SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 29, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1285N Muhammad E. Milhouse, Index 157602/14
Plaintiff-Respondent,

-against-

GMRI, Inc. doing business as Olive Garden,
Defendant-Appellant.

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Littler Mendelson, P.C., New York (George B. Pauta of counsel), for appellant.

Phillips & Associates, PLLC, New York (Jesse C. Rose of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered August 31, 2015, which, insofar as appealed from as limited by the briefs, denied defendant's cross motion pursuant to CPLR 7503(a) to stay the action and compel arbitration, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff agreed to be bound by the terms of defendant's Dispute Resolution Process (DRP), which provides for binding arbitration in lieu of litigation. This agreement was formed via

email correspondence between the parties' counsel in June and July of 2014 (*see J. Randazzo, Inc. v Sea Fresh*, 246 AD2d 513, 513 [2d Dept 1998], *lv denied* 92 NY2d 829 [1998]). Plaintiff contends that his acceptance of defendant's June 2014 offer to pay for mediation costs in exchange for agreeing to be bound by the DRP was conditioned on several events that never occurred. However, this contention is not supported by the record.

Nor did plaintiff validly rescind the agreement. Plaintiff sent mixed signals regarding his continued intention to arbitrate after defendant determined not to use the first mediator agreed upon by the parties. Even assuming plaintiff expressed an unambiguous intent to revoke the agreement, the dismissal of the first mediator selected was not a sufficient ground for revocation (*see Babylon Assoc. v County of Suffolk*, 101 AD2d 207, 215 [2d Dept 1984] [rescission appropriate upon showing of "a breach in the contract which substantially defeats the purpose thereof"]). The selection of a particular mediator was not an express condition to the agreement, nor is there any indication

that the first mediator selected was uniquely qualified or that plaintiff would have been unwilling to move forward with a different mediator - indeed, the parties ultimately agreed on another mediator, who was also suggested by plaintiff's counsel.

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

ENTERED: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1675 Henry Haynes, Index 18196/06
Plaintiff-Respondent-Appellant,

-against-

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

Detective Anthony Casilla,
Defendant-Appellant-Respondent.

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Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for appellant-respondent and respondents.

Rubert & Gross, P.C., New York (Soledad Rubert of counsel), for respondent-appellant.

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Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered January 16, 2015, in favor of plaintiff as against defendant Detective Anthony Casilla, and, after a jury trial, in favor of defendants the City of New York and Detective Joseph Human as against plaintiff, and bringing up for review, an order, same court, Justice and entry date, which, having granted plaintiff's motion in limine to strike Casilla's answer, severed the action against Casilla for inquest, and granted plaintiff's application to enter judgment in favor of the remaining defendants, dismissing his complaint against them, modified, on the law, the facts and in the exercise of discretion, to dismiss

the complaint as against defendant Casilla, and the judgment otherwise affirmed, without costs. The Clerk is directed to enter an amended judgment dismissing the complaint against all defendants. Appeal from aforementioned order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

After plaintiff's wife was arrested, the police agreed to bring her dogs to her apartment. Detectives Human and Casilla encountered plaintiff in the building's lobby, but would not allow him to go into the apartment because he had no keys or identification.

After hearing the front door slam, plaintiff, assuming that the officers had left, tried to enter the apartment by traversing a four-to six-inch wide ledge and climbing in through the bathroom window. Plaintiff claims that, as he was trying to enter the window, Casilla pushed him with both hands, causing him to fall 20 feet to the ground. According to Casilla and Human, after placing the dogs in the apartment, they closed and locked the door without looking into or entering the apartment. Upon exiting the building, they found plaintiff on the ground, contacted EMS and filled out an aided worksheet.

On August 7, 2008, Supreme Court (Larry S. Schachner, J.),

issued an order granting plaintiff's motion to strike defendants' answer to the extent that:

> "[Defendants] have till 30 days before trial to produce Officer Casilla's outstanding memo book. If the discovery is produced prior to that time [plaintiff] is entitled to an automatic second deposition of Officer Casilla in regards to same. Should it be produced after the 30 day point before trial, [defendant] is precluded from offering same into evidence at the trial of this action" (the "2008 order").

On May 6, 2014, the day before he was scheduled to testify, Casilla found his memo book in a locked cabinet at his precinct. Casilla notified his counsel, who notified counsel for plaintiff, of his discovery. The following day, plaintiff's counsel moved in limine to strike Casilla's answer, arguing, inter alia, that his opening statement and much of his prepared cross-examination of Casilla revolved around the missing memo book. When asked by the court how the book could have suddenly turned up midtrial, defense counsel stated that the precinct was undergoing equipment movement and Casilla walked by a locked cabinet he had never seen before that had his name on it. Casilla had the cabinet unlocked and the memo book was right there.

The trial court granted plaintiff's motion to strike Casilla's answer. While initially stating that it did not see any "fraud or unclean hands" on Casilla's part, the court,

referencing the above noted 2008 order, held that it "cannot disregard an order of a judge of coordinate jurisdiction right along this issue."

Without informing the jury that Casilla's answer had been stricken, the trial proceeded with Casilla as a witness. Plaintiff chose to affirmatively admit Casilla's memo book into evidence and cross-examined him about its recent discovery, contents and authenticity. The relevant entries in the book stated: "1335 A/A RE: Drop off dogs @ apt 1D. 1336 10-54 aided male fell from window while attempting to enter apt from ledge witness [identifying information redacted] 1356- 97H to Lincoln Hosp EMT 48 Pct."

The jury found that Casilla did not push plaintiff as he attempted to enter his apartment through a window. Pursuant to the trial court's instructions, the jury continued to the questions on the verdict sheet related to damages and made no awards for past or future medical expenses or pain and suffering, writing "none" in response to each question. The jury also found that plaintiff should not be awarded any punitive damages against Casilla.

The trial court improvidently exercised its discretion when it granted plaintiff's motion in limine seeking to strike

Casilla's answer pursuant to the 2008 order, without a finding that Casilla's conduct was willful, contumacious or due to bad faith (*see Bassett v Bando Sangsa Co.*, 103 AD2d 728 [1st Dept 1984]; *see also John Hancock Life Ins. Co. of N.Y. v Triangulo Real Estate Corp.*, 102 AD3d 656 [2d Dept 2013]). The 2008 order contemplated a remedy of preclusion, and on the record before us there is insufficient evidence of willful or contumacious conduct on Casilla's part, or prejudice to plaintiff, to warrant the drastic remedy of striking of Casilla's answer in the midst of the jury trial based on his belated production of the memo book (*see Fox v Grand Slam Banquet Hall*, 142 AD3d 473 [1st Dept 2016]; *Colome v Grand Concourse 2075*, 302 AD2d 251 [1st Dept 2003]), whose contents were exculpatory in nature (*see Ahroni v City of New York*, 175 AD2d 789 [2d Dept 1991]).

Under the unique circumstances of this case, where the jury found that Casilla did not push plaintiff out the window and that plaintiff is not entitled to any damages, judgment should be entered in Casilla's favor dismissing the complaint. It was plaintiff's attorneys who charted the course of the trial, suggesting that it proceed with Casilla as a witness, without informing the jury that his answer had been stricken, and that Casilla's alleged conduct be included in the verdict sheet as a

liability issue. Plaintiff's attorneys also suggested that the court "direct the jury that they must also award – decide a damages award no matter what they find as to liability." Plaintiff's counsel further argued to the court that: "When an answer is stricken and the testimony abides the event, [defense counsel is] not prejudiced at all. This case is going forward exactly the same way. He can argue to the jury that Detective Casilla is not responsible for what happened. It's only his legal status that has changed. The defense of this case is no different. If your Honor is wrong, ultimately, on whether the answer should be stricken, we've got a full record with a jury verdict. Everything is the same. The Appellate Division will either say you were right in striking the answer or you weren't, but the trial will be conducted and the outcome will be the same."

As to plaintiff's cross appeal, neither the testimony of defendants' expert toxicologist, nor the trial court's refusal to give a missing document charge regarding the original aided card, warrants retrial.

"Preclusion of expert evidence on the ground of failure to give timely disclosure, as called for in CPLR 3101(d)(1)(i), is generally unwarranted without a showing that the noncompliance

was willful or prejudicial to the party seeking preclusion" (*Martin v Triborough Bridge & Tunnel Auth.*, 73 AD3d 481, 482 [1st Dept 2010], *lv denied* 15 NY3d 713 [2010]). Prejudice can be shown where the expert is testifying as to new theories, or where the opposing side has no time to prepare a rebuttal (*see Krimkevitch v Imperiale*, 104 AD3d 649 [2d Dept 2013]).

Defendants' answer raised a culpable conduct defense and plaintiff was or should have been aware that his consumption of alcohol was at issue. Indeed, his medical records showed his blood alcohol level to be in excess of .15 and referenced his inebriated appearance, and plaintiff was questioned about his sobriety at his deposition. Moreover, plaintiff was able to serve his own expert notice, attacking the credibility of the blood alcohol reading. Given these circumstances, plaintiff has not shown why 34 days was not enough time to prepare for the cross examination of defendant's expert or that the belated disclosure was otherwise prejudicial (*see Ostrow v New London Pharm.*, 278 AD2d 158, 159 [1st Dept 2000]). In any event, the videotaped testimony of the defense expert was stopped before it finished and was stricken, with the jury advised to disregard it. The jury is presumed to have followed the court's instructions (*see Brown v Speaker*, 66 AD3d 422 [1st Dept 2009]).

Given that a copy of the aided card was available, the loss of the original did not warrant a missing document charge (*see Think Pink, Inc. v Rim, Inc.*, 19 AD3d 331 [1st Dept 2005]). The police department entered data from the card into a computer file and printout, admitted at trial. Plaintiff was able to elicit substantial testimony regarding the production of a copy and not the original, which counsel used to further plaintiff's coverup theory.

All concur except Mazzarelli, J.P. who concurs in a separate memorandum as follows:

MAZZARELLI, J. (concurring)

I agree with the majority that it was error for the court to strike defendant Casilla's answer without first finding that his conduct was willful, contumacious or in bad faith. However, I disagree with the majority's statement that the record contains "insufficient evidence of willful or contumacious conduct on Casilla's part." "Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses" (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]). Here, Casilla not only lacked an adequate excuse for not producing the memo book he carried on the day of the incident, despite having been ordered to do so on no less than four occasions over the span of six years, he made a veritable mockery of the proceedings by purporting to have "discovered" it on the literal eve of his own testimony. It simply defies credibility that a file cabinet with Casilla's own name on it appeared in a hallway in the precinct house at just the right time for Casilla to avoid the consequences of having lost it. Further, it throws grave doubt on Casilla's prior averment, in an affidavit responding to plaintiff's initial motion to strike defendants' answer, that he "conducted several searches" for the notebook in question.

Nevertheless, without actually determining that Casilla acted willfully, the court prematurely struck his answer. Further, the fact that the memo book turned out not to inculpate Casilla suggests that striking of the answer would ultimately have been too harsh a sanction. In addition, to order a new trial now, with a lesser sanction, such as an adverse inference in favor of plaintiff, would be to ignore the fact that, in voluntarily calling Casilla as a witness and submitting him to hostile questioning about the circumstances surrounding the sudden appearance of the memo book, plaintiff effectively selected his own remedy. It would not be appropriate for this Court to reverse course and remand the matter under these circumstances.

Incidentally, it was also plaintiff who requested a verdict sheet that instructed the jury to calculate plaintiff's damages even if it found, as it did, that Casilla did not push plaintiff out the window. It was error for the court to grant this request, as it could possibly have sowed great confusion among

the jurors. Nevertheless, this error was harmless as the jury was able to deduce that plaintiff was entitled to no damages upon its conclusion that defendants had no liability.

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

ENTERED: DECEMBER 29, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2158 Matthew Johnson, Index 21095/13E
Plaintiff-Respondent,

-against-

Law Office of Kenneth B. Schwartz,
et al.,
Defendants,

Helene Stetch, et al.,
Defendants-Appellants.

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Lewis Brisbois Bisgaard & Smith LLP, New York (Paula Gilbert of counsel), for Helene Stetch, appellant.

Goldberg Segalla LLP, New York (Todd D. Kremin of counsel), for Builders Mutual Insurance Company, appellant.

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for Andres V. Diaz, Giles Properties, Inc., and Diaz Group Design Build Corp, appellants.

Thomas G. Sherwood, LLC, Garden City (James P. Truitt III of counsel), for Stewart Title Insurance Company, appellant.

Doyle & Broumand, LLP, Bronx (Michael B. Doyle of counsel), for respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered on or about June 10, 2015, which, to the extent appealed from, denied defendants Helene Stetch's, Andres Diaz (Mr. Diaz), Giles Properties Inc. (Giles), and Diaz Group Design Build Corp.'s (collectively, the Diaz defendants), and Builders Mutual Insurance Company's (Builders Mutual) motions to dismiss the

complaint as against them and Stewart Title Insurance Company's (Stewart Title) motion for summary judgment dismissing the complaint as against it and for costs against plaintiff, unanimously modified, on the law, and on the facts and in the exercise of discretion insofar as costs are concerned, to grant the Diaz defendants' and Builders Mutual's motions, to grant Stetch's motion to dismiss the fourth cause of action without prejudice and plaintiff's request for attorneys' fees with prejudice, and to grant Stewart Title's motion and remand for a hearing to determine the amount of costs, expenses, and attorneys' fees reasonably incurred by it, and otherwise affirmed, without costs.

