West 25th Street in Manhattan as a homeless shelter and offices. Petitioner claims that the facility is improperly classified, under the Zoning Resolution of the City of New York, as a Use Group 5 "transient hotel," which permits BRC to operate it in the M1-6 light manufacturing zoning district where the building is located, and that the proper use classification for the facility is Use Group 3 "non-profit institution with sleeping accommodations," or Use Group 3 "health related facility," which uses are prohibited in the M1-6 district. Petitioner also seeks to enjoin the occupancy and operation of BRC's 100,000 square-foot facility, housing a 32-bed detoxification unit, a 96-bed reception center and a 200-bed homeless shelter, pending compliance with all laws, rules and regulations; compel respondent the City of New York to submit the proposed facility

to Uniform Land Use Review Procedure (ULURP) review; and enjoin operation of the proposed facility unless it complies with the Administrative Code of City of NY § 21-312 restriction on shelters exceeding 200 beds. Intervenor-petitioner, the City Council of the City of New York, also argues that the facility does not comply with the Administrative Code's restriction on shelters exceeding 200 beds.

"BSA and DOB are responsible for administering and enforcing the zoning resolution, and their interpretation must therefore be given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute" (*Appelbaum v Deutsch*, 66 NY2d 975, 977 [1985] [internal citations and quotation marks omitted]). The BSA rationally determined that the definition of "transient hotel" in section 12-10 of the Zoning Resolution is clear and unambiguous and that the proposed use of the building meets the three criteria of the definition, i.e., it (1) provides sleeping accommodations used primarily for transient occupancy; (2) has a common entrance to serve the sleeping accommodations; and (3) provides 24-hour desk service, housekeeping, telephone and linen laundering.

The court correctly determined that ULURP review is not

required. The municipal respondents do not have a lease or the functional equivalent of a lease of the building (*see* NY City Charter § 197-c[a][11]; *Matter of Plaza v City of New York*, 305 AD2d 604, 605-606 [2d Dept 2003]). Nor was it shown that the contract between BRC and the Department of Homeless Services is part of an actual housing and urban renewal plan (*see* NY City Charter § 197-c[a][8]; *West 97th-W. 98th Sts. Block Assn. v Volunteers of Am. of Greater N.Y.*, 190 AD2d 303, 309 [1st Dept 1993]).

The court also properly rejected petitioner's argument that the building operates in violation of the Administrative Code, which stipulates that "[n]o shelter for adults shall be operated with a census of more than [200] persons" (Administrative Code § 21-312[b]). The court, however, erroneously determined that the reception center and the 200-bed shelter constitute a single homeless shelter for purposes of the census limitation. The evidence shows that the reception center and the 200-bed shelter are separately operated, with separate budgets. Each program is separately licensed by the relevant state regulatory agency, and operated pursuant to separate agreements with the Department of Homeless Services. Although they are located in a single building, they are "separately operated programs," which should

have been evaluated separately for compliance with the Administrative Code.

Even assuming a census in excess of 200 persons, the court correctly determined that the building is permitted as a grandfathered shelter under the "Camp LaGuardia" exception to the Administrative Code's 200-bed limit (*see* Administrative Code §§ 21-312[b], 21-315[a][6]).

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

ENTERED: JUNE 4, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, JJ.

9374-
9374A-
9375 Index 651300/11

Thomas Barbarito, etc., et al.,
Plaintiffs-Respondents-Appellants,

-against-

Leor Zahavi, et al.,
Defendants,

TLM Real Estate, LLC, et al.,
Defendants-Appellants-Respondents.

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Meister Seelig & Fein LLP, New York (Kevin Fritz of counsel), for TLM Real Estate, LLC, appellant-respondent.

Traub Lieberman Strauss & Shrewsberry LLP, Hawthorne (Daniel G. Ecker of counsel), for Mark J. Seelig and Meisler Seelig & Fein LLP, appellants-respondents.

Hinckley & Heisenberg LLP, New York (Christoph Heisenberg of counsel), for respondents-appellants.

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Orders, Supreme Court, New York County (Anil C. Singh, J.), entered June 21, 2012, which, insofar as appealed from as limited by the briefs, denied TLM's motion to dismiss the eleventh and twelfth causes of action in the amended complaint as against it pursuant to CPLR 3211(a)(1) and (7), and denied defendants Mark J. Seelig's and Meister Seelig & Fein, LLP's motion to dismiss the amended complaint as against them pursuant to CPLR 3211(a)(7) and 3016(b), unanimously reversed, on the law, with costs, and

the motions granted. The Clerk is directed to enter judgment dismissing the amended complaint as against defendants Mark J. Seelig; Meister Seelig & Fein, LLP; and TLM Real Estate, LLC. Appeals from order, same court and Justice, entered December 22, 2011, which, inter alia, denied defendants TLM Real Estate, LLC's and Mark J. Seelig's motions to dismiss the seventh, eleventh, and twelfth causes of action in the original complaint as against them pursuant to CPLR 3211(a)(1) and (7), unanimously dismissed, without costs, as academic.

For the purpose of determining whether the amended complaint states a cause of action under CPLR 3211(a), we assume the truth of the following facts taken from the complaint (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). At some time before January 2004, plaintiff Thomas Barbarito, defendant Leor Zahavi, and nonparties to this appeal founded nominal defendant Admit One, LLC, a ticket brokerage firm. In August 2005, Admit One obtained a revolving line of credit for approximately $6.5 million from nonparty Bank of America.

From Admit One's inception, defendant Seelig and his law firm, defendant Meister Seelig & Fein, LLP (MSF), served as counsel for Admit One, and for Barbarito and Zahavi in their individual capacities. In addition, Seelig was the sole member

of defendant TLM Real Estate, LLC (TLM). In July 2008, Zahavi, Barbarito, and certain nonparties to this appeal borrowed around $1.4 million from TLM and executed a note for that loan (the July 2008 note).[1] Barbarito and Zahavi each executed confessions of judgment for the loan and placed mortgages on their homes.

