SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 15, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10636 Brian Estrada, Index 110123/11
Plaintiff-Appellant,

-against-

Metropolitan Property
Group, Inc., et al.,
Defendants-Respondents.

_____

Cohen, Frankel & Ruggiero, LLP, New York (Mina Kennedy of counsel), for appellant.

Pick & Zabicki, LLP, New York (Eric C. Zabicki of counsel), for Metropolitan Property Group, Inc., respondent.

Hogan Lovells US LLP, New York (Leah Rabinowitz of counsel), for Wells Fargo Bank, N.A., respondent.

Sahn Ward Coschignano & Baker, PLLC, Uniondale (Michele A. Pincus of counsel), for Victoria Hughes, respondent.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered August 10, 2012, which, upon reargument of defendant Wells Fargo Bank, N.A.'s motion to dismiss, granted the motion and dismissed the complaint as against it, granted defendant Victoria Hughes's motion for summary judgment dismissing the complaint as against her, and granted defendant Metropolitan Property Group, Inc.'s (the broker) cross motion for summary

judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff could not have reasonably relied on alleged misstatements about a cooperative apartment's square footage in deciding to purchase the apartment. The advertisements for the apartment by the broker described the apartment as "550 s.f." and as "approximately 500 s.f." The discrepancy in the square footage in the various advertisements should have alerted plaintiff to the possibility that advertisements were not accurate with respect to square footage but mere sales puffery. Under these circumstances, plaintiff should have taken the opportunity to inspect the apartment before he contracted to buy it. Moreover, with respect to the appraiser and the bank, plaintiff could not have relied on the appraiser's report inasmuch as he entered into a contract to purchase the apartment four months before the appraisal was prepared. Accordingly, the court properly dismissed the fraud claims against defendants (*see Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1st Dept 1997]).

The court properly dismissed the breach of fiduciary duty claim against the broker. Given that the fraud claim was deficient, the only branch of the fiduciary duty claim that could have remained was one for "injury to property." However, that

claim is time-barred by the three-year statute of limitations (*see* CPLR 214[4]; *Yatter v Morris Agency*, 256 AD2d 260, 261 [1st Dept 1998]), as the alleged injury occurred more than three years before the filing of this action.

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

ENTERED: OCTOBER 15, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, JJ.

10698N Antonio Navarro, Index 4807/09
Plaintiff-Respondent,

-against-

Dropattie Singh,
Defendant-Appellant.

_____

Howard L. Sherman, Ossining, for appellant.

Lieber & Gary, New York (Paul Golden of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered August 3, 2012, which denied defendant's motion to vacate the default judgment against her, unanimously affirmed, without costs.

Plaintiff satisfied his burden of establishing personal jurisdiction over defendant by service of the summons and complaint pursuant to CPLR 308(2). At the traverse hearing, the process server testified that he served defendant's sister, a person of suitable age and discretion, and mailed a copy of the summons and complaint to defendant. We find no basis to disturb the hearing court's determination to credit his testimony. That the affidavit of service filed by the process server incorrectly indicates that service was on the "Individual" defendant, and does not indicate that the summons and complaint was mailed to defendant, does not warrant a different result. These are mere

irregularities which do not divest the court of jurisdiction (*see Bell v Bell, Kalnick, Klee & Green*, 246 AD2d 442, 443 Dept 1998]; *Mendez v Kyung Yoo*, 23 AD3d 354 [2d Dept 2005]; *Mrwik v Mrwik*, 49 AD2d 750 [2d Dept 1975]). These irregularities in the affidavit of service did not stop or toll defendant's time to answer (*see e.g. Morrissey v Sostar, S.A.*, 63 AD2d 944 [1st Dept 1978]).

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

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

ENTERED: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10748 The People of the State of New York, Respondent, Ind. 4912/09

-against-

Anthony Barksdale, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and White & Case LLP, New York (Isaac Glassman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Analisa Torres, J. at hearing; Richard D. Carruthers, J. at plea and sentencing), rendered October 27, 2010, convicting defendant of three counts of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to concurrent terms of two to four years, unanimously affirmed.

The court properly denied defendant's suppression motion in all respects. The searches and seizures at issue took place in two separate incidents.

In the first incident, an officer conducting a vertical patrol saw defendant standing in the lobby of a "trespass affidavit" building (*see People v Tinort*, 272 AD2d 206 [1st Dept 2000], *lv denied* 95 NY2d 872 [2000]). This gave the officer an

"objective credible reason" to ask defendant whether he lived there, which constituted a level one request for information (*see People v Hollman*, 79 NY2d 181, 191 [1992]). The inquiry was not based merely on the reputation of the area, but also on the fact that the building was so prone to trespassing that the landlord had "request[ed] police assistance in removing intruders" (*id.* at 206). Furthermore, the officer's simple inquiry as to whether defendant lived there was the type of minimally intrusive question that a building employee might ask. We also conclude that the record sufficiently establishes that defendant was in a plainly nonpublic lobby of a posted trespass affidavit building, and that the officer was aware of this at the time he made his inquiry.