In December 2006, plaintiff entered into a contract with defendant Giles whereby plaintiff agreed to buy, for $995,000, a house built by Giles. The contract provided, inter alia, that closing would occur on or about February 7, 2007, provided that Giles obtained a final certificate of occupancy from the Department of Buildings. It also stated that "title will not close without purchaser's consent until a final certificate of occupancy has been issued." Plaintiff retained defendant Law Office of Kenneth Schwartz to act as his attorney in the proposed purchase. The firm assigned defendant attorney Helene Stetch to

the matter.

Closing on the sale took place on September 24, 2007. On that date, Andres Diaz, as president of Giles, signed a deed conveying the property. The deed was presented for recording by nonparty Judicial Title Insurance Agency, LLC, as agent for nonparty First American Title. In the contract, plaintiff acknowledged "that Judicial Title Insurance Agency has issued or will issue a policy of title insurance." Also on September 24, 2007, plaintiff signed a mortgage for the property, which was presented for recording by Judicial Title Insurance Agency as agent for First American Title.

The points of contention arise from the failure of Giles to obtain a certificate of occupancy before closing. In the complaint, plaintiff alleges that "[a]ll" the defendants encouraged him to close without the certificate of occupancy, stating that "these types of things," i.e., the failure to provide a valid certificate of occupancy, are "normal problems at closing" and that plaintiff could be adequately protected if he did close in spite of this "default." While the complaint refers to all defendants, Stewart Title and Builder's Mutual submitted affidavits on their motions stating that no representative of theirs was present at closing. Nevertheless, absent the

certificate of occupancy, an escrow contract was prepared, requiring that $100,000 be held in escrow pending receipt of the certificate of occupancy.

Plaintiff alleges that the escrow was ultimately released to the attorney defendants (including Stetch), but, in spite of due demand, the attorney defendants "failed, refused and neglected to remit the money to Plaintiff." He further alleges that pursuant to a "Stipulation of Settlement for Non-Completion of Project," with Giles as insured by Builder's Mutual Insurance Company, a settlement of $45,000 was paid to the attorney defendants but, in spite of due demand, they refused to pay the moneys to plaintiff.

Plaintiff commenced the instant action on or about March 15, 2013. He alleges that Andres F. Diaz, while the sole owner of Giles, also used another corporate alter ego, Diaz Group Design Build Corp. in his dealings with plaintiff. He also alleges that Stewart Title, and its agent, defendant Empire Land Services Corp. (Empire), were both hired to insure (and ensure) that plaintiff received valid title to the premises.

Plaintiff alleges breach of contract, malpractice, false promises, and breach of the duty of good faith and fair dealing for failure to pay plaintiff $45,000 as against the Schwartz firm, Kenneth Schwartz and Helene Stetch. He alleges breach of

the duty of good faith and fair dealing and breach of contract as against Giles, Andres Diaz and the Diaz Group. Finally, he alleges breach of contract and failure to pay plaintiff $45,000 as against Stewart Title and Empire.

On or about July 17, 2013, Builders Mutual moved to dismiss based upon improper service, lack of personal jurisdiction, and failure to state a cause of action. On or about July 23, 2013, Stetch moved to dismiss based on the statute of limitations and failure to state a claim. On or about October 4, 2013, the Diaz defendants moved to dismiss, inter alia, for failure to state a claim. On June 19, 2013, Stewart Title's attorney sent a letter to plaintiff's counsel stating that he was unable to locate any evidence that Stewart Title had issued a title insurance policy. He requested that plaintiff withdraw his claims against Stewart Title. On July 2, 2013, plaintiff's counsel refused to withdraw the claims. Stewart Title then served discovery requests on or about July 8, 2013, filed an amended answer on July 22, 2013, and moved for summary judgment and sanctions on November 13, 2014.

The motion court denied the motions with leave to renew after the conclusion of discovery, stating that there had not been sufficient discovery to determine the merits of the motions.

Plaintiff and Giles were the only parties to the contract

whereby plaintiff would purchase the house that Giles would construct. Thus, to the extent the fifth cause of action alleges that all three Diaz defendants breached the contract, it must be dismissed as against Mr. Diaz and Diaz Group Design Build Corp. (*see e.g. Leonard v Gateway II, LLC*, 68 AD3d 408 [1st Dept 2009]). For the same reason, to the extent the fourth cause of action alleges breach of the duty of good faith and fair dealing, it must be dismissed as against Mr. Diaz and Diaz Group Design Build Corp. (*Duration Mun. Fund, L.P. v J.P. Morgan Sec. Inc.*, 77 AD3d 474 [1st Dept 2010]).

The allegations that Mr. Diaz is the sole owner of Giles and that he also used Diaz Group Design Build Corp., "another corporate alter ego," in his dealings with plaintiff are far too conclusory to support piercing Giles's corporate veil to reach Mr. Diaz and then impute his liability to Diaz Group Design Build Corp. (*see e.g. East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775 [2011]). Plaintiff's plea that he needs discovery is unavailing (*see e.g. East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 128-129 [2d Dept 2009], *affd* 16 NY3d 775 [2011]).

To the extent the fourth cause of action can be read as alleging civil conspiracy, it must be dismissed as well, since

conspiracy to commit a tort is not a cause of action (*see Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968 [1986]).

To the extent the fourth cause of action can be read as alleging fraudulent inducement, it is insufficiently pleaded; it does not allege that the Diaz defendants or Builders Mutual made any misrepresentations to induce plaintiff to sign the document that supposedly released Builders Mutual in exchange for $45,000. Plaintiff's affidavit indicates that he dealt only with his former attorneys regarding the release.

Although the sixth cause of action purports to be against the Diaz defendants, it in fact alleges a cause of action against the attorney defendants for converting the $45,000.

The December 2006 contract between Giles and plaintiff merged into the September 2007 deed (*see e.g. TIAA Global Invs., LLC v One Astoria Sq. LLC,* 127 AD3d 75, 85 [1st Dept 2015]). Plaintiff alleges that Giles breached the contract because the property did not have a final certificate of occupancy (C of O) and was deficiently constructed. However, the provisions of the contract regarding those items did not survive delivery of the deed.

The fourth cause of action appears, based on the demand for damages, to relate to plaintiff's supposed agreement to release

Builders Mutual in exchange for $45,000. Since this agreement is between Builders Mutual and plaintiff, any claim that Giles breached the covenant of good faith and fair dealing implied in the release fails (*see Duration Mun. Fund*, 77 AD3d at 474-475).

As to Builders Mutual, accepted as true, the complaint and its exhibits indicate that plaintiff agreed to release Builders Mutual in return for $45,000. However, plaintiff does not allege that Builders Mutual failed to pay the money; instead, he alleges that the money was paid to the attorney defendants, who refused to remit it to him.

The fifth cause of action fails to state a claim against Builders Mutual (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Although it alleges that Builders Mutual breached its "contract with Plaintiff," Builders Mutual had no such contract. The allegations show that the fifth cause of action refers to Giles's breach of its December 2006 contract with plaintiff. Even if, arguendo, Builders Mutual insured Giles, its contract was with Giles, not plaintiff.

As to defendant Stetch, she contends that all claims against her are time-barred. Although couched as contract claims, the first and second causes of action are essentially malpractice claims, and they are not time-barred. Plaintiff alleges that the

attorney defendants should not have allowed him "to purchase the premises without a Final C of O" or to enter into the escrow agreement. Since plaintiff purchased the premises on or about September 24, 2007, and entered into the escrow agreement on that date, the first and second causes of action accrued at that time (*see Glamm v Allen*, 57 NY2d 87, 93 [1982]). Absent the continuous representation doctrine, the statute of limitations would have run in September 2010 (CPLR 214[6]; *see also Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 539, 541-543 [2004]). Plaintiff did not sue until March 2013. However, in opposition to Stetch's motion to dismiss, plaintiff submitted an affidavit saying that he was continually represented by Stetch up to and including February 2012. The only matter for which plaintiff retained the attorney defendants was the purchase of his home. Thus, as required for the application of the doctrine, Stetch's continuous representation related "to the matter upon which the allegations of malpractice are predicated" (*Serino v Lipper*, 47 AD3d 70, 76 [1st Dept 2007] [internal quotation marks omitted], *lv dismissed* 10 NY3d 930 [2008]).

The gravamen of the sixth cause of action is that the attorney defendants converted the $45,000 that plaintiff was

slated to receive from Builders Mutual. The three-year statute of limitations runs from the date that the conversion takes place (*see Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44-45 [1995]). "[I]t is well settled that, where the original possession is lawful, a conversion does not occur until after a demand and refusal to return the property" (*D'Amico v First Union Natl. Bank*, 285 AD2d 166, 172 [1st Dept 2001], *lv denied* 99 NY2d 501 [2002]). Stetch argues that the conversion occurred before February 23, 2010, so the statute of limitations would have run on or about February 22, 2013. According to Stetch, plaintiff's $45,000 conversion claim is time-barred because plaintiff sued on or around March 15, 2013, nearly one month after the supposed statute of limitations had run. However, there is nothing in the record to support this contention. The email from plaintiff's current counsel indicating that the $45,000 was released to plaintiff's former attorneys, including Stetch, before February 23, 2010 is insufficient to establish when plaintiff actually demanded the $45,000 from the attorney defendants and when the attorney defendants refused to remit the money to plaintiff. Therefore, the precise date of conversion is unclear.

Similarly, the gravamen of the third cause of action, which

is couched as a fraud claim, is that the attorney defendants stole the $100,000 escrow. However, this cause of action is not subject to CPLR 3211 dismissal as time-barred, as there is no clear indication in the record when the supposed $100,000 escrow was released. If discovery establishes that the $100,000 was converted more than three years before March 15, 2013, then Stetch may move for summary judgment based on the statute of limitations.

Stetch is correct that the first and second causes of action fail to state a claim for breach of contract. However, as they can be construed as legal malpractice claims, they need not be dismissed (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

The complaint says the fourth cause of action is for breach of the duty of good faith and fair dealing, presumably in connection with the $45,000 that plaintiff was supposed to get from Builders Mutual. As Stetch is not a party to the alleged agreement to pay $45,000, she cannot be sued for breach of the implied covenant of good faith and fair dealing (*see Duration Mun. Fund*, 77 AD3d at 474-475).

To the extent the fourth cause of action can be construed as a claim that Stetch fraudulently induced plaintiff to release Builders Mutual, it is inadequately pleaded. However, in his

affidavit, plaintiff says he accepted Builders Mutual's supposed offer upon the advice of his attorneys. As this indicates that plaintiff might be able to allege a specific misrepresentation by Stetch, the dismissal of the fourth cause of action as against her is without prejudice.

On the fifth cause of action, plaintiff requests legal fees in addition to damages. Stetch correctly points out that plaintiff is not entitled to attorneys' fees due to the American rule (*see e.g. Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

The complaint must be dismissed as against Stewart Title. It is undisputed that Stewart Title did not issue title insurance when plaintiff purchased his property. The issues of fact that plaintiff tried to create in opposition to Stewart Title's motion for summary judgment are not genuine, but feigned; they are speculative and contradicted by documentary evidence (*see e.g. Cillo v Resjefal Corp.*, 16 AD3d 339, 340-341 [1st Dept 2005]).

Plaintiff's plea that he needed discovery is unavailing, especially since there is no evidence in the record that he served any discovery requests (*see e.g. Meath v Mishrick*, 68 NY2d 992, 994 [1986]).

Moreover, Stewart Title's motion for costs against plaintiff

due to his frivolous conduct should be granted (*see Borstein v Henneberry*, 132 AD3d 447 [1st Dept 2015]). In his affidavit in opposition to Stewart Title's motion, which was sworn to on January 7, 2015, plaintiff asserted a material factual statement that was false (*see* 22 NYCRR 130-1.1[c][3]). He said that, with the exception of various documents – none of which was the title insurance policy for the purchase of his home – "I do NOT have any other documents." However, on or about December 23, 2014, plaintiff had produced nonparty First American Title Insurance Company's policy for said purchase.

Moreover, plaintiff should have known that Stewart Title did not issue the title insurance policy for the purchase of his home. The contract whereby plaintiff agreed to buy a house from Giles said, "Purchaser . . . acknowledges that [nonparty] *Judicial Title Insurance Agency* has issued or will issue a policy of title insurance insuring title to the land upon which the subject premises are to be built" (emphasis added). The deed for plaintiff's property was presented for recording by Judicial Title Insurance Agency as agent for First American Title; in addition, the metes and bounds description of the property is on a page headed "The Judicial Title Insurance Agency LLC – Title Number: 93163FA-B." Both the contract and the deed are exhibits

to the complaint.

Plaintiff's conduct is also frivolous under 22 NYCRR 130-1.1(c)(1), because, even if Stewart Title had issued a title insurance policy for plaintiff's house, it would not have been liable for the lack of a final C of O, as Stewart Title's attorney pointed out to plaintiff's counsel in an attempt to have him withdraw the claims against Stewart Title (*see Voorheesville Rod & Gun Club v Tompkins Co.*, 82 NY2d 564, 571 [1993]). *Voorheesville* was one of the cases that Stewart Title's attorney sent to plaintiff's attorney. "In determining whether the conduct undertaken was frivolous, the court shall consider . . . whether or not the conduct was continued when its lack of legal or factual basis . . . was brought to the attention of counsel or the party" (22 NYCRR 130-1.1[c]; *see also Borstein*, 132 AD3d at 452).

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

ENTERED: DECEMBER 29, 2016

CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2182 The City of New York, Index 651283/14
Plaintiff-Appellant,

-against-

Wausau Underwriters Insurance Company,
et al.,
Defendants-Respondents.

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Zachary W. Carter, Corporation Counsel, New York (Anjan Mishra of counsel), for appellant.