Plaintiffs assert that through the Fall and Winter of 2008, Zahavi borrowed more than $4 million from Admit One to pay personal obligations arising from his brokerage account. According to plaintiffs, Zahavi received most of the money by drawing upon Admit One's Bank of America line of credit, hiding the transaction's true nature from Bank of America by creating fictitious ticket purchases from Admit One.

Soon afterward, in April 2009, the July 2008 note was coming due. Zahavi and Seelig negotiated an amended and restated loan agreement by and among Zahavi, Barbarito, and TLM. In that amended loan agreement, the parties agreed to increase the principal amount of the obligation to $1.9 million, representing the original amount borrowed plus additional amounts that Zahavi had allegedly borrowed from TLM after July 2008. The parties

[1] Although Barbarito and Zahavi originally owned Admit One with other parties, they eventually bought out the other owners so that by December 2001, Barbarito and Zahavi owned the entire company.

then recorded the new amount in an amended and restated promissory note dated as of April 23, 2009 and agreed to extend the July 2008 note's due date until April 22, 2010. Additionally, Barbarito, Zahavi, and TLM entered into a pledge agreement in which Barbarito and Zahavi pledged to TLM their membership interests in Admit One as partial security for the TLM loan.

Plaintiffs allege that in 2009, Bank of America declared Admit One to be in default of the line of credit in the amount of $6.3 million, largely because Zahavi had not paid back the money he borrowed to pay his personal obligations. Bank of America eventually sold its rights in Admit One to defendant (and nonparty to this appeal) Metro Entertainment, Inc. Further, Seelig allegedly advised Barbarito to transfer to Zahavi 32.52 shares of Admit One, thus diluting Barbarito's interest in Admit One and giving Zahavi a majority interest in the company.

According to the amended complaint, on June 18, 2010, TLM and Zahavi entered into an assignment and assumption agreement in which TLM purported to assign to Zahavi all of its rights and interests in the pledge agreement. By letter allegedly prepared by MSF and dated June 21, 2010, Zahavi exercised his rights under the assignment and assumption agreement, claiming to have

obtained "all of Barbarito's right, title and interest as a member" of Admit One. Plaintiffs allege that TLM then assigned to Metro Entertainment – a company run by a friend of Zahavi – all its rights and interests in Barbarito's confession of judgment. Plaintiffs allege that Zahavi, with Seelig's assistance, eventually acquired a controlling interest in Admit One.

TLM, Zahavi, and Metro Entertainment offered to release Barbarito from liability under the outstanding TLM and Metro loans if Barbarito would give up his ownership rights in Admit One. Barbarito, however, refused to do so. Plaintiffs allege that thereafter, Zahavi and TLM, along with Metro and other nonparty defendants, seized Barbarito's rights in Admit One and began foreclosure proceedings on his New York and Florida properties.

In May 2011, Barbarito and his wife commenced this action, alleging that Zahavi and Seelig made false representations intended to induce Barbarito to enter into the various transactions surrounding the TLM loan. Those transactions, plaintiffs assert, ultimately deprived Barbarito of his membership interest in Admit One. Plaintiffs also allege that Seelig made misrepresentations that violated his "confidential

relationship" as counsel.

To begin, the motion court should have granted TLM's motion to dismiss the eleventh cause of action seeking surplus under UCC §§ 9-610 and 9-616. Uniform Commercial Code § 9-610(a) states, "[a]fter default, a secured party *may* sell . . . or otherwise dispose of any or all of the collateral . . . " (emphasis added). Moreover, the pledge agreement specifically states, "Pledgee [i.e., TLM] shall not be obligated to make any sale of the Collateral if it shall determine not to do so . . . ." TLM was therefore not obliged to sell the collateral – that is, Barbarito's membership interest in Admit One – after Barbarito defaulted on the loan.

Further, a secured party is "not obligated to act in a commercially reasonable manner before taking possession of the collateral" (*Chase Equip. Leasing Inc. v Architectural Air, L.L.C.*, 84 AD3d 439, 439 [1st Dept 2011]; *see Bank Leumi USA v Agati*, 5 AD3d 292, 293 [1st Dept 2004]). Here, the record does not indicate that TLM took possession of the collateral.

As to the June 18, 2010 assignment of the pledge agreement, the pledge agreement was merely an incident to the note it was intended to secure. However, the record contains no indication that TLM assigned the underlying note to Zahavi, and the transfer

of the pledge agreement without the note is a legal nullity, leaving the transferee without standing to enforce the pledge (*see U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]; *see also Merritt v Bartholick*, 36 NY 44, 45 [1867] [security cannot be separated from debt and exist independently of debt]). The eleventh cause of action therefore fails to state a claim as against TLM.

The twelfth cause of action for an accounting under the UCC also should be dismissed as against TLM. UCC § 9-608(a)(4) is inapplicable because, as we have already concluded, TLM was not obliged to dispose of the collateral. Likewise, UCC § 9-616 is inapplicable because a membership interest in a limited liability company is not a consumer good (*see* UCC 9-102[23]). UCC § 9-607, another section that plaintiffs cite in their amended complaint, does not address accountings at all.

The seventh cause of action fails to state a claim for fraud as against Seelig, as it does not allege that he made a material misrepresentation of fact (*see e.g. Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). In fact, plaintiffs attribute only one statement to Seelig – namely, that TLM would refrain from collecting on the July 2008 note until Admit One had sufficient assets. However, plaintiffs do not

allege Seelig made the statement with an intent to deceive, or even that the statement was false (*see* CPLR 3016[b]). Nor do plaintiffs claim that they relied on special knowledge that Seelig may have had, or that Seelig made a misleading partial disclosure (*cf. Williams v Sidley Austin Brown & Wood, LLP*, 38 AD3d 219, 220 [1st Dept 2007]).