Defendant admitted that he did not live in the building. When, in response to follow-up questions, he claimed to be visiting a friend but did not supply the friend's name or apartment number, the officer had probable cause to arrest defendant for criminal trespass (*see People v Tinort*, 272 AD2d at 207; *see also People v Hendricks*, 43 AD3d 361, 363 [2007]). Defendant did not preserve his claim that it was constitutionally impermissible to base probable cause on his alleged refusal to provide the police with information, and we decline to review it in the interest of justice. We note that the People were never

placed on notice of any need to develop the record (*see People v Martin*, 50 NY2d 1029 [1980]; *People v Tutt*, 38 NY2d 1011 [1976]) as to whether defendant *refused* to give information, or whether he willingly provided incredible information, in that he was *unable* to identify his purported host by name or apartment number. In any event, the totality of the information before the officer supported a reasonable inference, for probable cause purposes, that defendant was not "licensed or privileged" (Penal Law § 140.00[5]) to be in a building in which he admittedly did not reside (*cf. People v Davis*, 13 NY3d 17, 31-32 [2009]).

With respect to the second incident, defendant's principal argument is a challenge to the credibility of the officer's testimony establishing probable cause for the arrest. However, we find no basis to disturb the court's credibility determinations, including its resolution of any discrepancies between testimony and paperwork.

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

ENTERED: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10749 In re Michael O., IDV. 216/06
Petitioner-Respondent,

-against-

Peggy M.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Debevoise & Plimpton LLP, New York (Matthew T. Warren of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Melanie T. West of counsel), attorney for the child.

_____

Order, Supreme Court, Bronx County (Diane Kiesel, J.), entered on or about September 16, 2011, which granted the father's petition to modify a prior order, dated March 10, 2005, and awarded him permanent custody of the child, unanimously affirmed, without costs.

The record amply supports the court's determination of a substantial change in circumstances based on the testimony that the mother repeatedly engaged in a campaign to undermine the child's relationship with the father, her lack of suitable housing, and, according to the court-appointed psychiatrist, her inability to act in the child's best interests by refraining from

disparaging the father and his family (*see Matter of Mildred S.G. v Mark G.*, 62 AD3d 460, 461 [1st Dept 2009]; *see also Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]). This testimony also supported the court's finding that the change in custody was in the best interests of the child.

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

ENTERED: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10750 In re Nicole Clemons, Index 402649/11
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Nicole Clemons, appellant pro se.

Kelly D. MacNeal, New York City Housing Authority, New York (Jonathan Savella of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 10, 2012, which denied the petition, and granted respondent's (NYCHA) cross motion to dismiss this article 78 proceeding, unanimously affirmed, without costs.

On October 6, 2011, petitioner commenced this proceeding seeking to annul NYCHA's September 17, 2010 denial of her application to vacate her default in failing to appear at a hearing on charges against her tenancy. The proceeding is time-barred (*see* CPLR 217[1]) and this Court cannot extend the statute of limitations (*see* CPLR 201).

Petitioner's excuse for the untimeliness of the petition is improperly raised for the first time on appeal (*see Liddle, Robinson & Shoemaker v Shoemaker*, 12 AD3d 282, 283 [1st Dept

2004]). In any event, her claimed ignorance of the requirement to commence an article 78 proceeding within four months of NYCHA's final determination does not excuse her failure to comply with the statute of limitations (*see generally Harris v City of New York*, 297 AD2d 473 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002]). Respondent was not under any duty to advise petitioner of the applicable statute of limitations (*see Matter of Sumpter v New York City Hous. Auth.*, 260 AD2d 176 [1st Dept 1999]).

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

ENTERED: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10751 The People of the State of New York, Respondent, Ind. 2565/10

-against-

Michael Kramer, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J. at motion to quash; Juan M. Merchan, J. at jury trial and sentencing), rendered December 15, 2010, convicting defendant of grand larceny in the third degree and two counts of falsely reporting an incident in the third degree and sentencing him to an aggregate term of six months, concurrent with five years' probation, and ordering him to pay $3600 in restitution, unanimously affirmed.

Defendant's argument that his conviction of larceny by false promise was not supported by legally sufficient evidence is unpreserved (*see People v Gray*, 86 NY2d 10 [1995]), 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]). There is no basis for disturbing the jury's credibility determinations. The evidence amply supported the inference that when defendant took the victim's money in return for permitting her to occupy his apartment, he had no intention of fulfilling that promise (*see* Penal Law § 155.05[2][d]).

The court properly exercised its discretion in granting a motion to quash defendant's subpoena duces tecum for documents related to his past complaints to the Internal Affairs Bureau of the Police Department. The documents sought were not "relevant and material to facts at issue" in this case (*Matter of Terry D.*, 81 NY2d 1042, 1044 [1993]; *see also People v Gissendanner*, 48 NY2d 543, 551 [1979]). The motion court properly rejected defendant's far-fetched claims of relevance.

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

ENTERED: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10754 In re Joseph B.,

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

_____

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

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

_____

Order, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about May 3, 2012, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of robbery in the first degree, and placed him with the Office of Children and Family Services for a period of 33 months, including 12 months to be served in a secure facility and 12 months to be served in a residential facility, with no credit for time served, unanimously affirmed, without costs.

The court properly exercised its discretion in ordering restrictive placement pursuant to Family Court Act § 353.5. Since appellant committed a designated felony act, the guidelines for restrictive placement set forth in Family Court Act § 353.5(5) applied, as opposed to the least restrictive available

alternative standard (*see* Family Ct Act § 352.2[2][a]; *Matter of Michael R.*, 223 AD2d 465 [1st Dept 1996]). This disposition was warranted by, among other things, appellant's predatory behavior and his history of recidivism and violence (*see e.g. Matter of Malik H.*, 107 AD3d 447 [1st Dept 2013]). Although a psychiatrist and probation officer who evaluated appellant recommended against restrictive placement, they nevertheless recommended that appellant be placed in a structured environment outside the community, and the court properly concluded that this would best be provided through restrictive placement (*see id.*).