Jaffe & Asher LLP, New York (Marshall T. Potashner of counsel), for Wausau Underwriters Insurance Company, respondent.

Mulholland, Minion, Duffy, Davey, McNiff & Beyrer, Williston Park (Stephanie E. Kass of counsel), for Hellman Electric Corp., respondent.

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Order, Supreme Court, New York County (Frank P. Nervo, J.), entered February 25, 2015, which denied the motion of plaintiff City of New York (the City) for summary judgment declaring that defendant Wausau Underwriters Insurance Company (Wausau) has a duty to defend, indemnify and reimburse the City for defense costs incurred in five underlying personal injury actions, unanimously modified, on the law, to grant partial summary judgment to the City by declaring that Wausau is obligated to defend and reimburse the City for defense costs in the underlying actions titled *Moore-Dixon v Welsbach Elec. Corp.*, *Cruz v City of*

New York, *Bog Bae v City of New York*, and *Santana v City of New York* and, upon a search of the record, to grant summary judgment to Wausau by declaring that it has no duty to defend or reimburse the City for defense costs in the underlying action titled *Ramsarran v City of New York*, and otherwise affirmed, without costs.

On this appeal, the issue presented is whether Wausau has a duty to defend the City, which is listed as an additional insured under policies issued by Wausau to one of the City's contractors, Hellman Electric Company (Hellman) with respect to five underlying personal injury actions.[1] For the reasons that follow, we hold that Wausau has a duty to defend the City and reimburse its defense costs in four of those underlying actions, but has no such duty in the remaining action. Accordingly, we now modify the order of Supreme Court denying the City's motion for summary judgment, to the extent of granting summary judgment and declaring that Wausau has a duty to defend and reimburse the City for its defense costs as to four of those actions. With

[1] Although the City, by motion for summary judgment, sought a declaration that Wausau had a duty to defend, indemnify, and reimburse the City for defense costs incurred with respect to these five actions, at oral argument and in briefs submitted before this Court, the City stated that it now seeks a ruling solely as to the duty to defend and reimburse defense costs.

respect to the fifth action, upon searching the record (CPLR 3212[b]), we grant summary judgment and declare that Wausau has no duty to defend the City or reimburse its defense costs in that underlying action.

I. BACKGROUND OF THE CASE

A. The City's Trade Contracts With Hellman

The City has entered into four trade contracts with defendant Hellman which are relevant to this appeal.

Under the terms of the first trade contract, which was in effect from February 1, 2011 through January 31, 2013, Hellman was to maintain in proper working order all street lighting devices in the Borough of the Bronx (Bronx Street Lighting Contract). The second contract, effective December 1, 2012 through November 30, 2014, required Hellman to maintain in proper working order all illuminated traffic control devices in the Borough of the Bronx (Bronx Traffic Control Device Agreement). The third contract became effective on December 1, 2009. Under its terms, Hellman was to maintain in proper working order all illuminated traffic control devices in the Borough of Manhattan (Manhattan Traffic Control Device Contract). Although the contract's term was originally to end as of November 30, 2011, by change order dated April 25, 2011, the term of this contract was

extended to November 30, 2012. Under the terms of the fourth contract, effective January 24, 2011 through July 23, 2012, Hellman was to perform electrical work in connection with decorative lighting in the Borough of Queens (Queens Street Lighting Contract).

Under the terms of each of these four contracts, Hellman was required to obtain a commercial general liability (CGL) insurance policy naming the City as an additional insured.

B. The Wausau Insurance Policies

In compliance with the terms of the four trade contracts, Hellman obtained two CGL policies from Wausau, each of which names the City as an additional insured. These policies were in effect for consecutive terms, the first having been in effect from June 27, 2011 through June 27, 2012 (2011-2012 Policy) and the second from June 27, 2012 through June 27, 2013 (2012-2013 Policy). Each of these policies contained an identical additional insured endorsement, which provided in pertinent part:

> "The coverage afforded to the additional insured is limited to liability caused, in whole or in part, by the negligent acts or omissions of you [Hellman], your employees, your agents, or your subcontractors, in the performance of your ongoing operations.
>
> "This insurance does not apply to 'bodily injury' . . . arising out of 'your [Hellman's] work' included in the 'products-completed operations hazard' unless you are

> required to provide such coverage for the additional insured by the written agreement, and then only for the period of time required by the written agreement . . . ."

Both policies further provide, in identical language, that a products-completed operations hazard "[i]ncludes all 'bodily injury' . . . occurring away from premises you [Hellman] own or rent and arising out of . . . 'your [Hellman's] work' except . . . [w]ork that has not yet been completed or abandoned" and that "'your [Hellman's] work' will be deemed completed . . . [w]hen all the work to be done at the job site has been completed[.]"

II. LEGAL STANDARDS

On a summary judgment motion in a case involving an insurance contract or policy, "[t]he evidence will be construed in the light most favorable to the one moved against" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). The insured, however, has the burden of showing that an insurance contract covers the loss for which the claim is made (*Kidalso Gas Corp. v Lancer Ins. Co.*, 21 AD3d 779, 780-781 [1st Dept 2005]).

The applicable standard holds that the duty to defend arises when at least one of two alternate criteria are met. "A duty to defend exists whenever the allegations in the complaint in the underlying action, construed liberally, suggest a reasonable

possibility of coverage, or where the insurer has actual knowledge of facts establishing such a reasonable possibility" (*DMP Contr. Corp. v Essex Ins. Co.*, 76 AD3d 844, 845 [1st Dept 2010], *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006], and *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]; *see Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61 [1991]). "Any . . . exclusion[] . . . from policy coverage must be specific and clear in order to be enforced" (*DMP Contr. Corp.*, 76 AD3d at 845-846 [internal quotation marks omitted]).

III. DISCUSSION

In this case, in order to determine whether Wausau had a duty to defend the City as an additional insured in any or all of five underlying actions, we must examine the allegations in each of the five underlying complaints, construing them liberally, for the suggestion of a reasonable possibility of coverage under the policy for the claims asserted. In addition, we must examine the record with respect to each case to determine whether Wausau had actual knowledge of facts establishing such a reasonable possibility. Among the facts we will examine to determine whether a reasonable possibility of recovery existed are the nature of the occurrence, the time and location of the occurrence

and whether the trade contract and policy applicable to work performed at that location were in effect at the time of the alleged occurrence.

A. The *Moore-Dixon* Action.

In the first underlying action, *Moore-Dixon v Welsbach Elec. Corp.*, Index No. 300743/13 (Sup Ct, Bronx County), the complaint alleges that on November 24, 2011, the plaintiff stepped off a curb and into a deep depression and tilted storm sewer grating at the intersection of West 230th Street and Broadway in the Bronx. The complaint further alleges that the plaintiff's injury was attributable, in part, to defective street lighting at that intersection. At the time of this alleged occurrence, both the Bronx Street Lighting Contract and the 2011-2012 Policy were in effect.

Applying the first *DMP* criterion, because the terms of the 2011-2012 Policy provide that coverage of the additional insured (the City) is limited to liability caused by negligent acts of "you" (Hellman), and the complaint does not mention Hellman, the facial allegations in this complaint, even construed liberally, do not suggest a reasonable possibility of coverage under the 2011-2012 Policy.

Turning to the second *DMP* criterion, the record reveals that

on June 7, 2013, James Sanford of the Affirmative Litigation Division of the City's Law Department transmitted a facsimile message to "Claims Manager" at Wausau enclosing a copy of the summons and complaint in the underlying action. Also enclosed with the facsimile message was a copy of an email message dated January 6, 2012 from Joe Mauro, General Foreman-Street Lighting for Hellman, which, according to Sanford, indicates that the street light pole located at the intersection of West 230th Street and Broadway was not repaired until January 2012, weeks after the accident. Therefore, Wausau, having had actual knowledge of facts establishing a reasonable possibility that Moore-Dixon's claim was within the 2011-2012 Policy's indemnity coverage, has a duty to defend the City and reimburse its defense costs as an additional insured. Thus, even construing the evidence in the light most favorable to Wausau, the nonmoving party (*Kershaw v Hospital for Special Surgery*, 114 AD3d at 82), the City has met its burden of showing that the Wausau policy covers the loss for which the claim was made (*Kidalso Gas Corp. v Lancer Ins. Co.*, 21 AD3d at 780-781).

It is of no moment that Hellman, the named insured on the Wausau policy, was not named in the complaint (*see Fitzpatrick v American Honda Motor Co.*, 78 NY2d at—64, 69-70 [holding that

insurer had duty to defend principal of named insured notwithstanding that insurer "maintained that it was not required to provide a defense because the complaint did not name (the named insured)"]).

B. The *Cruz* Action.[2]

The complaint in the second underlying action, *Cruz v City of New York*, Index No. 304845/13 (Sup Ct, Bronx County), alleges that on February 27, 2013, the plaintiff was injured in a collision with a vehicle owned by the City and operated by an employee of the City at the intersection of Westchester Avenue and East 156th Street in the Borough of the Bronx. The complaint further alleges that the plaintiff's injury was attributable in part to a defective traffic light at the intersection. At the time of this occurrence, both the Bronx Traffic Control Device Contract and the 2012-2013 Policy were in effect.

Applying the first *DMP* first criterion, because the terms of 2012-2013 Policy limit coverage for the City, as an additional insured, to liability caused by the negligent acts of "you" (Hellman), and the complaint in *Cruz* does not mention Hellman,

[2] According to the City, *Cruz* was settled on or about April 11, 2014 for $30,000. A stipulation of discontinuance of *Cruz*, with prejudice, was filed with the Bronx County Clerk on July 29, 2014.

the facial allegations in this complaint, even construed liberally, do not suggest a reasonable possibility of coverage under the 2012-2013 Policy.

Nonetheless, an examination of the record through the lens of the second *DMP* criterion reveals that on August 28, 2013, Mr. Sanford of the City Law Department sent a fax to "Claims Manager" at Wausau, enclosing a copy of the summons and complaint as well as a copy of a traffic signal maintenance log showing that a defect in the traffic signal at Westchester Avenue and East 156th Street in the Bronx was reported to Wausau on February 26, 2013, the day before the alleged accident, and that Hellman was the contractor then responsible for maintenance of the traffic signal in question. Thus, Wausau had actual knowledge of facts establishing a reasonable possibility that Cruz's claim was within the 2012-2013 Policy's indemnity coverage. Thus, construing the evidence in the light most favorable to the insurer (*see Kershaw* at 82), the City has met its burden of showing that the 2012-2013 Policy covers the loss for which the claim was made (*Kidalso Gas Corp.* at 780-781), and Wausau has a duty to defend the City and reimburse its defense costs as an additional insured under the 2012-2013 Policy.

Again, it does not matter that Hellman, the named insured on

the Wausau policy, was not named in the complaint (*see Fitzpatrick* at 64, 69-70).

C. The *Bog Bae* Action.

A review of the complaint in the next underlying action, *Bog Bae v City of New York*, Index No. 158960/13 (Sup Ct, New York County), under the first *DMP* criterion shows that the complaint alleges that on September 6, 2012, the plaintiff was injured while operating a motor vehicle which collided with another vehicle at the intersection of East 125th Street and First Avenue in Manhattan. The complaint further alleges that the plaintiff's injury was attributable in part to a defective traffic control device at the intersection. Both the City and Hellman are named as defendants. At the time of this occurrence, both the Manhattan Traffic Control Device Contract (the effective term of which had been extended to November 30, 2012 by change order) and the 2012-2013 Policy were in effect. Thus, the facial allegations of the complaint, construed liberally, suggest a reasonable possibility of coverage under the 2012-2013 Policy.

Additionally, applying the second *DMP* criterion, the record shows that on October 29, 2013, Mr. Sanford of the City's Law Department transmitted a fax to "Claims Manager" at Wausau, enclosing a copy of the summons and complaint as well as a copy

of the police accident report and the traffic signal maintenance log for the period from September 6, 2011 to September 6, 2012, showing that the accident took place on September 6, 2012 and that Hellman was the contractor responsible for maintenance of the traffic signal at that intersection on the day of the accident. Thus, Wausau also had actual knowledge of facts establishing a reasonable possibility that the *Bog Bae* claim was within the 2012-2013 Policy's indemnity coverage. Construing the evidence in the light most favorable to Wausau as the nonmoving party (*see Kershaw* at 82), the City has met its burden of showing that the 2012-2013 Policy covers the loss for which the claim was made (*see Kidalso Gas Corp.* at 780-781), and under both criteria of *DMP*, Wausau has a duty to defend the City and reimburse its defense costs as an additional insured under the 2012-2013 Policy.

D. The *Santana* Action.

A review of the complaint in the next underlying action, *Santana v City of New York*, Index No. 159575/13 (Sup Ct, New York County), under *DMP*'s first criterion shows that the complaint alleges that on August 22, 2012, the plaintiff was injured when a traffic control box fell from a street pole and struck her on the head at the intersection of Worth Street and Broadway in

Manhattan. Both the City and Hellman are named as defendants. As in *Bog Bae*, at the time of this occurrence, both the Manhattan Traffic Control Device Contract (its term having been extended to November 30, 2012 by change order) and the 2012-2013 Policy were in effect. Thus, the facial allegations of the complaint suggest a reasonable possibility of coverage under the 2012-2013 Policy.