Similarly, even if we were to view the seventh cause of action as a claim for a scheme or conspiracy to wrongfully take Barbarito's membership interest in Admit One, it would still fail to state a cause of action as against Seelig. The amended complaint alleges, "TLM's Seelig and Zahavi agreed that ... the first step of the scheme would be for TLM to take Barbarito's Admit One membership interests and provide those to Zahavi, without TLM complying with its UCC obligations to offer the membership interests to the highest bidders." However, as we have already noted, TLM's purported assignment to Zahavi of its rights under the pledge agreement without a concomitant transfer of the underlying note was a legal nullity. As we have also noted, TLM was not obliged to sell Barbarito's membership interest in Admit One.

The seventh cause of action should also be dismissed insofar as it alleges that MSF aided and abetted the alleged fraud or the

scheme, because even assuming for the sake of argument that a fraudulent scheme existed, MSF did not provide "substantial assistance" to any such alleged scheme (*see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]). On the contrary, documenting and negotiating the April 23, 2009 loan transaction from TLM to plaintiffs "fall[s] completely within the scope of defendant's duties as an attorney" (*Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 606 [1st Dept 2010]).

To the extent the seventh cause of action alleges that Seelig aided and abetted a fraud against nonparty Bank of America, it should be dismissed because plaintiffs were not injured when Bank of America, after making a loan to Admit One, sold the loan at a steep discount to Metro Entertainment.

Finally, the "single motion rule" (CPLR 3211[e]) does not bar Seelig and MSF from moving to dismiss the amended complaint, as the fraud cause of action in the amended complaint is not the same as the corresponding cause of action in the original complaint. Indeed, plaintiffs did not assert the fraud claim against MSF in the original complaint, so MSF could not have moved to dismiss that claim. Although the malpractice cause of action is the same in the original complaint as in the amended

complaint, the motion court dismissed that cause of action in the original complaint. Therefore, because Seelig and MSF did not have the opportunity to address the merits of the original cause of action, the single motion rule does not apply (*Rivera v Board of Educ. of City of N. Y.*, 82 AD3d 614 [1st Dept 2011]; *cf. B.S.L. One Owners Corp. v Key Intl. Mfg.*, 225 AD2d 643, 644 [2d Dept 1996]).

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

ENTERED: JUNE 4, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, JJ.

9380 Century Indemnity Company, etc., et al., Plaintiffs-Appellants, Index 105491/10

-against-

Liberty Mutual Insurance Company, et al., Defendants-Respondents,

Certain Underwriters of Lloyd's and London Market Insurance Companies, et al., Defendants.

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O'Melveny & Myers LLP, New York (Elizabeth S. Kim of counsel), for appellants.

Gallet Dreyer & Berkey, LLP, New York (David S. Douglas of counsel), for Liberty Mutual Insurance Company, respondent.

Kasowitz, Benson, Torres & Friedman LLP, New York (Keith McKenna of counsel), for Warren Pumps LLC, respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered August 1, 2011, which to the extent appealed from, granted the motions by defendants Warren Pumps LLC and Liberty Mutual Insurance Company to dismiss the complaint on forum non conveniens grounds, unanimously affirmed, with costs.

This is an action for a judgment declaring the extent to which Liberty Mutual is obligated to defend and indemnify defendant Warren Pumps LLC under certain primary liability

insurance policies issued before 1970 (the Warren Only Policies). Plaintiffs are excess carriers who claim to have been exposed to substantial liability by reason of Liberty Mutual's settlement of a large number of asbestos-related claims for a nominal sum.

The Warren entities are alleged to have manufactured pumps that contained asbestos in Massachusetts, their principal place of business. Warren Pumps, Inc. became a wholly-owned subsidiary of nonparty Houdaille Industries, Inc. in 1972. In 1979, Warren Pumps, Inc. was merged into and became an operating division of Houdaille. In 1985, Houdaille sold Warren Pumps' assets to W.P., Inc. which changed its name to Warren Pumps Inc. and converted to what is now defendant Warren, a limited liability company organized under the laws of Delaware.

The insurance policies that are relevant to this appeal are (a) general liability and excess umbrella liability policies issued by Liberty Mutual to Houdaille between 1972 and 1985, under which Warren and Viking each claimed to have been entitled to coverage (the Houdaille Policies); (b) the Warren Only Policies that were allegedly issued by Liberty Mutual between 1936 and 1965 and undisputedly issued by the same carrier between 1966 and 1968; and (c) excess liability policies issued by excess insurers, including plaintiffs, between 1972 and 1985, under

which Warren and Viking seek coverage (the Excess Policies).

Since approximately 1987, Warren and Viking have been named as defendants in numerous personal injury and wrongful death lawsuits throughout the country. It was alleged in these suits that injury or death was caused by exposure to asbestos contained or used in pumps manufactured by Warren or Viking, as the case may be. Liberty Mutual has defended and indemnified Warren and Viking in these suits pursuant to the coverage afforded under the respective policies. In June 2005, Viking brought an action against Liberty Mutual in the Delaware Court of Chancery, New Castle County. Warren was added as a defendant in that action in November 2005. Viking alleged in that suit that its available coverage under the Houdaille Policies was inequitably depleted by Liberty Mutual's settlement of claims against Warren. In December 2005, Warren brought its own action in the Superior Court of Massachusetts, Worcester County suing Liberty Mutual, plaintiffs in this action and other excess carriers. The relief Warren sought in the Massachusetts action was a judgment declaring the respective carriers' obligations under the Warren Only Policies, the Houdaille Policies and the Excess Policies. By order dated May 25, 2006, the Superior Court (Bruce R. Henry, J.), stayed Warren's Massachusetts action pending the completion

of what the parties have dubbed "Phase I" of the Delaware action (*Warren Pumps, LLC v Liberty Mut. Ins. Co.*, 2006 WL 1646114, 2006 Mass Super LEXIS 243 [Super Ct Mass, May 25, 2006, No. 0502322C]). By subsequent order the court stayed the Massachusetts action pending the resolution of the entire Delaware action.