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

ENTERED: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10756 Michael I. Knopf, et al., Index 113227/09
Plaintiffs-Appellants, 15074/11

-against-

Michael Hayden Sanford, et al.,
Defendants-Respondents.

- - - - -

Michael I. Knopf, et al.,
Plaintiffs-Appellants,

-against-

Michael Hayden Sanford,
Defendant-Respondent.

_____

Berry Law PLLC, New York (Eric W. Berry of counsel), for appellants.

Michael Hayden Sanford, respondent pro se.

Corbally, Gartland and Rappleyea, LLP, Poughkeepsie (Jon H. Adams of counsel), for Pursuit Holdings, LLC, Sanford Partners, LP, MH Sanford & Co., LLC and Wyndclyffe, LLC, respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 11, 2012, which denied plaintiffs' motion to extend the notices of pendency, unanimously reversed, on the law, without costs, the motion granted, and the notices of pendency, filed on September 18, 2009, extended for a period of 3 years from the date of expiration of the notices.

Plaintiffs' complaint asserts a cause of action for a constructive trust, and alleges that defendant Michael Sanford

promised, in exchange for certain loans, that he would purchase two properties for the benefit of the subject hedge fund and provide plaintiffs with a mortgage on those properties, but has refused to transfer the properties to the hedge fund or to plaintiffs. This cause of action, as pleaded, was sufficient to support the issuance of the subject notices of pendency, since it seeks a judgment that "would affect the title to, or the possession, use or enjoyment of, real property" (CPLR 6501; *Mazzei v Kyriacou*, 98 AD3d 1088, 1090 [2d Dept 2012]).

Plaintiffs established good cause for extending the notices of pendency (*see* CPLR 6513). The evidence shows that the delay in ruling on defendants' motion to dismiss resulted in a stay of discovery and significantly delayed the adjudication of the action (*see L&L Painting Co. v Columbia Sussex Corp.*, 225 AD2d 670, 670-671 [2d Dept 1996]).

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

ENTERED: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10758 The People of the State of New York, Ind. 688/07
Respondent,

-against-

Leroy Middleton,
Defendant-appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx County (Nancy Killian of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, Bronx County (Dineen A. Riviezzo, J. at plea; Raymond L. Bruce, J. at sentencing), rendered February 5, 2010, convicting defendant of criminal sale of a controlled substance in or near school grounds, and sentencing him to a term of 3 years, unanimously dismissed as moot.

Since defendant only challenges the length of his sentence, and since he has completed his entire sentence including postrelease supervision, this appeal is moot.

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

ENTERED: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10760 Property & Casualty Insurance Company of Hartford,
Plaintiff-Respondent,

-against-

Steven Levitsky, et al.,
Defendants-Appellants.

Index 109550/11

The Wolford Law Firm LLP, Rochester (Michael R. Wolford of counsel), for appellants.

Wiggin and Dana LLP, New York (Jonathan M. Freiman of the bars of the States of Connecticut and Pennsylvania, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Lucy Billings, J.), entered February 11, 2013, which granted plaintiff insurer's motion for summary judgment declaring that it was not obligated to defend or indemnify defendants, unanimously affirmed with costs.

The insurance policy at issue contains three notice provisions: one requiring notice of "any" circumstances which "may" give rise to a claim; a second, separate notice provision if a claim does result; and a third provision related to notice allowing an insured to "lock in" coverage for a circumstance that occurs during the policy period, even if the resulting claim doesn't occur until after the policy period has ended. The notice of circumstance clause and the notice of claim clause,

which are each independent conditions precedent to coverage, are unambiguous (*see Sirignano v Chicago Ins. Co.*, 192 F Supp 2d 199, 202 [SDNY 2000]; *Bellefonte Ins. Co. v Albert, P.C.*, 99 AD2d 947, 948 [1st Dept 1984]).

Defendants failed to comply with the notice of circumstance clause in a timely fashion. The motion court correctly found that defendants became aware of circumstances which may give rise to a claim in October 2006, either when the defendant in the underlying action answered the complaint, denying ownership of the premises, or six days later, when the statute of limitations expired and defendants had failed to join the owner of the premises on which their client was injured. Even if the answer was ambiguous, defendants were aware of circumstances which may give rise to a claim no later than December 2007, when Wilmorite, Inc.'s representative testified during a deposition that Great Eastern and not Wilmorite, Inc. was the owner of the premises.

Despite these circumstances, defendants did not notify plaintiff as to the potential claim until August 2008, after their client's case was dismissed. Defendants' argument that the notice of circumstance clause was triggered, at the earliest, when the firm or attorney received an unfavorable ruling from the trial court is unavailing, because the expiration of the statute of limitations, under the circumstances here present, provided a

reasonable expectation that a malpractice claim might be filed (*see United Nat. Ins. Co. v Granoff, Walker & Forlenza, P.C.*, 598 F Supp 2d 540, 549 [SDNY 2009]; *cf. Bellefonte*, 99 AD2d, at 948).

Equally unavailing is defendants' claim that untimely notice should be excused based on their reasonable belief of nonliability (*see SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 [1st Dept 1998]). In any event, defendants' good faith basis for nonliability after December 2007, was not reasonable. Defendants' own evidence established that the defendant sued as the alleged owner of the property was not independently liable under Labor Law §§ 240 and 241 and was not united in interest with the real owner of the property (*see Rowland v Wilmorite, Inc.*, 68 AD3d 1770, 1771 [4th Dept 2009]).

The motion to change venue was properly denied as moot.