Applying the second *DMP* criterion, the record reveals that on December 10, 2013, Mr. Sanford of the City's Law Department transmitted a fax to Ms. Sheron Muir of Wausau tendering the City's defense, stating that the City was an additional insured on Hellman's policy and enclosing a copy of the complaint, which alleges that the accident took place on August 22, 2012 and that Hellman was the contractor responsible for maintenance of the traffic signal at that intersection on the day of the accident. Thus, Wausau had actual knowledge of facts establishing a reasonable possibility that the *Santana* claim was within the policy's indemnity coverage. Construing the evidence in the light most favorable to the insurer (*see Kershaw* at 82), the City has met its burden of showing that the 2012-2013 policy covers the loss for which the claim was made (*Kidalso*), and under both *DMP* criteria, Wausau has a duty to defend the City and reimburse its defense costs as an additional insured under the 2012-2013

Policy.

E. The *Ramsarran* Action.

Examining the fifth of these five underlying actions, *Ramsarran v City of New York*, Index No. 704988/13 (Sup Ct, Queens County), under *DMP*'s first criterion, the complaint alleges that on August 9, 2012, the plaintiff was injured when he tripped on uneven, broken pavement at a crosswalk at the intersection of Jamaica Avenue and Sutphin Boulevard in Queens County. Both the City and Hellman are named in the complaint.

While the 2012-2013 Policy was in effect at the time of this occurrence, the term of the Queens Street Lighting Contract had expired on July 23, 2012. Although a change order for the contract was approved on May 3, 2012, the change order made clear that the latest extended contract completion date remained July 23, 2012, and there is no subsequent change order in the record. Thus, the accident took place subsequent to the contract completion date.

Had the work at any of the job sites covered by the Queens Street Lighting Contract, including the site of the alleged accident, not been completed, it seems highly likely that following its established practice in its dealings with Hellman,

the City would have issued a subsequent change order extending the completion date. There is no such subsequent change order in the record, however. Thus, the record indicates that the work at the site of the alleged accident had been completed prior to the accident, meaning that the work falls within the 2012-2013 Policy's products-completed operations hazard exclusion. As the policy specifically makes clear, bodily injury arising out of Hellman's work included in the products-completed operations hazard is not covered by the policy unless the contract required Hellman to provide such coverage (*DMP Contr. Corp.*, 76 AD3d at 845-846). The contract merely provides that the CGL insurance policy procured by Hellman "shall be maintained during the term of this Contract[,]" and makes no provision for coverage beyond the term of the contract. Thus, in this underlying action, the facial allegations of the complaint do not suggest a reasonable possibility of coverage under the 2012-2013 Policy.

Turning to the second *DMP* criterion, the record shows that on December 4, 2013, Mr. Sanford of the City's Law Department transmitted a fax to "Claims Manager" at Wausau tendering the City's defense, stating that it was an additional insured on Hellman's policy and enclosing, among other things, a copy of the summons and complaint and information regarding permits obtained

by Hellman. This showing is not dispositive, however, in view of a further exclusion in the policy pertaining to work done pursuant to permits issued by the City.

Item 13 of the CGL endorsement to the 2012-2013 Policy, entitled "Additional Insured - State, Municipality or Political Subdivision," provides, in pertinent part:

> "Who Is An Insured is amended to include as an additional insured any . . . municipality . . . with respect to any operations performed by you [Hellman], or on your behalf, for which the . . . municipality . . . has issued a permit.
>
> "However, this insurance does not apply to:
>
> "1. 'Bodily injury[]' . . . arising out of operations performed for the . . . municipality . . . ."

Here, the record shows that Hellman obtained permits from the City to install decorative lighting for the City at Jamaica Avenue and Sutphin Boulevard in Queens. Because Hellman obtained permits from the City to perform this work for the City, and the plaintiff's bodily injury allegedly arose out of the resulting operations performed by Hellman, the incident at issue in *Ramsarran* is within this 2012-2013 Policy exclusion.

Accordingly, construing the evidence in the light most favorable to the insurer (*see Kershaw* at 82), the City has failed to meet its burden of showing that the 2012-2013 Policy covers

the loss for which the claim was made (*see Kidalso Gas Corp.* At 780-781), and Wausau has no duty to defend the City or reimburse its defense costs in this underlying action.

Furthermore, even in the absence of a cross appeal by defendant Wausau, this Court is authorized to search the record and to grant summary judgment in favor of Wausau as to those causes of action seeking a declaration as to Wausau's duty to defend the City and to recover the costs of defense in *Ramsarran*. (CPLR 3212[b]; *Merritt Hill Vineyards v. Windy Hgts. Vineyard*, 61 NY2d 106, 110-111 [1984]; *Anderson v Colonial Penn Ins. Co.*, 179 AD2d 504 [1st Dept 1992]). On the facts presented, we conclude that summary judgment should be granted in Wausau's favor as to the *Ramsarran* underlying action and that the ninth and tenth causes of action in the complaint in the instant case should be dismissed.

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

ENTERED: DECEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2327 Julien Entertainment.Com, Inc. doing business as Julien's Auctions, Plaintiff-Respondent, Index 652791/11

-against-

Live Auctioneers, LLC, Defendant-Appellant,

John Does 1 through 10, Defendants.

Novack Burnbaum Crystal LLP, New York (Howard C. Crystal of counsel), for appellant.

Matalon Shweky Elman PLLC, New York (Yosef Rothstein of counsel), for respondent.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered August 3, 2015, which, insofar as appealed from, denied defendant Live Auctioneers, LLC's motion for summary judgment dismissing the claims for breach of contract, negligence, and gross negligence and on its counterclaim for contractual indemnification, and granted plaintiff's cross motion to dismiss the counterclaim for contractual indemnification, unanimously modified, on the law, to grant defendant's motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendant established prima facie that its conduct was not

grossly negligent and that it was therefore entitled to enforce the contractual limitations on liability contained in its "Terms & Conditions Acknowledgement [sic] Form" (*see Colnaghi, U.S.A., Ltd. v Jewelers Protection Servs., Ltd.*, 81 NY2d 821 [1993]). In opposition, plaintiff failed to submit evidence that supported its allegation that defendant knowingly and intentionally created confusion on its website. The evidence shows, at most, ordinary negligence on defendant's part (*see Lubell v Samson Moving & Stor.*, 307 AD2d 215 [1st Dept 2003]).

Defendant's counterclaim for contractual indemnification was correctly dismissed since the indemnification provision does not demonstrate unmistakably that the parties intended the loser in litigation between them to indemnify the winner for legal fees (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]).

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

ENTERED: DECEMBER 29, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2542 The People of the State of New York, Ind. 4455/13
Respondent,

-against-

Kenneth Davis,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered March 27, 2014, convicting defendant, upon his plea of guilty, of identity theft in the first degree and two counts of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 2½ to 5 years, unanimously affirmed.

The court's oral colloquy with defendant, viewed in conjunction with a written waiver, establishes a valid waiver of defendant's right to appeal (*see People v Sanders*, 25 NY3d 337, 341 [2015]; *People v Lopez*, 6 NY3d 248, 256-257 [2006]). This waiver forecloses review of defendant's claim relating to presentencing procedure.

Regardless of whether defendant validly waived his right to

appeal, his claim that his sentence was based on a presentence report that lacked required information is unpreserved (*see People v Pinkston*, 138 AD3d 431 [1st Dept 2016], *lv denied* 27 NY3d 1137 [2016]), and we decline to review it in the interest of justice. As an alternative holding, we find no basis for resentencing, because defendant could not have been prejudiced by the defective report. Defendant received the precise sentence he bargained for, which was close to the minimum lawful sentence, and "had he wished to be interviewed by the Probation Department, he could have called the court's attention to the {lack of] such an interview" (*id.*).

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

ENTERED: DECEMBER 29, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Gische, JJ.

2543 Arbor Realty Funding, LLC, Index 651079/11
Plaintiff, 601122/12
651623/11

-against-

Herrick, Feinstein LLP,
Defendant-Respondent.

- - - - -

Arbor Realty Funding, LLC,
Plaintiff,

-against-

Garret Gourlay, et al.,
Defendants.

- - - -

East 51st Street Development, LLC, et al.,
Plaintiffs-Appellants,

-against-

Blank Rome, LLP, et al.,
Defendants-Respondents.

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McDonnell Daly, LLP, Lake Success (John S. McDonnell of counsel), for appellants.

Davis Polk & Wardwell LLP, New York (Nancy B. Ludmerer of counsel), for Herrick, Feinstein LLP, respondent.

Steptoe & Johnson LLP, New York (Michael Miller of counsel), for Blank Rome, LLP, respondent.

Paul, Weiss, Rifkind, Wharton and Garrison LLP, New York (Moses Silverman of counsel) for Cozen O'Connor PC, respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.),

entered on or about October 14, 2014, amending order (same court and Justice), entered on or about October 6, 2014, which denied plaintiffs East 51st Street Development, LLC, 968 Kingsman, LLC, and 964 Associates, LLC's application to reinstate their complaint and dismissed the complaint with prejudice, unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, the complaint reinstated, and plaintiffs directed to, within 30 days, respond to defendants' discovery requests in the form requested and pay defendants a fine of $10,000 for their willful failure to comply with the trial court's discovery.

In this legal malpractice action, consolidated with two other actions, although plaintiffs produced responsive material, it was imbedded in large amounts of otherwise irrelevant documents. Over 30,000 documents were produced. The trial court then gave plaintiffs ample time and opportunity to further produce the documents in an electronically searchable format and to organize its responses in the form that defendant requested them. Plaintiffs failed to comply with the court's directions. Under these circumstances, the trial court properly concluded that plaintiffs' failure to comply with its orders was willful (*Merrill Lynch, Pierce, Fenner & Smith v Global Strat Inc.*, 94

AD3d 491 [1st Dept 2012], *mod* 22 NY3d 877 [2013]). Given, however, plaintiffs' partial compliance and the strong public policy in favor of disposing of cases on the merits, we find that dismissal of the action is too severe a sanction at this time and that a less severe sanction, of a monetary fine in the amount of $10,000 plus costs is appropriate, along with a final 30-day opportunity for plaintiffs to provide the discovery in the format ordered by the trial court on February 19, 2014.

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

ENTERED: DECEMBER 29, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2545 The People of the State of New York, Ind. 3323/14
Respondent,

-against-

Herbert Villalona,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., Distrit Attorney, New York (David P. Stromes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered September 11, 2015, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of 6½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The element of serious physical injury was established by the evidence that a knife wound caused an approximately six-inch-long keloid scar, mostly running from the back of the victim's head to the left side of his neck, but ending on that side of his face (*see People v Coney*, __ AD3d __, 38 NYS3d 557 [1st Dept 2016]). The jury received a full opportunity to view the scar, and the court thoroughly described

it for the record. Accordingly, we find that the scar met the standard of serious disfigurement (*see People v McKinnon* 15 NY3d 311 [2010]). Defendant failed to preserve his challenge to the sufficiency of the evidence of his intent to cause serious physical injury, and we decline to review it in the interest of justice. As an alternative holding, we find that defendant's intent was abundantly established by his conduct of repeatedly slashing the victim with a knife, and repeatedly circumventing a person who attempted to block him from reaching the victim (*see People v Abdul-Khaliq*, 43 AD3d 700, 701 [1st Dept 2007], *lv denied* 9 NY3d 989 [2007]).

The admission of a recording of a 911 call placed by a nontestifying declarant, and seeking help for the injured victim, did not violate defendant's right of confrontation. The call was not testimonial, because the circumstances objectively indicated that the primary purpose of the call was to enable the authorities "to meet an ongoing emergency" (*Davis v Washington*, 547 US 813, 822 [2006]), in light of the victim's profuse bleeding. To the extent the call failed to qualify as an excited utterance because there was evidence of the declarant's studied reflection, we find that any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). There was overwhelming evidence

of defendant's guilt, and we note that even defense counsel deemed the 911 call cumulative to other testimony.

The prosecutor's summation did not deprive defendant of a fair trial. The portions of the summation to which defendant objected on the ground of vouching were proper responses to defense counsel's arguments that the victim lacked credibility (*see People v Overlee*, 236 AD2d 133, 144 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]). The prosecutor's statement that an argument made by defense counsel was "offensive" came within the broad latitude afforded to attorneys on summation (*see People v Glover*, 165 AD2d 761, 762 [1st Dept 1990], *lv denied* 77 NY2d 877 [1991]). Since the only weapon involved in this case was a knife, the prosecutor's rhetorical question, "In what world can a person get pushed, take out a gun or a knife or some other weapon and then use it on the person who pushed them?" should not have mentioned a "gun," but this isolated error does not warrant reversal (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). The prosecutor's argument about the nontestifying 911 caller was a fair response to a defense argument. In any event, any error as to these summation remarks was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Defendant's remaining challenges to the prosecutor's

summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we similarly find no basis for reversal.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they generally involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Therefore, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. Alternatively, to the extent the record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Accordingly, we do not find that any lack of preservation may be excused on the ground of ineffective assistance.

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

ENTERED: DECEMBER 29, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2546 Alberto Vazquez, et al., Index 300498/10
Plaintiffs-Appellants, 84176/10

-against-

Takara Condominium,
Defendant-Respondent,

Pablo Barrera Contracting, et al.,
Defendants.

- - - - -

Takara Condominium,
Third-Party Plaintiff-Respondent,

-against-

Nations Roof East, LLC,
Third-Party Defendant-Respondent.

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Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for appellants.

Havkins Rosenfeld Ritzert & Varriale LLP, White Plains (Carmen A. Nicolaou of counsel), for Takara Condominium, respondent.