At Phase I, the issue before the Delaware Chancery Court involved Warren's rights as an insured under the Houdaille policies (*Viking Pump v Century Indem. Co.*, 2 A3d 76, 85 [Del Ch 2009]). In the Delaware action, Warren cross-claimed against Liberty Mutual and filed a third-party complaint against plaintiffs and other excess carriers. Liberty Mutual eventually entered into settlement agreements with Viking and Warren. The settlement with Warren encompassed Liberty Mutual's obligations to defend and indemnify Warren under the Warren Only and Houdaille Policies. Consequently, and with no objection by plaintiffs, stipulations of settlement dismissing Warren's claims against Liberty Mutual were filed before the Delaware and Massachusetts courts. Unaffected by the settlements, Warren's and Viking's third-party claims against plaintiffs and the other excess insurers proceeded under Phase II of the Delaware action.

On October 14, 2009, the Delaware Court of Chancery granted

summary judgment in favor of Warren and Viking, setting forth the method of allocation of liability under the excess policies (*Viking Pump*, 2 A3d at 130). By letter dated March 17, 2010, the excess insurers' counsel wrote the Chancery Court requesting a conference and outlining outstanding issues that included "'Old Warren' Coverage." Plaintiffs commenced this action on April 27, 2010. In June 2010, the Delaware Chancery Court transferred the Delaware action to the Delaware Superior Court where it remains pending.

In dismissing the complaint on forum non conveniens grounds, the motion court concluded that the prosecution of this action in New York would pose a hardship to defendants and unnecessarily burden the courts of this State. The court also considered the residencies of the parties and the absence of a significant nexus to New York. We affirm.

The doctrine of forum non conveniens, as codified under CPLR 327, permits a court to stay or dismiss an action "where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied*, 469 US 1108 [1985]). The doctrine rests on considerations of justice, fairness and convenience (*id.* at 479). The complaint in this

action calls for a judgment declaring Liberty Mutual's "obligations to pay defense costs and indemnity for the underlying asbestos claims." Plaintiffs also allege, in support of their contribution claim, that Liberty Mutual paid "inadequate compensation" in settling the underlying asbestos claims under the Warren Only Policies. As acknowledged in plaintiffs' brief, an issue in the Delaware action is whether Warren's primary insurance policies (including those issued by Liberty Mutual) were exhausted. It is inescapable that the issue of Liberty Mutual's indemnity and defense obligations set forth in the instant complaint is inextricably tied to the issue of whether Warren's coverage was exhausted under its policy with Liberty Mutual. Although Liberty Mutual is no longer a party to the Delaware action, it would be burdensome and wasteful to unnecessarily require Warren to litigate intertwined issues in two different fora. On the other hand, it would not be a burden for plaintiffs to assert the claims they now make in the Delaware action in which they are already third-party defendants.

The subject matter of this action - insurance coverage for liability relating to the manufacture of products in Massachusetts - has no substantial connection to New York. When the policies were issued, Warren was a Massachusetts corporation

and had its principal place of business in that state. Liberty Mutual, the insurer under the policies at issue, is a Massachusetts corporation that has its principal place of business in that state. Both plaintiffs are foreign corporations that maintain their principal places of business in other states. Plaintiffs place undue reliance on *Travelers Cas. & Sur. Co. v Honeywell Intl. Inc.* (48 AD3d 225 [1st Dept 2008]), which it cites for the proposition that forum non conveniens should be denied because the policies at issue were sold in New York. Plaintiffs' argument overlooks the fact that the *Travelers* Court also weighed the distinguishing factor that "the circumstances giving rise to the underlying actions largely occurred here" (*id.* at 226). For the same reason, we are unpersuaded by plaintiffs' citation to *Continental Ins. Co. v Garlock Sealing Tech., LLC* (23 AD3d 287 [1st Dept 2005]). In sum, the court properly granted

defendants' motion to dismiss on forum non conveniens grounds after considering the relevant factors (*see Pahlavi*, 62 NY2d at 479). We have considered plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: JUNE 4, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9542 Philip Seldon, Index 116217/08
Plaintiff-Respondent,

-against-

Allstate Insurance Company et al.,
Defendants-Appellants.

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Shapiro, Beilly & Aronowitz, LLP, New York (Roy J. Karlin of counsel), for appellants.

Philip Seldon, respondent pro se.

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Order, Supreme Court, New York County (Debra A. James, J.), entered April 19, 2012, which denied defendants Allstate Insurance Company and Allstate Insurance Co., Inc.'s (Allstate) motion for summary judgment dismissing the third cause of action, unanimously reversed, on the law, without costs, and the motion granted.

The third cause of action alleges that defendant insurer acted in bad faith by failing to settle libel and slander claims within policy limits, resulting in a judgment against plaintiff that included punitive damages. Defendant is entitled to summary judgment on that claim based on public policy precluding an insured from recovering the punitive damages portion of any judgment which may have resulted from the insurer's bad faith

failure to settle (*see Soto v State Farm Ins.*, 83 NY2d 718 [1994]). Although this public policy argument was advanced for the first time in defendant's appellate brief, defendant alleged no new facts, but rather raised pure legal arguments which may be considered for the first time on appeal (*see Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2010]).