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

ENTERED: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10761-
10761A V.A.L. Floors, Inc.,
Plaintiff-Appellant,

-against-

Marson Contracting Co., Inc.,
Defendant,

Travelers Casualty and Surety
Company of America,
Defendant-Respondent.

Index 653516/11

_____

Law Office of Robert J. Miletsky, White Plains (Robert J. Miletsky of counsel), for appellant.

Torre, Lentz, Gamell, Gary & Rittmaster, LLP, Jericho (Lawrence S. Novak of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ellen M. Coin, J.), entered December 7, 2012, dismissing the complaint as against defendant Travelers Casualty and Surety Company of America (Travelers), unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about September 4, 2012, which granted Travelers' motion for summary judgment dismissing the complaint as against it and denied plaintiff's cross motion for partial summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Beginning in May 2007 and ending on January 9, 2008, plaintiff subcontractor performed flooring installation work for

defendant Marson Contracting Co., Inc., the general contractor on the construction of a 15-story condominium building. On December 14, 2007, 985 Park Avenue Realty LLC (the Developer) conveyed one of the condominium units to a married couple (the Buyers). In the deed, the Developer covenanted that it would "receive the consideration for this conveyance," "hold the right to receive such consideration as a trust fund for the purpose of paying the cost of the improvement," and "apply the same first to the payment of the cost of the improvements before using any part of the same for any other purpose." On January 18, 2008, plaintiff filed a mechanic's lien against the subject unit.

Here, since the deed contains the statutorily required trust fund language (*see* Lien Law § 13[5]), and the conveyance occurred prior to the filing of plaintiff's lien, the "lien is not valid against the deed" (*Leonard Eng'g v Zephyr Petroleum Corp.*, 135 AD2d 795, 797 [2d Dept 1987]).

Moreover, Lien Law § 4 provides that a mechanic's lien "shall extend to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien." Since ownership of the condominium unit passed to the Buyers at the time of delivery of the deed (*see* Real Property Law § 244), and since the Buyers did not consent to the work performed outside of the unit which constituted the basis of

the overwhelming majority of the Lien (*see* Real Property Law § 339-l[2]), the Lien was also "invalid under Lien Law § 4(1)" (*Matter of Myrtle Owner LLC [Ro-Sal Plumbing & Heating Inc.]*, 32 Misc 3d 1221[A], 2011 NY Slip Op 51376[U], *6 [Sup Ct, Kings County 2011]).

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

ENTERED: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10762 The People of the State of New York, Respondent, Ind. 12195C/11

-against-

Roberto Rivera, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Doris Gonzalez, J.), rendered on or about March 23, 2011, 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: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10764 Quality Building Contractor, Inc., Index 106516/11
Plaintiff-Respondent,

-against-

Delos Insurance Company
formerly known as Sirius
America Insurance Company,
Defendant-Appellant-Respondent,

Utica First Insurance Company,
Defendant-Respondent-Appellant.

_____

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for appellant-respondent.

Farber, Brocks & Zane, Garden City (Tracy L. Frankel of counsel), for respondent-appellant.

Carroll McNulty & Kull, LLC, New York (Douglas K. Eisenstein of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered May 22, 2012, which, in this action seeking a declaration as to insurance coverage, granted plaintiff's motion for summary judgment declaring that defendant Delos Insurance Company f/k/a Sirius America Insurance Company (Sirius) is obligated to defend and indemnify plaintiff for all claims asserted in an underlying personal injury action, unanimously reversed, on the law, without costs, and the motion denied. Cross appeal from same order and judgment (one paper), unanimously dismissed, without costs.

Although the court properly found that Sirius's disclaimer of coverage based on a late notice of claim was ineffective as a matter of law (*see George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 106 [1st Dept 2012]), issues of fact exist with respect to the timeliness of Sirius's disclaimer of coverage based on an exclusion endorsement in the subject insurance policy (*see Those Certain Underwriters at Lloyds, London v Gray*, 49 AD3d 1 [1st Dept 2007]). Indeed, a trier of fact should determine when the grounds for the exclusion endorsement disclaimer were "readily apparent" to Sirius, and whether Sirius reasonably delayed issuing its disclaimer during its investigation into the applicability of the endorsement (*id.* at 4).

Defendant Utica First Insurance Company's cross appeal is dismissed, as it is not an "aggrieved party" within the meaning of CPLR 5511. Indeed, it withdrew its motion for summary judgment, and it takes no position on Sirius's appeal. In any event, we note that plaintiff's status as an additional insured under a policy issued by Utica to plaintiff's subcontractor, and

Utica's coverage obligations or lack thereof to plaintiff, are in dispute and have not been fully litigated or determined.

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

ENTERED: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10766-
10767N Windsor Owners Corp.,
Plaintiff-Respondent/Appellant,

-against-

Frank Mazzocchi,
Defendant-Appellant/Respondent,

Riley Smith, et al.,
Defendants.

Index 110714/11

Leeds Brown Law, P.C., Carle Place (Bryan Arbeit of counsel), for appellant/respondent.

Thomas M. Curtis, New York, for respondent/appellant.

Orders, Supreme Court, New York County (Milton A. Tingling, J.), entered August 27, 2012 and May 6, 2013, which, respectively, denied defendants' motion to dismiss the complaint, and denied plaintiff's motion to strike defendants' answer and/or for summary judgment for defendants' failure to comply with a discovery order, unanimously affirmed, without costs.