Kenney Shelton Liptak Nowak LLP, White Plains (Deborah A. Summers of counsel), for Nations Roof East, LLC, respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered February 26, 2015, which, inter alia, granted the motion of defendant Takara Condominium (Takara) for summary judgment dismissing the complaint alleging violations of Labor Law § 241(6), § 200 and common-law negligence, granted the motion of third-party defendant Nations Roof East, LLC (Nations) for

summary judgment dismissing the Labor Law § 241(6) claim and Takara's third-party action against it, and denied plaintiffs' cross motion for partial summary judgment on their Labor Law § 200 and § 241(6) claims, unanimously affirmed, without costs.

Plaintiff Alberto Vazquez was injured during the course of his employment at a construction site on property owned by Takara. Takara had retained Vazquez's employer, Nations, to replace an outdoor plaza and to perform repair work in the garage directly underneath the plaza. Vazquez allegedly slipped and fell as he was descending a flight of stairs leading from the plaza to the garage.

The court properly rejected Vasquez's affidavit as being tailored to avoid the consequences of his deposition testimony (*see Garcia-Rosales v 370 Seventh Ave. Assoc., LLC*, 88 AD3d 464 [1st Dept 2011]). While he averred in the affidavit that he slipped on "slimy mildew" and worn treads, he never testified that such conditions contributed to his fall.

The court properly dismissed the Labor Law § 241(6) claim, as plaintiffs failed to demonstrate that Takara violated 12 NYCRR 23-1.7(d), which protects workers against "slipping hazards." While Vazquez testified during his deposition that he had previously seen dust and rust on the stairs after the power

washing of metal I-beams, he also testified that he could not remember how much dust there was or where exactly on the stairs the dust had landed. Further, he testified that he could not remember whether he saw such dust on the stairs the day of the accident, and contrary to plaintiffs' contention, the photographs in the record do not show existence of such a condition. The remaining Industrial Code predicates cited by plaintiffs are not applicable to the facts of this case.

The court also properly dismissed the Labor Law § 200 and common-law negligence claims. "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). Here, as plaintiffs were unable to identify what it was exactly that caused Vazquez to slip, they failed to show that Takara or Nations created or had notice of the alleged slippery condition. Furthermore, the record does not support plaintiff's allegation that the subject handrail was unstable due to rust. In any event, even if the record demonstrates a rusty unstable handrail of which Takara had notice, plaintiffs have not shown that such condition was a proximate cause of Vazquez's fall. Rather, the record, including

his own testimony, shows that he fell primarily because he lost his balance and was unable to grab onto the rail to stop his fall.

The record establishes an absence of negligent acts or omissions on Nations' part. Accordingly, the court properly dismissed Takara's third-party action against it (*see Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]).

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

ENTERED: DECEMBER 29, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2547-
2548-
2549 In re Daleena T., and Another,

Dependent Children Under the Age of
Eighteen Years, etc.,

Wanda W.,
Respondent-Appellant,

Derek T.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for Wanda W., appellant.

Daniel R. Katz, New York, for Derek T., appellant.

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the child Daleena T.

Karen Freedman, Lawyers for The Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child Jelinea K.T.

_____

Appeals from amended fact-finding order, Family Court, New York County (Susan K. Knipps, J.), entered on or about September 2, 2015, which, after a fact-finding hearing, found that respondent parents neglected the subject children, unanimously dismissed, without costs. Appeal from order of disposition, same

court and Judge, entered on or about September 2, 2015, which placed the subject children with petitioner Administration for Children's Services (ACS) until the next permanency hearing scheduled for April 20, 2016, unanimously dismissed, without costs, as academic.

The appeals from the fact-finding order are dismissed because the parents defaulted in appearing at the continued fact-finding hearing and did not move to vacate their default (*see Matter of Sandra J.,* 25 AD3d 360 [1st Dept 2006]).

In any event, the record establishes that respondents neglected the subject children. It is undisputed that respondent father, who had a long-standing history of mental illness, left his infant son in a stroller on the street unattended for half an hour, thereby exposing the child to risk of imminent harm (*see Matter of Malachi H. [Dequisa H.],* 125 AD3d 478 [1st Dept 2015]).

Regarding respondent mother, the record shows that she refused to comply with orders of protection barring the father from the home, continued to leave the children in his custody after the incident, did not acknowledge that he posed a danger to the children, and refused to cooperate with ACS supervision or sign a release to permit ACS to verify her claim that she was receiving therapy (*see Matter of Beautiful B. [Damion R.],* 106

AD3d 665 [1st Dept 2013]). There exists no basis to disturb the Family Court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776 [1975]).

Although the mother appeared at the dispositional hearing, her appeal from that order is dismissed as academic since it expired on its own terms (*see Matter of Fred Darryl B.*, 41 AD3d 276 [1st Dept 2007]).

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

ENTERED: DECEMBER 29, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2550 The People of the State of New York, Ind. 3033/14
Respondent,

-against-

Elliot Parrilla,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Stephen J. Kress of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Neil E. Ross, J.), rendered March 30, 2015, convicting defendant, upon his plea of guilty, of aggravated family offense, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The indictment was not jurisdictionally defective. "The incorporation by specific reference to the statute" of the charged crime "operates without more to constitute allegations of all the elements of the crime" (*People v Cohen*, 52 NY2d 584, 586 [1981]; *see also People v D'Angelo*, 98 NY2d 733, 735 [2002]; *People v Downs*, 26 AD3d 525, 526 [3d Dept 2006], *lv denied* 6 NY3d 847 [2006]). Here, the indictment unmistakably identified the "specified offense" (Penal Law § 240.75) defendant was alleged to

have committed by stating its definition, albeit without identifying it by section number. There was no nonwaivable defect, and by his plea of guilty, defendant waived any nonjurisdictional claim that the indictment failed to include sufficient allegations to provide him with notice of the charges (*see People v Iannone*, 45 NY2d 589, 600-601 [1978]).

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

ENTERED: DECEMBER 29, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2552 The People of the State of New York, Ind. 8207/87
Respondent,

-against-

Nate Rose,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered September 17, 2015, which adjudicated defendant a level two sexually violent sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument

or outweighed by the seriousness of the underlying crime and defendant's violent criminal history.

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

ENTERED: DECEMBER 29, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2555 Navigators Insurance Company, Index 653024/13
Plaintiff-Appellant,

-against-

Sterling Infosystems, Inc., et al.,
Defendants-Respondents.

_____

Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of counsel), for appellant.

Lowenstein Sandler LLP, New York (Lynda A. Bennett of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Ellen M. Coin, J.), entered July 28, 2015, to the extent appealed from as limited by the briefs, declaring that plaintiff is obligated to indemnify defendants for the settlement reached in an action in the U.S. District Court for the Southern District of New York titled *Ernst v Dish Network, LLC*, unanimously affirmed, with costs.

Pursuant to an errors and omissions insurance policy, plaintiff is obligated to pay all damages arising in connection with defendants' performance of their professional services. The policy defines damages as "any compensatory sum," including a settlement, and excludes coverage for, inter alia, penalties. With the requisite consent of plaintiff, defendants entered into

a settlement with the plaintiffs in the putative class action *Ernst v Dish Network, LLC*, which alleged that defendants' business practices violated provisions of the Fair Credit Reporting Act (FCRA), causing the class members injury, including, in certain instances, termination from employment.

Plaintiff argues that the statutory damages that defendants paid to settle the *Ernst* action constitute a penalty, rather than compensatory damages, and are therefore excluded from their insurance coverage. The motion court correctly rejected this argument.

To make out a claim under the FCRA (15 USC § 1681 *et seq.*), the complaint must allege, inter alia, injury in fact, a "concrete and particularized" and "actual or imminent" "invasion of a legally protected interest," i.e., the statutory right to the fair handling of the plaintiff consumer's credit information (*see Spokeo, Inc. v Robins*, ___ US ___, 136 S Ct 1540, 1547-1548 [2016] [internal quotation marks omitted]). The remedy for "willful" failure to comply with a requirement of the statute is "any actual damages sustained by the consumer by the failure or damages of not less than $100 and not more than $1,000," *and* "such amount of punitive damages as the court may allow," as well as costs and reasonable attorneys' fees (15 USC § 1681n[a][1A],

[2], [3]). Since the consumer must elect the option of either actual or statutory damages, and may also recover punitive damages, it is reasonable to infer, as the motion court did, that the actual and the statutory damages serve the same purpose (*see Bateman v American Multi-Cinema, Inc.*, 623 F3d 708, 718 [9th Cir 2010]). Moreover, the statute provides separately for a civil penalty (recoverable by the Federal Trade Commission) (*see* 15 USC § 1681s[a][2]). Plaintiff argues that the limitation of damages to a "willful" violation of the statute evinces a legislative intent to penalize intentional misconduct, rather than compensate for actual damages sustained, but this is not so, since willfulness as a statutory condition of civil liability "cover[s] not only knowing violations of a standard, but reckless ones as well" (*Safeco Ins. Co. of Am. v GEICO Gen. Ins. Co.*, 551 US 47, 57 [2007]). Thus, it is clear that Congress intended the statutory damages provided for by the FCRA to be compensatory and

not a penalty.

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

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

ENTERED: DECEMBER 29, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2556 The People of the State of New York, Ind. 5616/13
Respondent,

-against-

Lamar Pierce,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered January 15, 2015, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant'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: DECEMBER 29, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2557 The People of the State of New York, Ind. 1142/13
Respondent,

-against-

Douglas Locust,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Division, New York (Katherine Kulkarni of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Beirer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered February 19, 2014, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree and burglary in the third degree, and sentencing him to an aggregate term of 6½ years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the attempted burglary conviction to a term of four

years, with five years' postrelease supervision, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: DECEMBER 29, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Gische, JJ.

2558- Index 800173/11
2559-
2560 Julia Velez, et al.,
Plaintiffs-Appellants,

-against-

New York Presbyterian Hospital, et al.,
Defendants-Respondents,

Memorial Sloan Kettering Cancer Center,
Defendants.

_____

Silver & Kelmachter, LLP, New York (Leslie D. Kelmachter of counsel), for appellant.

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for New York Presbyterian Hospital, respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for Ralph Lauren Center for Cancer Care and Prevention, respondent.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered August 4, 2014, which denied plaintiff Cortorreal's motion to substitute himself, as administrator of the estate of Julia Velez, as plaintiff in the decedent's place, and granted defendants New York Presbyterian Hospital's and Ralph Lauren Center for Cancer Care and Prevention's cross motions to dismiss the action as against them, unanimously reversed, on the law and the facts, without costs, the substitution motion granted, the

motions to dismiss denied, and the complaint reinstated as against defendants-respondents. Appeals from orders, same court and Justice, entered February 27, 2015 and October 7, 2015, unanimously dismissed, without costs, as academic.

Julia Velez died after the commencement of this medical malpractice action by herself and her husband, plaintiff Cortorreal. Cortorreal applied for letters of administration in December 2012, but his original attorneys failed to file a notice of application for letters of administration until January 2014; letters of administration were issued that month, about 21 months after the decedent's death. Cortorreal then moved pursuant to CPLR 1015 to be substituted for Velez as plaintiff, and defendants cross-moved to dismiss the complaint, pursuant to CPLR 1021, for failure to timely substitute.

The court lacked jurisdiction to grant defendants' motions to dismiss the action, since, "before proceeding further," and "upon such notice as it may in its discretion direct," the court was required to "order the persons interested in the decedent's estate to show cause why the action should not be dismissed" (CPLR 1021; *see Noriega v Presbyterian Hosp. in City of N.Y.*, 305 AD2d 220 [1st Dept 2003]; *Petty v Meadowbrook Distrib. Corp.*, 266 AD2d 88 [1st Dept 1999]; *but see Rose v Frankel*, 83 AD3d 607 [1st

Dept 2011] [stating in dicta that plaintiffs' motion for substitution conferred jurisdiction over defendants' cross motions to dismiss]). The persons interested in Velez's estate who were entitled to notice included Velez's two adult children.

In any event, in the absence of any prejudice to defendants, and in light of the strong public policy of deciding cases on the merits, the motion to substitute, made less than two years after Velez's death, should have been granted (*see Peters v City of New York Health & Hosps. Corp.*, 48 AD3d 329 [1st Dept 2008]; *compare Leroy v Morningside House Nursing Home Co., Inc.*, 126 AD3d 652 [1st Dept 2015]). Defendants failed to show that the delay in seeking substitution resulted in undue prejudice, since this medical malpractice action "will likely rely on medical records and other documentary evidence and not the testimony of eyewitnesses" (*Peters v City of N.Y. Health & Hosps. Corp.*, 48 AD3d at 329; *Public Admr. v Levine*, 142 AD3d 467, 469-470 [1st Dept 2016]). In opposition to defendants' motions to dismiss, plaintiff made a showing of a reasonable excuse and of the merits

of the action through an affidavit by a medical expert, which is sufficient in the procedural posture of the case (*see Wynter v Our Lady of Mercy Med. Ctr.*, 3 AD3d 376, 378 [1st Dept 2004]).

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

ENTERED: DECEMBER 29, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2561 Argon Electrical Corp., Index 651871/14
Plaintiff-Appellant,

-against-

Capital One, N.A.,
Defendant-Respondent.

_____

Amos Weinberg, Great Neck, for appellant.

Lazer, Aptheker, Rosella & Yedid, P.C., Melville (Joseph C. Savino of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Jennifer G. Schecter, J.), entered November 4, 2015, denying plaintiff's motion for summary judgment, granting defendant's cross motion for summary judgment, and dismissing the complaint, unanimously affirmed, without costs.

Plaintiff is correct that defendant, who did not have a corporate resolution with regard to signing authority on judgment debtor's account, lost the protection of Banking Law § 9. However, because there was no evidence of wrongdoing, fraud, forgery or misappropriation of any of the checks at issue,

plaintiff failed to raise a triable issue of fact on its claims of conversion or for money had and received (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]; *Parsa v State of New York*, 64 NY2d 143, 151 [1984]).