The Decision and Order of this Court entered herein on March 14, 2013 is hereby recalled and vacated (*see* M-2259 decided simultaneously herewith).

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

ENTERED: JUNE 4, 2013

CLERK

Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10258 The People of the State of New York, Ind. 3999/03
Respondent,

-against-

Zhomy Quito,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber of counsel), for respondent.

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Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about May 23, 2011, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously modified, on the law, to extent of reducing the adjudication to that of a level one sex offender, and otherwise affirmed, without costs.

The court erred in assessing 15 points under the risk factor for use of violence, because the People did not meet their burden of establishing, by clear and convincing evidence, that defendant caused physical injury (*see* Penal Law 10.00[9]) to the victim. Although minor injuries may cause substantial pain, a showing of "more than slight or trivial pain" is required (*People v Chiddick*, 8 NY3d 445, 447 [2007]. The People do not dispute

defendant's assertion that the photographs of the injuries depicted only "faint marks and superficial scratches." Although evidence of medical treatment is unnecessary to establish physical injury (*see People v Guidice*, 83 NY2d 630, 636 [1994]), here the victim's bare statement that her knee "hurt" was insufficient to support the inference that she suffered substantial pain, given the absence of evidence that she even used ice or an over-the-counter pain reliever. Furthermore, the injury was not sustained as a result of a deliberate assault or other act supporting an inference that it caused substantial pain (*see Chiddick*, 8 NY3d at 448). Therefore, the court should have assessed 10 points for forcible compulsion, but not 15 points.

Without the five improperly assessed points, defendant qualifies as a level one offender. Accordingly, we find it unnecessary to reach any other issues.

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

ENTERED: JUNE 4, 2013

CLERK

Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10260 In re Tyttus D.,

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

_____

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

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

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about April 16, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed him on probation for a period of 12 months, unanimously reversed, as an exercise of discretion in the interest of justice, without costs, and the petition dismissed.

An adjournment in contemplation of dismissal would have been the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). In the underlying incident, the 14-year-old appellant punched another 14 year old

once in the face, causing him to sustain a contusion. Appellant came from a stable home, and this incident was his first contact with the juvenile justice system. Appellant accepted full responsibility for his actions and demonstrated sincere remorse and insight into his misconduct. While appellant would have benefited from monitoring with regard to his attendance at school and his academic performance, this could have been provided under an ACD.

Since the period of the probation has now expired, we dismiss the petition.

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

ENTERED: JUNE 4, 2013

CLERK

Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10261 In re Elaine Rivera, Index 401373/11
Petitioner-Respondent,

-against-

New York City Housing Authority
Respondent-Appellant.

_____

Kelly D. MacNeal, New York (Seth E. Kramer of counsel), for appellant.

Elaine Rivera, respondent pro se.

_____

Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 24, 2011, granting the petition to set aside respondent's determination, dated April 13, 2011, which terminated petitioner's public housing tenancy, to the extent of remanding the matter to respondent for further proceedings, unanimously vacated, on the law, without costs, the petition treated as one transferred to this Court for de novo review, and upon such review, the challenged determination confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 dismissed.

The petition raised an issue of substantial evidence and thus, the proceeding should have been transferred to this Court pursuant to CPLR 7804(g). Accordingly, we will "treat the

substantial evidence issues de novo and decide all issues as if the proceeding had been properly transferred" (*Matter of Jimenez v Popolizio*, 180 AD2d 590, 591 [1st Dept 1992]).

Substantial evidence supports the determination that petitioner was chronically delinquent in the payment of her rent in violation of the terms of her probation (*see Matter of Devins v New York City Hous. Auth.*, 92 AD3d 581 [1st Dept 2012]). Although petitioner caught up with the payment of arrears in rent during the course of this proceeding, her delinquency provided grounds for the determination (*see Matter of Zimmerman v New York City Hous. Auth.*, 84 AD3d 526 [1st Dept 2011]).

Petitioner claims that she did not pay her rent in a timely fashion because respondent failed to make certain repairs to her apartment. Because petitioner never raised this argument at the administrative hearing, it is not properly before this Court (*see Matter of Brown v New York City Hous. Auth.*, 40 AD3d 511 [1st Dept 2007]; *see also Davis v Hernandez*, 13 AD3d 90 [1st Dept 2004]). Nor did the Hearing Officer have an obligation to develop the record on petitioner's behalf, even though she was pro se (*see Matter of Jackson v Hernandez*, 63 AD3d 64, 67-69 [1st Dept 2009]). In any event, petitioner did not establish that the conditions were so severe in her apartment that a rent abatement

was warranted. Indeed, the 2010 stipulation from a related civil court action demonstrates that they were not so severe, as no abatement was granted. We have considered petitioner's remaining contentions and find them unavailing.

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

ENTERED: JUNE 4, 2013

CLERK

Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10262 The People of the State of New York, Ind. 2352/04
Respondent,

-against-

George Roque, etc.,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Laura Safer-Espinoza, J.), rendered on or about June 8, 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: JUNE 4, 2013

CLERK

Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10263 Commandment Keepers Ethiopian Hebrew Congregation of the Living God, Pillar and Ground of Truth, Inc., Plaintiff-Respondent, Index 106102/07

-against-

31 Mount Morris Park, LLC, et al., Defendants,

Julian A. Wormley, Defendant-Appellant.

_____

Preston Wilkins & Martin LLC, Levittown (Greogry R. Preston of counsel), for appellant.

David M. Doré, New York, for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered November 7, 2011, which, to the extent appealed from as limited by the briefs, denied so much of defendant-appellant's motion for summary judgment as sought dismissal of the second, third, fifth and sixth causes of action in the complaint as asserted against him, unanimously affirmed, without costs.