The motion court properly denied defendants' motion to dismiss. Defendants' claims that the instant ejectment action was improperly commenced and was unauthorized under plaintiff's by-laws and the proprietary lease, raise, at most, issues of fact. Mazzocchi's current claim that the motion court should have, sua sponte, treated defendants' CPLR 3211 motion to dismiss

as one for summary judgment, is unavailing. Defendants never requested that relief below. Even assuming that the parties had requested that the motion be converted to a summary judgment motion, the court gave no notice that it would treat it as such, and the exceptions to the notice requirement are not applicable here (*see Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]). In any event, fact issues remain which would have precluded summary judgment.

The motion court did not improvidently exercise its discretion in denying plaintiff's motion (*see* CPLR 3126). Defendants proffered a reasonable excuse for the delay in complying with the court's prior conditional discovery order and demonstrated the existence of a meritorious defense (*see Anderson v Ariel Servs., Inc.*, 93 AD3d 525 [1st Dept 2012]).

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

ENTERED: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10768N Samantha Jagopat, Index 15497/05
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for appellant.

Chopra & Nocerino, LLP, New York (Alex Nocerino of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered April 25, 2012, as modified by order entered August 9, 2012, which, to the extent appealed from, directed respondent City of New York to conduct a Department of Transportation records search for the entire length of the Bruckner Expressway in both directions, including 311 complaints for the same geographical span, and to produce for deposition a witness with knowledge as to the aforementioned search by September 7, 2012, unanimously reversed, on the law and the facts, without costs, and those provisions stricken from the order.

In this action for personal injuries, plaintiff alleges that she was injured on March 27, 2004, while traveling southbound on the Bruckner Expressway at or near the intersection of Soundview Avenue when the motor vehicle she was operating struck an open or

missing steel storm drain/grate and crashed into a concrete barrier wall. She commenced this action against defendant City which owns and maintains the Bruckner Expressway, including the storm grates embedded in the roadway. After plaintiff moved to strike the City's answer for failing to respond to her discovery demands, the motion court issued an interim order dated April 25, 2012, directing the City to perform, inter alia, a search of the records maintained by the New York City Department of Transportation (DOT) for the entire length of the Bruckner Expressway, in both directions, including 311 complaints for the same geographical span, for a time period of two years prior to and including the date of the accident, and to produce a witness with knowledge as to the aforementioned DOT search.

By notice of motion dated May 25, 2012, the City moved for modification of the order, seeking to have the aforementioned provisions removed and for an enlargement of time to respond to the order. While the motion was pending, the City produced a witness who testified that she conducted a DOT records search for the Bruckner Expressway between Exits 49 and 53 in both directions, which included the alleged location of the accident, and a search of records of 311 calls regarding the same geological span, for the two years prior to and including the date of the accident. The motion court granted the City's motion

to the extent of enlarging its time to respond until September 7, 2012.

Contrary to plaintiff's arguments that the records sought are material and necessary to the prosecution of her case, the fact that the City may have received complaints regarding missing grates on other parts of the Bruckner Expressway will not establish that it had the required written notice of the specific defect alleged in the notice of claim to have caused her injury (*see* Administrative Code of the City of New York § 7-201[c][2]; *Bielecki v City of New York*, 14 AD3d 301, 301-302 [1st Dept 2005]). Furthermore, plaintiff does not argue that the witness who was deposed was not competent to testify or that her search of the DOT records for the accident location was defective.

Under these circumstances, the provisions in the order, to the extent that they direct the City to conduct a DOT record search for the entire span of the Bruckner Expressway in both directions, including 311 calls for the same geological span, for a time period of two years prior to and including the date of the accident, and to produce a witness with knowledge of the aforementioned search, are palpably improper and should be

stricken from the order, despite the City's failure to timely object thereto under CPLR 3122 (*Haller v North Riverside Partners*, 189 Ad2d 615, 616 [1st Dept 1993]*; Alaten Co. v Solil Mgt. Corp.*, 181 AD2d 466, 466 [1st Dept 1992]).

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

ENTERED: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10769 [M-4345] In re Aron Lichtfeld, Petitioner,

-against-

Hon. N.A. Anderson, et al., Respondents.

Index 3335/10

Aron Lichtfeld, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for Hon. N.A. Anderson, respondent.

Jacqueline Sadow, New York, respondent pro se.

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

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

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

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

ENTERED: OCTOBER 15, 2013

CLERK

Mazzarelli, J.P., Andrias, Saxe, Manzanet-Daniels, Gische, JJ.

9983N- Index 110470/09
9983NA Kevin Strong, 104168/10
Plaintiff-Appellant,

-against-

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

Geraldo Falcon,
Defendant.

- - - - -

Miguel Carrasquillo, et al.,
Plaintiffs-Appellants,

-against-

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

Geraldo Falcon,
Defendant.

_____

Warren J. Willinger, Mount Kisco, for appellants.

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

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Order, Supreme Court, New York County (Cynthia Kern, J.), entered February 7, 2012, modified, on the law, to reinstate the spoliation sanction, and to grant plaintiff's cross motion to the extent of directing the production of unredacted police accident reports to the extent not previously provided and of proper affidavits of compliance, and otherwise affirmed, without costs. Order, same court and Justice, entered September 20, 2011, dismissed, without costs, as superseded by the appeal from the order entered February 7, 2012.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
David B. Saxe
Sallie Manzanet-Daniels
Judith J. Gische, JJ.

9983N-9983NA
Index 110470/09
104168/10

_____x

Kevin Strong,
Plaintiff-Appellant,

-against-

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

Geraldo Falcon,
Defendant.

- - - - -

Miguel Carrasquillo, et al.,
Plaintiffs-Appellants,

-against-

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

Geraldo Falcon,
Defendant.