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

ENTERED: DECEMBER 29, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2562 The People of the State of New York, Ind. 2116/13
Respondent,

-against-

Flavio Orta,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lindsey Richards 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 (Jill Konviser, J.), rendered August 13, 2013,

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: DECEMBER 29, 2016

CLERK

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

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2563-
2564N Index 113480/04

Oversea Chinese Mission,
Plaintiff-Appellant,

-against-

Well-Come Holdings, Inc., et al.,
Defendants-Respondents.

- - - - -

Oversea Chinese Mission,
Plaintiff-Respondent,

Guide One Insurance Company,
Nonparty Intervenor-Respondent,

-against-

Well-Come Holdings, Inc., et al.,
Defendants-Appellants,

Diamond Point Excavation Corp.,
Defendant.

_____

Foley & Mansfield PLLP, New York (James J. Lotz of counsel), for Oversea Chinese Mission, appellant/respondent, and Guide One Insurance Company, respondent.

Quirk and Bakalor, P.C., Garden City (Debra E. Seidman of counsel), for Well-Come Holdings, Inc., respondent/appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Gerard Benvenuto of counsel), for Flintlock Construction Services LLC, respondent/appellant.

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Order, Supreme Court, New York County (Debra A. James, J.), entered on or about December 12, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff Oversea

Chinese Mission's (OCM) motion for a new trial on damages, and order, same court and Justice, entered June 24, 2015, which, to the extent appealed from as limited by the briefs, granted nonparty Guide One Insurance Company's (Guide One) motion to intervene as a plaintiff, unanimously affirmed, without costs.

OCM's contentions on its appeal are unavailing. The record on appeal is clear that no agreement to prosecute the action on behalf of the insured (OCM) and the insurer (Guide One) was ever produced in discovery; thus, OCM's reliance on CPLR 1004 is unavailing. Nor was any prejudice suffered due to the court's grant of a collateral source hearing pursuant to CPLR 4545, as the parties stipulated that OCM was entitled to out-of-pocket expenses of $85,726 from the $1,150,000 jury award, with prejudgment interest from January 1, 2005, and the jury award would have preclusive effect on any subrogation action by the insurer (*see State Farm Mut. Auto. Ins. Co. v Baltz Concrete Constr. Inc.*, 29 AD3d 777, 778 [2d Dept 2006], citing *Allstate Ins. Co. v Stein*, 1 NY3d 416, 417 [2004]].

Despite repeated discovery requests from 2004 through 2009, it was not until 2012 that, for the first time, OCM produced documents of repairs actually made in 2007; therefore the court providently precluded OCM from offering such evidence at trial

(*see Siegman v Rosen*, 270 AD2d 14, 15 [1st Dept 2000], citing CPLR 3126). Further, "willfulness can be inferred when a party repeatedly fails to respond to discovery demands and/or to comply with discovery orders, coupled with inadequate excuses for those defaults," such as here (*id.*).

"[A] trial court has broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary" (*Pramer S.C.A. v Abaplus Intl. Corp.*, 123 AD3d 474, 474 [1st Dept 2014]), and the court here did not abuse its discretion in determining that cross-examination and introduction of the construction contract did not "open the door" for evidence concerning actual repairs, which was subject to the preclusion order.

Further, the court providently denied OCM's motion to preclude expert Weinstein's testimony. Although "involuntary expert opinion testimony may not ordinarily be compelled" (*Metropolitan N.Y. Coordinating Council on Jewish Poverty v FGP Bush Term.*, 1 AD3d 168, 168 [1st Dept 2003]), the testimony of Weinstein, originally disclosed by a severed third party defendant, was voluntary, and OCM's challenge to the sufficiency of the disclosure was untimely (*see Clark v Weber*, 264 AD2d 569,

570 [1st Dept 1999]). OCM could not establish prejudice, because until eight days prior to trial, Weinstein was potentially going to testify. The court also properly exercised its discretion when it admitted Weinstein's repair estimates, which were not cumulative to other estimates.

Defendants' challenge to Guide One's motion to intervene is unavailing, as no proposed pleading is required under CPLR 1012 and 1013, and, even if untimely, the claim or defense and the main action have a common question of law or fact (*see McHale v Anthony*, 41 AD3d 265, 266 [1st Dept 2007]).

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

ENTERED: DECEMBER 29, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Gische, JJ.

2565 In re Teddy Moore, Index 80/16
[M-5547] Petitioner,

-against-

New York State Commission on
Judicial Conduct,
Respondent.

Teddy Moore, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Alissa S. Wright of counsel), for respondent.

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

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

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

ENTERED: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2566- Ind. 1673/11
2567-
2568-
2569 The People of the State of New York,
Respondent,

-against-

Victor Capellan,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Natalie Rea of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Ryan P. Mansell of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Patricia DiMango, J.), entered December 10, 2013, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court's discretionary upward departure was based on clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument (*see e.g. People v Sherard*, 73 AD3d 537 [1st Dept 2010], *lv denied* 15 NY3d 707 [2010]). Contrary to defendant's argument, the court did not rely solely on defendant's psychiatric illness. Instead,

it cited a combination of serious aggravating factors indicative of a grave risk of reoffense, including defendant's threat to the victim of the underlying crime and his boast that he had committed other sex crimes and would continue to commit them. Defendant's argument regarding an alleged overassessment of points under one of the risk factors is unavailing.

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

ENTERED: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2570 Patricia Brownie, Index 22903/14E
Plaintiff-Appellant-Respondent,

-against-

Donald Redman, et al.,
Defendants-Respondents-Appellants.

_____

Jason B. Kessler, P.C., White Plains (Daniel J. McKenna of counsel), for appellant-respondent.

Adams, Hanson, Rego & Kaplan, Yonkers (Jeffrey A. Domoto of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered March 22, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment to the extent of dismissing plaintiff's claim that she suffered a serious injury to her left knee within the meaning of Insurance Law § 5102, and denied the motion to the extent it sought dismissal of the 90/180-day serious injury claim, unanimously reversed, on the law, without costs, to deny the branch of the motion seeking dismissal of plaintiff's claim of serious injury to her left knee and to grant the branch of the motion seeking dismissal of the 90/180-day claim.

Defendants made a prima facie showing that plaintiff did not sustain a serious injury to her left knee by submitting the

report of an orthopedist, who found no objective evidence of disability and full range of motion (*see Birch v 31 N. Blvd., Inc.*, 139 AD3d 580 [1st Dept 2016]; *Streeter v Stanley*, 128 AD3d 477 [1st Dept 2015]).

In opposition, plaintiff raised a triable issue of fact as to her left knee injury by submitting the report of her treating orthopedic surgeon, who found persisting limitations in range of motion, and opined, based on his review of the MRI films and observations during surgery, that plaintiff's injuries were caused by the accident (*see Santana v Centeno*, 140 AD3d 437 [1st Dept 2016]; *Steele v Santana*, 125 AD3d 523 [1st Dept 2015]). The surgeon acknowledged the presence of arthritis in plaintiff's left knee, but pointed to specific medical evidence of trauma to support his opinion that the torn menisci were caused by the accident (*see Swift v New York Tr. Auth.*, 115 AD3d 507 [1st Dept 2014]).

Although defendants' expert did not examine plaintiff until more than two years after the accident, defendants established that plaintiff did not suffer a 90/180-day claim by relying on her admission in her verified bill of particulars that she was confined to home and bed for just one week after the accident

(*see Nakamura v Montalvo*, 137 AD3d 695, 696 [1st Dept 2016]; *Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]). In opposition, plaintiff failed to provide medical evidence sufficient to raise an issue of fact as to this claim.

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

ENTERED: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2571 In re Jeremy M., Jr., and Another,

Children Under the Age of Eighteen Years, etc.,

Roque A.M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

_____

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about December 9, 2014, insofar as it determined, after a hearing, that respondent father neglected the subject children, unanimously affirmed, without costs.

The children's corroborated statements to the caseworker about the father's alcohol abuse and its effect upon them were appropriately considered as evidence supporting the finding of neglect (Family Court Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 118-119 [1987]). Moreover, they established by a

preponderance of the evidence the presumption that the father neglected the children (Family Court Act § 1046[a][iii]; *Matter of Nasiim W. [Keala M.]*, 88 AD3d 452, 453-454 [1st Dept 2011]), obviating the need to establish the children's impairment or risk of impairment (*Matter of Christina G. [Vladimir G.]*, 100 AD3d 454, 455 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]).

The father failed to rebut the statutory presumption that he neglected the children. He did not testify or present any evidence to support his statement to the caseworker that he was "voluntarily and regularly participating in a recognized rehabilitative program" (Family Court Act § 1046[a][iii]; *Matter of Nyheem E. [Jamila G.]*, 134 AD3d 517, 519 [1st Dept 2015]; *Matter of Keoni Daquan A. [Brandon W.-April A.]*, 91 AD3d 414, 415 [1st Dept 2012]; *Matter of Nasiim W. [Keala M.]*, 88 AD3d at 453-454). Because he did not testify, the court was permitted to

draw the strongest inference against him that the opposing evidence permitted (*Matter of Nadia S. [Ron S.]*, 138 AD3d 526, 527 [1st Dept 2016]; *Matter of Michael P. [Orthensia H.]*, 137 AD3d 499, 500 [1st Dept 2016]).

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

ENTERED: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2572 In re Stephen Grant, Index 101412/13
Petitioner-Appellant,

-against-

New York City Loft Board, et al.,
Respondents-Respondents.

_____

Law Offices of Sokolski & Zekaria, P.C., New York (Robert E. Sokolski of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for New York City Loft Board, respondent.

Linda Rzesniowiecki, New York, for SMCB Associates, LLC, respondent.

_____

Judgment (denominated an order), Supreme Court, New York County (Margaret A. Chan, J.), entered February 9, 2015, denying the petition to annul an amended final determination of respondent New York City Loft Board, dated June 20, 2013, which, inter alia, found the fourth-floor loft that petitioner entirely occupied consisted of two separate apartment units, and that he was the tenant of record of only one of the two units, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The Loft Board's determination that petitioner waived the objections he now seeks to assert to the division of the fourth

floor into two units was rationally based in the record and not contrary to law (*see Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007], *affd* 11 NY3d 859 [2008]; *Matter of Lower Manhattan Loft Tenants v New York City Loft Bd.*, 104 AD2d 223, 224-225 [1st Dept 1984], *affd* 66 NY2d 298 [1985]).

Petitioner participated in a 1994 narrative statement conference, at which the owner submitted plans for the legalization of his fourth-floor loft as two interim multiple dwelling (IMD) units. Petitioner objected to aspects of the owner's application, but did not object to the configuration of the loft as two IMD units. The Loft Board certified the owner's compliance with the narrative statement process, and the New York City Department of Buildings subsequently issued a work permit legalizing the floor as two IMD units. Under applicable Loft Board rules, petitioner thereby waived his right to object to that configuration (*see* former 29 RCNY 2-01[d][2][iv][B], 2-01[d][2][vi], 2-01[h]). In any event, the evidence adduced at

the administrative hearing showed that the fourth floor was comprised of two separate units on the effective date of the Loft Law.

Petitioner's remaining contentions are unavailing.

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

ENTERED: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2573 Amanda Karlsson, Index 314224/13
Plaintiff-Respondent,

-against-

Conny Karlsson,
Defendant-Appellant.

_____

Conny Karlsson, appellant pro se.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered March 30, 2015, which awarded sole legal custody and primary physical custody of the parties' children to plaintiff mother, with parenting time to defendant father, unanimously affirmed, without costs.

The determination that awarding plaintiff sole legal and primary physical custody would serve the best interests of the children is supported by the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). The court thoughtfully assessed the evidence and the credibility of the witnesses (*see id.* at 173), and properly considered the recommendations of the forensic evaluator (*see Matter of Cisse v Graham*, 120 AD3d 801, 806 [2d Dept 2014], *affd* 26 NY3d 1103 [2016]). The record shows that plaintiff is more likely to support and encourage the children's relationship with defendant than defendant is to facilitate a relationship

between plaintiff and the children (*see Bliss v Ach*, 56 NY2d 995 [1982]; *William S. v Tynia C.*, 283 AD2d 327 [1st Dept 2001]; *Matter of Damien D.C. v Jennifer H.S.*, 57 AD3d 295 [1st Dept 2008], *lv denied* 12 NY3d 710 [2009]). The Court properly weighed the defendant's history of making claims to the police, the Administration for Children's Services and hospital personnel, that were all found to be unsubstantiated.

The court properly determined visitation and parenting time for defendant (*see Matter of Thompson v Yu-Thompson*, 41 AD3d 487 [2nd Dept 2007]).

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: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2574 The People of the State of New York, Ind. 11639/87
Respondent,

-against-

Jose Garcia,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Shane Tela of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Roger S. Hayes, J.), entered on August 27, 2014, which denied defendant's petition to modify his sex offender classification, unanimously affirmed.

Defendant failed to meet his burden under Correction Law §168-o of presenting clear and convincing evidence that a downward modification of his risk level is warranted (*see People v Torres*, 120 AD3d 1126 [1st Dept 2014], *lv denied* 24 NY3d 911 [2014]). The factors cited by defendant are outweighed by the seriousness of the underlying sex crime against a child,

defendant's continuing unlawful conduct after being released from prison on that conviction, and his failure to accept responsibility.