Defendant failed to support his motion with a current affidavit of merit stating facts disputing the specific allegations of the complaint (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Moreover, disputed issues of

fact exist on plaintiff's claims regarding the wrongful taking of the synagogue contents (*see id.*). Plaintiff's claims are not time-barred, as the record indicates that the alleged taking occurred in 2007, the year this action was commenced (*see* CPLR 214[3]).

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

ENTERED: JUNE 4, 2013

CLERK

Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10265 The People of the State of New York, Ind. 2584/00
Respondent,

-against-

Oscar Miller,
Defendant-Appellant.

_____

Labe M. Richman, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered August 6, 2001, convicting defendant, after a jury trial, of assault in the first degree, criminal sale of marijuana in the fourth degree and criminal possession of marijuana in the fourth degree, and sentencing him to an aggregate term of 12 years, unanimously affirmed.

Defendant's legal sufficiency claim, including his related claim concerning the court's charge on depraved indifference, is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

Defendant concedes that his conduct was reckless but

contends that the evidence was insufficient to establish that he possessed the requisite depraved indifference to human life necessary to sustain his first-degree assault conviction (Penal Law § 120.10[3]). Since the court charged the jury in accordance with the law of depraved indifference in effect at the time of defendant's trial in 2001 (*see People v Register*, 60 NY2d 270 [1983], *cert denied* 466 US 953 [1984]), and since defendant failed to object to the charge or specifically challenge the sufficiency of the proof regarding the depraved indifference element in moving to dismiss the indictment, the law as reflected in the jury charge "became the standard by which both the sufficiency . . . and the weight . . . of the evidence are measured" (*People v Ortega*, 47 AD3d 485, 486 [1st Dept 2008], *lv denied* 10 NY3d 842 [2008]). In any event, whether we analyze this case under the *Register* standard or under the current standard set forth in *People v Feingold*(7 NY3d 288, 296 [2006]), we reach the same result.

While attempting to evade capture by the police, defendant drove at high speeds, swerved dangerously in and out of traffic, disregarded traffic signals, drove the wrong way down a one-way street in a residential section and repeatedly rammed his vehicle into a police vehicle. Furthermore, when defendant's path was

blocked by oncoming traffic, he drove onto a sidewalk crowded with pedestrians, paused, and then rapidly accelerated his vehicle directly towards the victim, who was walking his dog on the sidewalk approximately 30 feet away. Even after defendant struck the victim, causing him to fly onto the hood of defendant's vehicle, defendant continued to accelerate and only stopped when he crashed into a parked car, at which point defendant got out of his car and fled, almost colliding with the seriously injured victim. Based on this evidence, the jury could have reasonably determined that defendant acted with "utter disregard for the value of human life" without "car[ing] whether grievous harm results or not" (*Feingold*, 7 NY3d at 296; *see also People v Shin*, 61 AD3d 568 [1st Dept 2009], *lv denied* 12 NY3d 930 [2009]).

Defendant's main ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters not reflected in, or not fully explained by, the trial record, particularly regarding counsel's voir dire strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Defendant claims that, given allegedly graphic testimony that the victim's dog was placed in danger during this incident, his attorney should have asked prospective jurors, or

asked the court to ask them, about their attitudes toward dogs and whether these attitudes might affect the panelists' impartiality. On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Taylor*, 1 NY3d 174, 175-176 [2003]; *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Counsel could have reasonably concluded that it was unwise to overemphasize the role of the dog in the case. In any event, defendant has not shown that he was prejudiced by the absence of voir dire concerning dogs. The presence of the dog was incidental, and defendant's contention that dog ownership was the type of factor that would affect a juror's ability to be impartial is speculative. To the extent defendant is also making an ineffective assistance claim regarding the depraved indifference issue, we find it to be without merit.

Defendant did not preserve his challenges to portions of the victim's testimony, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. In several instances, the court struck the testimony at issue, and the jury is presumed to have followed the court's instruction to disregard anything stricken from the record (*see*

People v Baker, 14 NY3d 266, 273-274 [2010]). To the extent that the remaining testimony challenged by defendant on appeal would be inadmissible, defendant opened the door to such testimony (*see People v Marte*, 99 AD3d 432 [1st Dept 2012], *lv denied* 20 NY3d 987 [2012]), and any potential prejudice was likewise alleviated by the court's instructions.

We have considered and rejected defendant's claims regarding the sentencing proceeding, including those relating to the loss of the minutes of defendant's in absentia sentencing. The loss of minutes is attributable to defendant's nearly nine years spent as a fugitive and concomitant delay in perfecting his appeal. We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 4, 2013

CLERK

Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10266-
10266A In re Camarrie B.,

A Child Under the Age
of Eighteen Years, etc.,

Maria R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about August 6, 2012, which to the extent appealed as limited by the briefs insofar as it brings up for review the fact-finding determination of derivative neglect, unanimously affirmed, without costs. Appeal from the fact-finding order, same court and Judge, entered on or about August 6, 2012, unanimously dismissed, without costs, as superseded by the appeal from the order of disposition.

The Family Court properly granted the motion for summary judgment made by the attorney for the child on the derivative neglect petition based on prior findings, entered in July 2010,

that respondent neglected her six other children, only 10 months prior to the filing of the instant petition (*see Matter of P. Children*, 276 AD2d 428 [1st Dept. 2000]). The prior findings of neglect, based, in part, on respondent's daily use of marijuana, were sufficiently close in time to the derivative proceeding to support the conclusion that respondent's parental judgment remained impaired (*see Matter of Nhyashanti A [Evelyn B],* 102 AD3d 470 [1st Dept 2013]; *Matter of Cruz,* 121 AD2d 901, 902,-903 [1st Dept 1986]). Moreover, the permanency hearing orders, dated on or about February 11, 2011 and August 9, 2011, both found that the continued placement of the subject child's siblings was required due to their best interests and safety needs. Respondent admitted to daily use of marijuana for more than nineteen years, failed to complete drug treatment, and refused to submit to drug testing (*id.*).