_____x

Plaintiffs appeal from orders of the Supreme Court, New York County (Cynthia Kern, J.), entered February 7, 2012, and September 20, 2011, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motion to reargue a prior order imposing a

preclusion as a sanction for spoliation of evidence, and, upon reargument, vacated the imposition of the sanction, and denied plaintiff's cross motion, inter alia, to strike certain affirmative defenses for failure to comply with discovery obligations.

Warren J. Willinger, Mount Kisco, for appellants.

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

SAXE, J.

This appeal requires us to decide whether spoliation sanctions were merited for the failure of defendant City to take steps to prevent the automatic destruction of a recorded radio run that could have either confirmed or called into question its asserted "emergency operation" affirmative defense under Vehicle and Traffic Law §§ 114-b, 1103 and 1104. To decide whether this failure constituted spoliation, we must determine the proper legal standards to be applied where the destroyed evidentiary material at issue is an audiotape of a radio communication. In particular, we must decide whether this spoliation claim can be fully addressed with the established New York spoliation doctrine, or whether we should apply, in this context, the *Zubulake* standard regarding spoliation of discoverable electronically stored information (ESI) (*see Zubulake v UBS Warburg LLC*, 220 FRD 212 [SD NY 2003] ["*Zubulake IV*"]), which has already been adopted in this Department in cases involving ESI discovery (*see U.S. Bank, N.A. v GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58 [1st Dept 2012]; *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33 [1st Dept 2012]; *Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481 [1st Dept 2010]).

Facts

On June 30, 2009, an NYPD vehicle operated by Police Officer Matthew Peacock collided with a vehicle operated by defendant Geraldo Falcon, mounted a nearby sidewalk, and struck five pedestrians, including plaintiffs Kevin Strong, Miguel Carrasquillo, and De Fa Chen. Their three separate personal injury actions, seeking money damages from defendants City of New York, Officer Peacock and Geraldo Falcon, have been consolidated for trial.

Plaintiff Strong filed his notice of claim on July 9, 2009, and commenced an action initially against defendant Falcon alone. On July 22, 2009, before any municipal defendant could be joined as a party, Strong brought a motion by order to show cause for an order compelling the NYPD to provide copies of Sprint reports, radio calls, and the call log for the 30 minutes preceding the accident. Although that motion was withdrawn on November 19, 2009, the record contains an affidavit of service by counsel indicating that the order to show cause and supporting papers were served on the NYPD on July 31, 2009.

Following his General Municipal Law § 50-h hearing on September 7, 2009, Strong served an amended verified complaint dated September 10, 2009, naming the City and Officer Peacock, in addition to Falcon, as defendants. The City joined issue on

September 21, 2009, at which time it interposed the emergency operation defense, essentially claiming that Officer Peacock's vehicle was an authorized emergency vehicle engaged in an emergency operation at the time of the accident, and therefore, the City could only be held liable if Peacock acted with reckless disregard for the safety of others.

The Carrasquillo plaintiffs filed their notice of claim on September 1, 2009, and Miguel Carrasquillo's 50-h hearing was held on December 7, 2009. The Carrasquillos commenced their action against all three defendants on March 31, 2010. When the municipal defendants joined issue in April 2010, their answer also pleaded the emergency operation defense.

Plaintiffs' disclosure demands served on the municipal defendants began with Strong's demand for a bill of particulars from the City as to its affirmative defenses, dated June 21, 2010, and his notice for discovery and inspection, dated June 23, 2010. Among Strong's discovery requests was a demand for audiotapes of the alleged emergency being responded to at the time of the accident, and the radio dispatcher calls and call logs for the emergency operation and accident. A discovery order dated November 17, 2010 directed the City to comply with Strong's discovery requests. The City's response, dated March 22, 2011, provided some reports and agreed to turn over a copy of a 911

call, but did not include any recordings or transcriptions of the transmission that Officer Peacock allegedly relied on to justify proceeding in an emergency fashion.

Underlying Discovery Motion

In a motion dated May 31, 2011, Strong and the Carrasquillos asked for an order precluding the City and Officer Peacock from offering particulars at trial in support of their emergency operation defense, based on the City's failure to comply with plaintiffs' discovery demand. In opposition, the City submitted the affidavit that gave rise to the spoliation claim at the heart of this appeal. In that affidavit, NYPD supervising police communication technician Awilda DeJesus explained that any recording of communications between a patrol unit and the commanding officer for the unit would be maintained for 180 days and then deleted, and therefore she could not locate any such recording.

DeJesus first said that she was unable to find any "Sprint reports," which she described as "documents containing information from NYPD audio recordings of 911 calls and radio runs, reduced to writing, [and] maintained on the Tapes and Records Unit's computer database," regarding a 10-85 radio code issued on June 30, 2009, indicating that an additional unit was needed at 10th Street and Avenue D. She then explained that a

communication between a patrol unit and its commanding officer directing that the unit respond to a specified location would not result in a Sprint report but, rather, in a radio run audio recording, and that such a radio run recording would have been maintained for 180 days and then deleted. DeJesus thus concluded that a radio run audio recording of the transmission by the commanding officer of Officer Peacock's unit would have been deleted in the normal course of business 180 days after June 30, 2009.