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

ENTERED: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2575 In re Genesis R., and Another,

Children Under the Age of Eighteen Years, etc.,

Marcelino C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Anne Reiniger, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Benjamin Welikson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about June 1, 2015, which determined, after a hearing, that respondent father neglected the subject children, unanimously affirmed, without costs.

A preponderance of the evidence demonstrates that respondent posed an imminent danger to the children's emotional well being (*see* Family Court Act § 1012[f]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). On numerous occasions, he acted aggressively and angrily toward agency personnel, causing the older child to cry in distress (*see e.g. Matter of Madison M. [Nathan M.]*, 123

AD3d 616, 617 [1st Dept 2014]; *Matter of Nia J. [Janet Jordan P.]*, 107 AD3d 566 [1st Dept 2013]). He also was disruptive and verbally violent toward personnel at the hospital where he was visiting the newborn younger child, resulting in his being escorted out of the hospital and barred from visiting the child. There is evidence that he physically abused the children's mother.

Moreover, the neglect finding would be warranted by either of two single incidents alone that demonstrate that respondent's judgment was strongly impaired and the older child was exposed to a risk of substantial harm (*see Matter of Allyerra E. [Alando E.]*, 132 AD3d 472, 472 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]). On one occasion, respondent screamed at the children's mother, grabbed her phone, and pushed her into an elevator in the presence of the agency case worker and the older child. On the other, during one of his unsupervised visits with the older child, he allowed the mother, who is permitted only agency-supervised visits with the children, to have access to the child.

The foregoing evidence of respondent's impaired level of parental judgment warrants a derivative finding of neglect with respect to the younger child (*see Matter of Joshua R.*, 47 AD3d 465 [1st Dept 2008], *lv denied* 11 NY3d 703 [2008]).

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

ENTERED: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2577 The People of the State of New York, Ind. 3093/12
Respondent,

-against-

Paris Fuller,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Jill Konviser, J.), rendered April 30, 2013,

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: DECEMBER 29, 2016

CLERK

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

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2578 The People of the State of New York, Ind. 2283/12
Respondent,

-against-

Daniel Holmes,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan P. Mansell of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Joseph J. Dawson, J. at plea; Raymond L. Bruce, J. at sentencing), rendered October 17, 2013, convicting defendant of burglary in the third degree, and sentencing him, as second felony offender, to a term of two to four years, unanimously affirmed.

The court was not obligated to appoint new counsel for defendant at sentencing in connection with his motion to withdraw his guilty plea, notwithstanding remarks by defense counsel that defendant contends were adverse to his claim that his plea was coerced. First, the remarks were made after the court had implicitly denied the motion to withdraw the plea, and could not have affected that ruling. Second, to the extent that counsel's remarks were relevant to defendant's motion, they did not give

rise to a conflict of interest. When the conduct of counsel is challenged in the context of a motion to withdraw a plea, "defense counsel should be afforded the opportunity to explain his performance with respect to the plea, but may not take a position on the motion that is adverse to the defendant" (*People v Mitchell*, 21 NY3d 964 [2013] [citation omitted]). Here, counsel's brief, limited and innocuous comments recounting some of her efforts leading up to the plea did not amount to asserting that defendant's motion lacked merit (*see People v Washington*, 25 NY3d 1091, 1095 [2015]). The court properly denied the motion without assigning new counsel. Defendant received an opportunity to amplify his challenge to his plea, but declined to do so (*see People v Frederick*, 45 NY2d 520 [1978]).

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

ENTERED: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2579 The People of the State of New York, Ind. 2446/10
Respondent,

-against-

Reynaldo Lebron,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ 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 (Gregory Carro, J.), rendered June 27, 2013,

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: DECEMBER 29, 2016

CLERK

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

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2580 In re The People of the State of New York, ex rel. Russel Green, Petitioner-Appellant,

-against-

C. Saunders, New York City Department of Corrections, Respondent-Respondent.

Index 100072/16
Scid 30012/16

Russel Green, appellant pro se.

Cyrus R. Vance, Jr., Distrit Attorney, New York (Grace Vee of counsel), for respondent.

Appeal from judgment (denominated an order), Supreme Court, New York County (Kevin B. McGrath, J.), entered on or about February 4, 2016, denying the petition for a writ of habeas corpus and dismissing the proceeding brought pursuant to CPLR article 70, unanimously dismissed, without costs, as moot.

This appeal challenging the legality of petitioner's preconviction detention is moot, since petitioner is currently incarcerated pursuant to a judgment of conviction (*see People ex*

rel. Macgiollabhui v Schriro, 123 AD3d 633 [1st Dept 2014]), and no exception to the mootness doctrine applies (*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: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2581 The People of the State of New York, Ind. 3176/13
Respondent,

-against-

Pablo Minier,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Ellen Dille of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Thomas Farber, J.), rendered July 29, 2014,

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: DECEMBER 29, 2016

CLERK

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

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2582- Index 107941/10
2583 Natalie Solomon,
Plaintiff-Appellant,

-against-

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

Action Arts League,
Defendant-Respondent.

_____

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP, Lake Success (Anthony J. Genovesi Jr. of counsel), for appellant.

Cruser, Mitchell, Novitz, Sanchez, Gaston & Zimet, LLP, Farmingdale (Rondiene E. Novitz of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Frank P. Nervo, J.), entered August 7, 2015, upon a jury verdict in defendant's favor, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered October 30, 2014, which denied plaintiff's motion to set aside the jury verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff seeks to recover damages for injuries she sustained at an art festival run by defendant. Plaintiff had climbed to the top of an art installation known as the Drop, an

18-foot-high, smooth, round, air-filled structure, and begun to dance on it, and, when other people reached the top and started dancing, she fell off.

The jury's conclusion that defendant did not breach its duty to maintain the Drop in a reasonably safe condition by failing to secure it in such a way as to prevent plaintiff from falling off it is supported by a reasonable interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744 [1995]; *McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]).

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

ENTERED: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2584 Dilenia Sanchez, Index 300374/09
Plaintiff-Appellant, 83940/09

-against-

New Scandic Wall Limited Partnership, et al.,
Defendants/Third-Party Plaintiffs-Respondents,

Schindler Elevator Corp.,
Third-Party Defendant-Respondent.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for New Scandic Wall Limited Partnership and 40 Wall Limited Partnership, respondents.

McMahon, Martine & Gallagher, LLP, Brooklyn (Kristina M. Scotto of counsel), for Schindler Elevator Corp., respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered June 8, 2015, which, inter alia, granted third-party defendant's motion and defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants and third-party defendant demonstrated their prima facie entitlement to summary judgment by presenting evidence showing that the elevators were regularly inspected, and the door of the subject elevator was operating properly before

and after plaintiff was struck in the shoulder by the closing door, while attempting to enter it. Moreover, even if a defect existed, they demonstrated that they did not create or have actual or constructive notice of it (*see Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 713 [1st Dept 2005]; *Lasser v Northrop Grumman Corp.*, 55 AD3d 561, 562 [2d Dept 2008]). The doctrine of res ipsa loquitur is inapplicable in this case, as defendant had ceded all maintenance and repair to third-party defendant Schindler Elevator Corp. (*see Ebanks v New York City Tr. Auth.*,70 NY2d 621, 623 [1987]; *Fasano v Euclid Hall Assoc., L.P.*, 136 AD3d 478, 479 [1st Dept 2016]; *Hodges v Royal Realty Corp.*, 42 AD3d 350 [1st Dept 2007]). Moreover, plaintiff admits that she was not aware of the door closing until it hit her (*see Graham*, 283 AD2d 261), and she offers no expert affidavit or other evidence of any malfunction in the door, which would cause it to close unusually quickly. She also admits that the elevator door opened

immediately after it hit her, and, as noted above, that the elevator operated properly before and after the incident (*see Lasser*, 55 AD3d at 562).

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

ENTERED: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2585 The People of the State of New York, Ind. 1978/14
Respondent,

-against-

Martin Oquendo,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Maxwell Wiley, J.), rendered December 18, 2014,

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: DECEMBER 29, 2016

CLERK

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

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2586N In re Global Liberty Insurance Co., Index 260649/15
Petitioner-Appellant,

-against-

Coastal Anesthesia Services, LLC, as
Assignee of Lourdes Irizarry,
Respondent-Respondent.

_____

The Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

Russell Friedman & Associates, LLP, Lake Success (Dara C. Goodman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered April 6, 2016, which denied petitioner's application to vacate a master arbitration award entitling respondent to no-fault insurance benefits, and granted respondent's cross motion to confirm the award, unanimously affirmed, with costs.

Petitioner failed to demonstrate the existence of any of the statutory grounds for vacating the Master Arbitrator's award (CPLR 7511[b]). The decision of the Master Arbitrator in affirming the arbitration award had evidentiary support, a rational basis, and was not arbitrary and capricious (*see Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 211 [1981]). The original arbitrator properly acted within her discretionary

authority to refuse to entertain any late submissions proffered by petitioner (*see* 11 NYCRR 65-4.2[b][3]; *Matter of Mercury Cas. Co. v Healthmakers Med. Group, P.C.*, 67 AD3d 1017 [2d Dept 2009]).

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

ENTERED: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2587N Stillwell Café, Inc., et al., Index 21236/13E
Plaintiffs-Appellants,

-against-

1680 Eastchester Realty Corp.,
Defendant-Respondent.

_____

Trivella & Forte, LLP, White Plains (Arthur J. Muller III of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered August 21, 2015, which granted defendant's motion to vacate the default judgment entered against it after inquest, and granted leave to serve an answer, unanimously affirmed, without costs.

Defendant is not entitled to relief under CPLR 5015(a). Defendant failed to demonstrate a reasonable excuse for its default even though there has been extensive litigation between the parties over the premises, and the person (Michael Verini) who was defendant's chief executive officer, principal executive officer, and registered agent, passed away around the time the default occurred, because there is no explanation as to what prevented defendant from updating its entity information with the

Secretary of State (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]*; Diggs v Karen Manor Assoc., LLC*, 117 AD3d 401, 402-403 [1st Dept 2014]; *J & S Constr. of NY, Inc. v 321 Bowery LLC*, 39 AD3d 391 [1st Dept 2007]).

However, we find that vacatur of the judgment is appropriate under CPLR 317. Defendant established that it did not receive actual notice of process in time to defend the action by submitting the affidavit of Thomas Verini, Michael's son who was involved in the affairs of defendant (*see Arabesque Recs. LLC v Capacity LLC*, 45 AD3d 404 [1st Dept 2007]). Defendant has also demonstrated that it has a meritorious defense, as the Appellate Term has determined that defendant made a sufficient showing of a meritorious claim for nonpayment of rent by plaintiffs (32 Misc 3d 128[A], 2011 NY Slip Op 51253[U] [App Term, 1st Dept 2011]), and plaintiffs make no challenge to this finding on the appeal.

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

ENTERED: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2589N Madison 96th Associates, LLC, Index 601386/03
Plaintiff, 108695/04

-against-

17 East Owners Corp.,
Defendant.

- - - - -

17 East Owners Corp.,
Plaintiff-Appellant,

-against-

Madison 96th Associates, LLC,
Defendant-Respondent,

21 East 96th Street Condominium,
Defendant.

_____

Charles E. Boulbol, P.C., New York (Charles E. Boulbol of counsel), for appellant.

Schoeman, Updike & Kaufman LLP, New York (Charles B. Updike of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 11, 2015, which, to the extent appealed from as limited by the briefs, granted the in limine motion of defendant Madison 96th Associates, LLC to preclude the testimony of Frank Luzi, P.E., unanimously dismissed, without costs.

No appeal lies from an evidentiary ruling made before trial,

either by right or by permission (*see Matter of Grusetz*, 248 AD2d 618 [1st Dept 1998]). Such a ruling is reviewable only in connection with an appeal from the judgment rendered after trial (*see Weatherbee Constr. Corp. v Miele*, 270 AD2d 182 [1st Dept 2000]).

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

ENTERED: DECEMBER 29, 2016

CLERK

Mazzarelli, J.P., Sweeny, Richter, Manzanet-Daniels, Feinman, JJ.

2591N In re DTG Operations, Inc. doing business as Dollar Rent A Car, Petitioner-Appellant, Index 650007/15

-against-

The Travelers Indemnity Co. as subrogee of Genise Forbes, Respondent-Respondent.

_____

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

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Mohammad M. Haque of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered July 14, 2015, denying the petition to vacate an arbitration award granting respondent $42,591.14 in no-fault benefits, unanimously affirmed, without costs.

Petitioner's insured was involved in a motor vehicle accident with another vehicle driven by a nonparty who was insured under a policy issued by respondent. Respondent paid personal injury protection (PIP) benefits to its insured, and then sought "loss transfer" reimbursement from petitioner pursuant to Insurance Law § 5105, under the mandatory arbitration procedure. Accordingly, this matter involves compulsory

arbitration, and the award will be upheld so long as it comports with CPLR 7511 and is not arbitrary and capricious (*Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]; *Matter of Emerald Claims Mgt. for Ullico Cas. Ins. Co. v A. Cent. Ins. Co.*, 121 AD3d 481, 482 [1st Dept 2014]).

There is no basis for vacating the award under CPLR 7511(b), and the award is not arbitrary and capricious. An evidentiary basis exists in the record to support a finding that respondent had demonstrated a causal relationship between the accident and the medical treatments for which it paid (*American Transit Insurance Company v Acceptance Indemnity Insurance Company*, 2009 NY Slip Op 33169[U] [Sup Ct, Nassau County [2009]). Respondent "responded in writing to the causation argument" (emphasis omitted), stating that the applicant passenger, who was injured while riding in an Access-A-Ride vehicle insured by respondent, was disabled prior to this loss, that the loss worsened any prior condition, that it takes a disabled person much longer to recover from said injuries, and that a disabled person therefore requires more treatment. Unlike *American Transit*, there were no allegations of fraud here. If petitioner still had reservations regarding the amount paid, it could have requested further proof

(*see Matter of Progressive Northeastern Ins. Co. [New York State Ins. Fund]*, 56 AD3d 1111, 1114 [3d Dept 2008], *lv denied* 12 NY3d 713 [2009]).