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

ENTERED: JUNE 4, 2013

CLERK

Acosta, J.P., Saxe, Moskowitz, Freedman, JJ.

10267 In re Estate of File No. 3187/01
Elizabeth L. De Sanchez,
Deceased,
- - - - -
Pedro R. Arellano, Jr., in his
capacity as Personal Respresentative
of the Estate of Elizabeth Laurent De Sanchez,
Petitioner-Respondent,

-against-

JPMorgan Chase Bank, N.A., etc.,
Respondent-Appellant.

_____

Kelley Drye & Warren LLP, New York (Robert E. Crotty of counsel), for appellant.

Dorsey & Whitney LLP, New York (Mark S. Sullivan of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Nora Anderson, S.), entered on or about October 19, 2012, which denied JPMorgan Chase Bank, N.A.'s motion to (1) vacate its default at the January 27, 2012 call of the calendar on the petition for a compulsory accounting, (2) vacate the order (same court and Surrogate), entered on or about February 15, 2012, which directed it to file an account within 45 days, (3) permit it to oppose the petition nunc pro tunc, and (4) dismiss the petition, unanimously modified, on the facts and in the exercise of discretion, to grant branches 1-3 of the motion, and otherwise affirmed, without costs.

Contrary to the Surrogate, we find that JPMorgan has shown both a reasonable excuse for its default and a meritorious defense to the underlying petition. Law office failure is the reasonable excuse (*see e.g. Tewari v Tsoutsouras*, 75 NY2d 1, 12 [1989]; *Cruz v Bronx Lebanon Hosp. Ctr.*, 73 AD3d 597 [1st Dept 2010]). As to its defense, JPMorgan made a prima facie showing that the settlor of the trust at issue revoked it before she died (*see Bergen v 791 Park Ave. Corp.*, 162 AD2d 330 [1st Dept 1990]).

However, this showing was not so overwhelming that the petition should be dismissed; rather, JPMorgan may file objections, after which this matter can take whatever course is required (e.g. discovery and a trial).

Contrary to JPMorgan's contention, the petition is not time-barred. JPMorgan did not turn over its trusteeship to a successor, which would start the clock running (*see Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195, 201 [2008]). And it repudiated its obligation to administer the trust, at the earliest, on November 9, 2010 (*see Matter of Barabash*, 31 NY2d 76, 80 [1972]). Petitioner commenced the instant proceeding on December 22, 2011, well within six years of November 9, 2010.

Nor is this proceeding barred by laches, i.e., prejudicial delay, because "[a] fiduciary is not entitled to rely upon the

laches of his beneficiary as a defense, unless he repudiates the relation to the knowledge of the beneficiary" (*id.* at 81 [internal quotation marks omitted]). JPMorgan has not been prejudiced by the passage of time since its November 9, 2010 repudiation; it was already prejudiced by the loss of evidence that occurred before that date (*see id.* at 79, 81-82).

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

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

ENTERED: JUNE 4, 2013

CLERK

Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10268 Manuel Vasquez, Index 115556/09
Plaintiff-Respondent,

-against-

Sirkin Realty Corporation,
Defendant-Appellant,

Riverside Equities, LLC, etc., et al.,
Defendants.

_____

Weiner, Millo, Morgan & Bonanno, LLC, New York (Alissa A. Mendys of counsel), for appellant.

Law Office of Neil R. Finkston, Great Neck, (Neil R. Finkston of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 2, 2012, which, insofar as appealed from, denied the motion of defendant Sirkin Realty Corporation (Sirkin) for summary judgment dismissing the complaint and all cross claims as against it, unanimously modified, on the law, the motion granted to the extent of dismissing plaintiff's claims alleging negligent hiring and negligent supervision, and otherwise affirmed, without costs.

The court properly determined that triable issues were raised as to whether defendant Suazo was Sirkin's employee and whether Suazo was acting within the scope of his employment when

he assaulted plaintiff. Although the contract between Suazo and Sirkin designates Suazo as an independent contractor, the contract, as well as other record evidence, shows that Sirkin employed Suazo as its building superintendent and exercised control over the methods and means by which his work was to be done (*see Shah v Lokhandwala*, 265 AD2d 396 [2d Dept 1999]). There was also evidence that Suazo was protecting building property at the time of the assault (*see Ramos v Jake Realty Co.*, 21 AD3d 744 [1st Dept 2005]).

Nevertheless, the claims alleging negligent hiring and supervision are not viable. There is no evidence that Sirkin was on notice that Suazo had any propensity for violence (*see White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243 [1st Dept 2006]).

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

ENTERED: JUNE 4, 2013

CLERK

Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10269 The People of the State of New York, Ind. 1469/11
Respondent,

-against-

Anthony Gomez,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about June 23, 2011,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: JUNE 4, 2013

CLERK

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

Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10270-
10270A

Reyna M. Espinal,
Plaintiff,

Index 116011/09
590575/10

-against-

City of New York, et al.,
Defendants.
- - - - - -
Time Warner Entertainment Company, L.P., doing business as Time Warner Cable through its New York City Division, sued herein as Time Warner Cable of NYC,
Third-Party Plaintiff-Respondent,

-against-

Hylan Datacom & Electrical Inc.,
Third-Party Defendant-Appellant.

_____

McGaw, Alventosa & Zajac, Jericho (Joseph Horowitz of counsel), for appellant.