Having learned for the first time from the DeJesus affidavit that any audio recording of the claimed radio communication between Officer Peacock and his commanding officer would have been automatically deleted after 180 days, plaintiffs requested, for the first time, in their reply papers on their motion, the sanction of an order striking the City's emergency operation defense. As to the City's assertion in opposition that no request had been made for such recordings until after the expiration of the 180-day period, plaintiffs pointed out that the claims and affirmative defense gave the City notice that such recordings would be relevant, and that, moreover, an order to show cause prepared and served by Strong's prior counsel on July 29, 2009 had requested that the NYPD be directed to provide copies of "sprint reports, including the recorded sprint report,

911 calls, radio dispatch calls, [and] call log" relating to the accident at issue.

First Order

The motion court granted plaintiffs' motion to the extent of directing defendants to produce, "to the extent they exist[ed], unredacted memoranda, records and reports regarding the emergency Peacock was allegedly responding to at the time of the accident," and precluding the City from introducing testimony as to the contents of the audio recording, since "other evidence of the emergency defendant City was responding to [was] available."

Reargument Motion

The City moved for reargument with regard to the portion of the motion court's order precluding it from introducing testimony as to the contents of the audio recording. It protested that plaintiffs had not asked for spoliation sanctions, and therefore it had had no opportunity to oppose such a request. Further, the City argued that it was improper for the motion court to rely on the July 29, 2009 order to show cause to establish the City's obligation to retain radio run audio recordings from the date of the accident -- first, because plaintiffs had failed to append an affidavit of service to the copy of that order to show cause they provided with the May 31, 2011 motion, and, second, because the July 2009 order to show cause had been withdrawn before it was

decided.

In response to the City's contention that plaintiffs' moving papers did not include proof that the July 2009 order to show cause was ever served, Strong's counsel asserted that on the adjourn date of the preclusion motion, August 10, 2011, he had handed up to the court and counsel a copy of the affirmation of service of the July 2009 order to show cause, showing service on the Police Department.

Order on Appeal

The motion court granted reargument and vacated the portion of its original order that precluded the City from introducing testimony as to the contents of the audio recording. The court held that plaintiff failed to show that the NYPD was on notice that such an audio recording might be relevant to a forthcoming lawsuit, citing the lack of an affirmation of service attached to the submitted copy of Strong's July 29, 2009 order to show cause, as well as his subsequent withdrawal of the order to show cause.

Discussion

To determine whether the sanction imposed by the motion court, or any sanction, was proper, we must first consider whether the City's failure to prevent the automatic erasure of the radio run audio recording after 180 days constituted spoliation.

Initially, it is New York's common-law doctrine of spoliation, rather than CPLR 3126, that we must consider, since CPLR 3126 covers refusal to comply with a discovery order or a willful failure to disclose, neither of which is applicable here. Despite some New York cases stating that only "willful, deliberate, or contumacious" destruction of evidence warrants the imposition of spoliation sanctions (*see e.g. Kerman v Martin Friedman, C.P.A., P.C.*, 21 AD3d 997, 999 [2d Dept 2005]), this Court has, on many occasions, authorized the imposition of sanctions where the destruction of evidence was negligent rather than willful (*see Adrian v Good Neighbor Apt. Assoc.*, 277 AD2d 146 [1st Dept 2000], *lv dismissed* 96 NY2d 754 [2001]; *Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11 [1st Dept 2000], *lv dismissed* 96 NY2d 937 [2001]; *Squitieri v City of New York*, 248 AD2d 201 [1st Dept 1998]).

The earliest New York cases involving negligent spoliation concerned negligent destruction of allegedly defective equipment. In *Squitieri v City* (248 AD2d at 201), for example, the City was sued by a sanitation worker injured by carbon monoxide poisoning caused by a defective street sweeping vehicle. The City disposed of the vehicle while the litigation was ongoing. Years later, it impleaded the manufacturer of the vehicle, but the third-party claim was dismissed because "the absence of the sweeper would

prevent [the manufacturer] from countering the design defect claim with evidence that the City's misuse, alteration, or poor maintenance of this particular sweeper was a proximate cause of Squitieri's injuries" (*id.* at 203-204). This Court affirmed, explaining that "[s]poliation sanctions such as [dismissal and preclusion] are not limited to cases where the evidence was destroyed willfully or in bad faith, *since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense*" (*id.* at 203 [emphasis added]).

Sage Realty (275 AD2d at 11) concerned the plaintiff's destruction of audiotape recordings of discussions that were at the heart of the plaintiff's claims against their former attorneys. This Court affirmed the dismissal of the complaint for spoliation, citing *Squitieri* for the proposition that "willfulness or bad faith may not be necessary predicates" for spoliation sanctions under the common-law rule (*id.* at 16).

Accordingly, the negligent erasure of audiotapes can certainly give rise to the imposition of spoliation sanctions under New York's common-law spoliation doctrine, if the alleged spoliator was "on notice that the [audiotapes] might be needed for future litigation" (*Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 220 [1st Dept 2004]; *Westbroad Co. v Pace El. Inc.*, 37 AD3d 300 [1st Dept 2007]; *Enstrom v Garden Place*

Hotel, 27 AD3d 1084 [4th Dept 2006]; *Lawrence Ins. Group, Inc. v KPMG Peat Marwick*, 5 AD3d 918, 920 [3d Dept 2004]; *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53 [2d Dept 1998]).

We reject the City's assertion that it was not on notice that the recording might be needed for future litigation before it was erased. The City was placed on notice of plaintiffs' claim and its own claimed affirmative defense within the 180 days after the recording was made, by (1) the filing of plaintiff Strong's notice of claim, (2) the evidence given at his 50-h hearing, and (3) if nothing else, by the City's service of its answer to the Strong complaint on September 21, 2009, in which it actually raised the emergency doctrine defense, making any evidence tending to establish that defense highly relevant. The City therefore had the obligation to take steps to prevent the automatic erasure of any audio recording from that incident, and its failure to do so constituted spoliation.

In addition, plaintiffs established that the Police Department, the presumptive custodian of those records, received notice even before the City could be brought into the action, through the order to show cause served on the Police Department by Strong's former lawyer, seeking copies of radio dispatch calls and reports relating to the accident. Although the affirmation of service of the order to show cause was not attached with the

other attachments to Strong's May 31, 2011 motion, his counsel explained, without dispute, that a copy of the affirmation of service, included in the record, was handed up to the court and counsel on the calendar date. And, while the order to show cause was ultimately withdrawn, service of it gave the Police Department notice that plaintiffs might need the type of audio recording at issue here.

As the foregoing establishes, plaintiffs' spoliation claim can be fully addressed under New York's common-law spoliation doctrine. However, because plaintiffs rely exclusively on the *Zubulake IV* rule that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold'" to preserve evidence (220 FRD at 218), we briefly address the question of whether we need to import *Zubulake*'s rules into the established New York common-law rules as to spoliation of non-ESI evidence.

The cases in which this Court has explicitly adopted the *Zubulake* rulings have involved ESI discovery (*see U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58 [1st Dept 2012]; *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33 [1st Dept 2012]; *Tener v Cremer*, 89 AD3d 75 [1st Dept 2011]; *Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481 [1st Dept 2010]). The

usefulness of the *Zubulake* standard in the e-discovery arena, is, as the *Voom* Court observed, that it "provides litigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered" (93 AD3d at 36). At the same time, as the *Voom* opinion also observed, *Zubulake* "is harmonious with New York precedent in the traditional discovery context" (93 AD3d at 36). This is an area that did not need greater certainty or clarification.

We are aware that a few recent decisions by this Court, in cases involving destruction of *non*-ESI evidence, quote the *Zubulake* or *Voom* formulation, implicitly employing the federal standard for spoliation of non-electronic evidence (*see New York City Hous. Auth. v Pro Quest Sec., Inc.*, 108 AD3d 471 [1st Dept 2013] [part of surveillance video destroyed]; *Suazo v Linden Plaza Assoc., L.P.*, 102 AD3d 570, 571 [1st Dept 2013] [surveillance video automatically recorded over]; *Harry Weiss, Inc. v Moskowitz*, 106 AD3d 668, 669 [1st Dept 2013] [entire computer disposed of]). We nevertheless conclude that reliance on the federal standard is unnecessary in this context. *Zubulake* interpreted federal rules and earlier federal case law to adapt those rules to the context of ESI discovery. However, the erasure of, and the obligation to preserve, relevant audiotapes

and videotapes, can be, and has been, fully addressed without reference to the federal rules and standards.

The elements of a spoliation claim under New York common law having been demonstrated, we turn to consideration of the appropriate sanction. Plaintiffs assert that the City's emergency operation defense should be stricken or, alternatively, that the City should be precluded from offering any evidence in support of the defense. We conclude that a less severe sanction would be appropriate. Nothing in the record supports an inference that the erasure of the audio recording sought here was willful or in bad faith such as would justify the striking of a pleading (*see DiDomenico*, 252 AD2d at 41).

Preclusion, also a relatively severe sanction, is appropriate where "the defendants destroyed essential physical evidence leaving the plaintiff without appropriate means to confront a claim with incisive evidence" (*see Kerman*, 21 AD3d at 999 [internal quotation marks omitted]). Here, the radio run audio recording is not key to the proof of plaintiff's case in chief, although, depending on its contents, it could have been relevant either to prove or help disprove defendant's emergency operation defense. Plaintiffs' inability to establish whether the missing evidence would have been helpful to them cannot serve to support the City's opposition to sanctions, since that

inability is the City's fault, not plaintiffs' (*see Sage Realty*, 275 AD2d at 17).

The City's emergency operation defense can still be challenged through examination of the officers involved and their commanding officer. We therefore conclude that the preclusion of any evidence that establishes the defense would be excessive (*see Alleva v United Parcel Serv., Inc.*, 102 AD3d 573 [1st Dept 2013], *lv dismissed* 21 NY2d 906 [2013]). The limited preclusion that the motion court ordered initially, preventing the City from introducing testimony as to the contents of the audio recording, is appropriate (*see Baldwin v Gerard Ave., LLC*, 58 AD3d 484 [1st Dept 2009]). If warranted, an adverse inference charge at trial may be an appropriate additional sanction (*see Suazo*, 102 AD3d at 571; *Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248 [1st Dept 2011]).

Finally, since plaintiffs demonstrated that defendants did not comply with their discovery obligations under the initial order, we order the production of unredacted police accident reports to the extent not previously provided, and proper affidavits of compliance.

Accordingly, the order of the Supreme Court, New York County (Cynthia Kern, J.), entered February 7, 2012, which, to the extent appealed from as limited by the briefs, granted

defendants-respondents' motion to reargue a prior order imposing a preclusion as a sanction for spoliation of evidence, and, upon reargument, vacated the imposition of the sanction, and denied plaintiff's cross motion seeking, inter alia, to strike certain affirmative defenses for failure to comply with discovery obligations, should be modified, on the law, to reinstate the spoliation sanction and to grant plaintiff's cross motion to the extent of directing the production of unredacted police accident reports to the extent not previously provided, and of proper affidavits of compliance, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered September 20, 2011, should be dismissed, without costs, as superseded by the appeal from the order entered February 7, 2012.

All concur.

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

ENTERED: OCTOBER 15, 2013

CLERK