Newman Myers Kreines Gross Harris, P.C., New York (Richard E. Schmedake of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered July 23, 2012, which, insofar as appealed from as limited by the briefs, granted the motion of third-party plaintiff (Time Warner) for summary judgment on its claim for contractual indemnification against third-party defendant (Hylan) and denied Hylan's cross motion for summary judgment dismissing the contractual indemnification claim, unanimously affirmed,

without costs. Order, same court and Justice, entered October 12, 2012, which, to the extent appealable, denied Hylan's motion to, inter alia, renew, unanimously affirmed, and the appeal therefrom otherwise dismissed, without costs.

The subject indemnification clause provides that Hylan "shall indemnify, defend and hold harmless [Time Warner] . . . against and from: claims, demands, damages, costs and expenses (including, without limitation, reasonable attorneys' fees, court and other proceeding costs and all other costs incurred to enforce the indemnity granted in this Section) . . . threatened, brought or instituted, arising out of or in any way connected with the acts or omissions of [Hylan] . . . except to the extent attributable to the negligence of [Time Warner]." Such language is clear and unambiguous, and, pursuant thereto, Hylan is required to indemnify Time Warner for the costs it incurred in defending itself against plaintiff's claims, including reasonable attorneys' fees (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]).

Although Hylan is correct that its work did not cause or contribute to plaintiff's accident, its work was connected to plaintiff's claim against Time Warner. Plaintiff's basis for naming Time Warner as a defendant was the permit that the

Department of Transportation issued to Time Warner to perform work at the subject intersection, and it is undisputed that Hylan performed that work.

As to Hylan's motion for renewal and reargument, no appeal lies from the denial of a motion to reargue (*see Mejia-Ortiz v Inoa*, 89 AD3d 514 [1st Dept 2011]), and Hylan's reliance upon recently decided case law as constituting new facts warranting renewal is unavailing (*compare* CPLR 2221[d][2] *with* CPLR 2221[e][2]).

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

ENTERED: JUNE 4, 2013

CLERK

Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10271 Patricia Kenny, Index 603387/06
Plaintiff, 592746/07
590556/10
-against- 590556/11
590243/11

Turner Construction Company, et al.,
Defendants.

[And Other Actions]
- - - - -
The Corporate Source, Inc.,
Fourth Third-Party
Plaintiff-Respondent,

-against-

Mueser Rutledge Consulting Engineers,
Fourth Third-Party
Defendant-Appellant.

_____

Lewis Brisbois Bisgaard & Smith LLP, New York (David M. Pollack of counsel), for appellant.

Hardin, Kundla, McKeon & Poletto, P.A., New York (David C. Blaxill of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 20, 2012, which denied Mueser Rutledge Consulting Engineers's motion to dismiss the fourth third-party complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the fourth third-party complaint.

Plaintiff Patricia Kenny seeks damages for injuries

sustained on January 19, 2005, when she slipped on black ice in the parking garage of the United States District Court, Eastern District Courthouse, in Central Islip, New York. The garage and courthouse were constructed in the 1990s and plaintiff alleges that a design defect caused or allowed water to drip, which water froze, causing the ice condition on which she slipped and fell. Third-party defendant The Corporate Source commenced a fourth third-party action seeking contribution from Mueser Rutledge Consulting Engineers (MRCE), a firm retained by another party to provide geotechnical engineering services in connection with the design and construction of the courthouse and garage. MRCE's work on the project was completed by September 1997.

The Corporate Source's claim against MRCE arises under CPLR 214-d and is subject to heightened scrutiny on a motion to dismiss, requiring a demonstration "that a substantial basis in law exists to believe that the performance, conduct or omission complained of such . . . engineer . . . was negligent and . . . a proximate cause of personal injury . . . complained of by the claimant" (CPLR 3211[h]). As we held in *Castle Vil. Owners Corp. v Greater New York Mut. Ins. Co.* (58 AD3d 178, 183 [1st Dept 2008]), "a court reviewing the sufficiency of a complaint under CPLR 3211(h) must . . . determine whether the claim alleged is

supported by 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact'" (citing Senate Mem in Support L 1996, ch 682, 1996 McKinney's Session Laws of NY, at 2614).

In opposition to the motion to dismiss, The Corporate Source did not meet the heightened standard imposed by CPLR 3211(h) and failed to establish, via relevant proof, that a substantial basis for its claim against MRCE exists. The Corporate Source's claim that MRCE's contribution to the design of the foundation of the subject garage proximately caused plaintiff's injuries is speculative and conclusory. The Corporate Source did not identify the manner in which MRCE was alleged to have been negligent and proximately relate such negligence to the damages claimed (*cf. Castle Village Owners Corp.*, 58 AD3d 178).

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

ENTERED: JUNE 4, 2013

CLERK

Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10273N Board of Managers of the Cove Club Condominium, Plaintiff-Respondent, Index 104309/12

-against-

Lawrence M. Jacobson, et al., Defendants-Appellants.

_____

Julie Hyman, P.C., Bronx (Julie Hyman of counsel), for appellants.

Belkin Burden Wenig & Goldman, LLP, New York (Alexa Englander of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Louis B. York, J.), entered January 29, 2013, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint or, alternatively, for a stay of the proceedings pending an investigation by the New York State Division of Human Rights, unanimously dismissed, without costs, as moot.

The issue in this case, i.e., whether plaintiff can lawfully evict defendants' dog from its premises, is no longer a live controversy, since the dog died during the pendency of this appeal (*see Matter of Klasson*, 290 AD2d 223 [1st Dept 2002]; *Matter of Johnson v Pataki*, 91 NY2d 214, 222 [1997]).

This case does not qualify as an exception to the mootness doctrine, since defendants' challenge to plaintiff's small pet rule, while capable of repetition, would not typically evade review (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

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

ENTERED: JUNE 4, 2013

CLERK