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

ENTERED: DECEMBER 29, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1493 U.S. Bank National Association, etc., Index 651954/13
Plaintiff-Appellant-Respondent,

-against-

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

_____

Holwell Shuster & Goldberg LLP, New York (Michael S. Shuster of counsel), for appellant-respondent.

Murphy & McGonigle, P.C., New York (Theodore R. Snyder of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered March 4, 2015, affirmed, with costs.

Opinion by Gische, J. All concur except Acosta, J.P. who dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
David B. Saxe
Rosalyn H. Richter
Judith J. Gische, JJ.

1493
Index 651954/13

_____x

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

-against-

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

_____x

Cross appeals from the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered March 4, 2015, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the breach of contract claim to the extent the claim is based upon cure demands made on defendant, and denied the motion to dismiss that claim to the extent it is based upon allegations of defendant's independent discovery of breaches.

Holwell Shuster & Goldberg LLP, New York (Michael S. Shuster, Dwight A. Healy, Brendon DeMay and Adam T. Kirgis of counsel), for appellant-respondent.

Murphy & McGonigle, P.C., New York (Theodore R. Snyder and James A. Murphy of counsel), for respondent-appellant.

GISCHE J.

This is a "put-back" action, involving residential mortgage backed securities (RMBS). Plaintiff U.S. Bank National Association, the trustee of the securitization trust, claims that a large number of the mortgages, originated by defendant, GreenPoint Mortgage Funding, Inc., and held by the trust, breached the representations and warranties that GreenPoint made regarding their quality. Although under the governing agreements GreenPoint was obligated to cure any non-conforming mortgage within 60 days of either discovering or being notified of a breach, the trustee claims that GreenPoint failed to cure by either replacing or repurchasing the nonconforming mortgages.

The issues before us are related to the contractual requirement and sufficiency of notices of breach (breach notice). We consider whether a breach notice is required when the underlying contract claim is based upon a defendant's independent discovery or knowledge of the nonconforming mortgages. We also consider whether an otherwise late breach notice can relate back in time to the commencement of the underlying action in order to avoid dismissal. For the reasons that follow, we hold that the breach of contract claims based upon defendant's alleged independent discovery or likely knowledge of nonconforming

mortgage loans do not require breach notices to be sent before an action may be brought. We further hold that the doctrine of relation back does not save claims that do require that a breach notice be sent as a precondition to bringing an action.

GreenPoint originated 418 mortgage loans that were sold to a nonparty sponsor pursuant to a Mortgage Loan Sale Agreement (MLSA) dated August 1, 2005. The MLSA included various representations and warranties concerning the characteristics, quality and risk profile of the mortgage loans. Those and other loans were pooled together and conveyed to the JP Morgan Alternative Loan Trust (JPMALT) for securitization through the issuance of RMBS certificates. The securitization closed on May 31, 2007, and plaintiff is JPMALT's trustee. The representations and warranties in the MLSA were incorporated and reconstituted in a separate agreement, also dated May 31, 2007, made for the benefit of the trustee (and others).

Plaintiff contends that most of the loans owned by the trust, which originated with GreenPoint, breached the representations, warranties and other covenants set forth in MLSA §§ 7.01 and 7.02. The representations include statements that none of the loans are in default, that the mortgaged property is lawfully occupied, and that no mortgage loan has been more than

30 days delinquent since origination (MLSA § 7.01). MLSA § 7.02(l) also states, in sum and substance, that the MLSA contains no untrue statements or omissions of material fact.

MLSA § 7.3 sets forth the rights and remedies of the parties (repurchase protocol) in the event nonconforming, breaching loans are either discovered by GreenPoint, or nonparty Wells Fargo, as the servicer and securities administrator, notifies GreenPoint of the nonconforming mortgage. It provides that:

> "Upon discovery by the Seller, the Servicer or the Purchaser of a breach of any of the foregoing representations and warranties which materially and adversely affects the value of the Mortgage Loans [,] . . . the party discovering such breach shall give prompt written notice to the others.
>
> . . .
>
> "Within sixty (60) days of the earlier of either discovery by or notice to either the Seller or the Servicer (such period, the "Cure Period") of any breach of a representation or warranty which materially and adversely affects the value of a Mortgage Loan or the Mortgage Loans or the interest of the Purchaser therein, the Seller or the Servicer, as the case may be, shall use its best efforts promptly to cure such breach in all material respects and, if such breach cannot be cured, the Seller shall repurchase such Mortgage Loan or Mortgage Loans at the Repurchase Price"

The repurchase protocol states further that GreenPoint's obligation to cure, repurchase or provide a substitute for a defective mortgage loan and/or to indemnify the purchaser "constitute the sole remedies of the Purchaser respecting a breach of the representations and warranties set forth in Subsections 7.01 and 7.02."

By letter dated May 29, 2013, the Federal Home Loan Mortgage Corp. (Freddie Mac), an investor and certificate holder, notified plaintiff that its independent loan-level forensic review had revealed pervasive breaches of GreenPoint's representations and warranties. On May 31, 2013, plaintiff commenced this action by filing a summons with notice. The filing was effectuated exactly six years after May 31, 2007, the closing date of the underlying transaction in which the representations and warranties were made.

Prior to the commencement of the action, GreenPoint was not notified that any of the loans it had originated were in breach of its representations and warranties; nor was any demand made for GreenPoint to cure or repurchase any of the mortgages. The summons with notice refers to a breach of contract claim solely predicated on defendant's knowing about the nonconforming mortgages at closing. It states in relevant part:

> "On information and belief, Defendant was aware from the Closing Date that the mortgage loans that were sold to the Trust were in breach of the R&W [representations and warranties]. Defendant is in breach of its obligations under the applicable agreements to cure breaches of the R&Ws or repurchase breaching mortgage loans within the contractually specified time periods. Defendant has failed to cure or repurchase any of its mortgage loans in breach of the R&Ws as required by the Repurchase Obligation."

Only after this action was commenced were three breach notices then sent to GreenPoint. The first notice, dated June 13, 2013, identified 85 defective loans, the second notice, dated August 30, 2013, identified another 98 loans, and the third, dated November 4, 2013, identified yet an additional 17 loans that breached GreenPoint's representations and warranties. By the time these breach notices were sent, the applicable statute of limitations had expired. None of the breach notices provided for a 60-day cure period, as the MLSA allows, and the November 4, 2013 breach notice was sent only two days before the complaint was filed.

On November 6, 2013, more than six months after the action was commenced, plaintiff filed its complaint. The complaint contains a breach of contract cause of action, based, in part, upon the following allegations:

"5. GreenPoint . . . was in a unique position to know and, based on the nature of the breaches that have been identified to date, as well as the nature of the loan review undertaken by GreenPoint in originating the Mortgage Loans, upon information and belief likely did know, about the defective nature of the Mortgage Loans long before the Trustee did. It is unlikely that GreenPoint, in performing the procedures it averred it undertook, could have generated such a high percentage of breaching Mortgage Loans without knowing it was doing so. Rather, it is likely that GreenPoint did discover the breaches, or was willfully blind or grossly negligent in not discovering them, long before the Certificateholder and the Trustee did so.

"6. Given GreenPoint's likely knowledge of breaches of representations and warranties, it breached its contractual obligations to provide notice to the Trustee of the breaches and, based on its own discovery of the breaches (and prior to notice thereof from the Securities Administrator), to cure the breaches or repurchase the affected Mortgage Loans. Rather, GreenPoint willfully has remained silent and has failed to cure or repurchase, repudiating its contractual obligations.

"7. When the Trustee, which is not obligated under the parties' agreements to investigate GreenPoint's compliance with its representations and warranties or to inspect loan files, learned of the breaches, it notified the Securities Administrator, which provided prompt notice thereof to GreenPoint and demanded that GreenPoint cure the breaches or repurchase the loans at issue. GreenPoint has not repurchased a single Mortgage Loan in response to these demands

> and, with respect to the contracts at issue here and elsewhere, has repudiated its repurchase obligations. The Trustee at the direction of the Certificateholder now sues, seeking specific performance, damages, and rescission, and to the extent rescission is impracticable, to rescissory damages in lieu of rescission."

The complaint includes the breach of contract claim, as originally asserted in the summons with notice, that GreenPoint was in a unique position to know and likely knew of the defective nature of the loans but failed to take curative measures. The complaint also includes new allegations, that GreenPoint had been given notice of the nonconforming loans, but had failed to cure by replacing or repurchasing them.

Under MLSA § 7.03, GreenPoint's obligation to cure a nonconforming loan is triggered in one of two ways. One way is if GreenPoint discovers on its own that a loan it sold breached the representations and warranties contained in the governing documents. The other way is if it is notified by the servicer of a nonconforming loan. We have recognized that these alternative contractual obligations give rise to independent, separate claims for breach of contract (*Mortgage Stanley Mtge. Loan Trust 2006-13ARX v Morgan Stanley Mtge. Capital Holdings, LLC*, 143 AD3d 1, 4 [1st Dept 2016]; *Nomura Home Equity Loan, Inc., Series 2006-FM2*

v Nomura Credit & Capital, Inc., 133 AD3d 96, 108 [1st Dept 2015]). In either case, GreenPoint is contractually entitled to a 60-day period in which to cure its default, presumably so litigation can be avoided. GreenPoint may replace the defective loan with a compliant one, but if it does not replace the loan within the 60-day cure period, then, under the repurchase protocol, GreenPoint must repurchase the defective loan.

Regardless of when GreenPoint discovers a breach or is notified of the nonconforming mortgage, the breach of contract cause of action accrues on the date of the closing of the underlying transaction, which is when the representations and warranties were made (*ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581 [2015]). This action was timely brought within six years after the date of closing.

Central to this appeal is whether the notice provision in the repurchase protocol applies to contract claims where a defendant itself knows about the nonconforming mortgages. In other words, is a breach notice still required when the contract claim is predicated on nonconforming mortgages that defendant itself discovered? Relying on the terms of the MLSA repurchase protocol, we find that it would have been wholly illogical for

plaintiff to be required to notify GreenPoint about the existence of nonconforming mortgages that GreenPoint already knew about or would have discovered through its own due diligence. For these claims, no precommencement breach notice was necessary. The terms of the repurchase protocol provide that the cure period is triggered upon "discovery by or notice to [GreenPoint]." Thus, this action, to the extent it alleges that GreenPoint's obligation to cure was triggered by its own discovery of nonconforming mortgages, but no cure was effected, is not only timely, but it also may proceed regardless of the validity of the late breach notices.

We also find that the allegation that defendant breached the repurchase protocol under the contract, because it knew or should have known that the loans were in breach of the warranties and representations, is sufficient to withstand a motion to dismiss. Plaintiff claims that as the originator of the mortgage loans, GreenPoint created and had full access to the loan files and either could or did perform pre- and post-closing due diligence.

The second prong of plaintiff's contract cause of action is separately based on allegations that GreenPoint was notified of the breaching mortgages, but failed to cure. The breach notices underpinning this separate notice-based claim were sent only

after plaintiff had commenced this action by filing its summons with notice. The breach notices did not afford GreenPoint its contractual opportunity to cure its default and thereby avoid this lawsuit, let alone trigger its obligation to repurchase them. We find that the breach notices had to be sent so as to permit GreenPoint its allotted time to cure any claimed breach. The breach notices were a contracted-for condition precedent to bringing this action. The doctrine of relation back cannot render these otherwise untimely breach notices timely.

Our conclusion that a breach notice is a condition precedent to a claim predicated on actual notice of default is mandated by the language of the repurchase protocol in the MLSA and the Court of Appeals decision in *ACE* (25 NY3d 581). In *ACE*, the Court determined that a contract requiring a breach notice triggering an opportunity to cure/repurchase is a condition precedent to bringing a contract claim for breach of representations and warranties. *ACE* was an RMBS put-back action involving contracts substantially similar to those at bar. The dispute in *ACE* largely centered on when the contractual cause of action accrued for statute of limitations purposes. In finding that the cause of action accrued when the non-conforming representations were made, the Court of Appeals distinguished between procedural

prerequisites, which seek a remedy for a pre-existing wrong, and substantive prerequisites, which are conditions to performance. The Court of Appeals held that the breach notice and cure period required in *ACE*, which is substantially identical to the breach notice and cure period required here, was a procedural prerequisite to suit. Thus, in *ACE* the Court of Appeals affirmed dismissal of the complaint, stating that, "because the Trust admittedly failed to fulfill the condition precedent, we need not and do not address the issues of standing and relation back disputed by the parties" (25 NY3d at 599).

To the extent plaintiff has asserted claims that rely upon GreenPoint's notification by the servicer of nonconforming mortgages, those claims were correctly dismissed because the breach notices were sent too late. Where, as here, a contract specifies a cure period, any claim premised on the failure to effect a cure is premature if it is brought before the expiration of the cure period (*Chumley's Bar & Rest. Corp. v Bedford Ct. Assoc.*, 174 AD2d 398 [1st Dept 1991]). Because the breach notices were sent only after the summons with notice was filed, the cure period had not begun, let alone expired, when this action was commenced (*see Southern Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC*, 80 AD3d 505 [1st Dept 2011], *citing*

Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp., 208 AD2d 63 [1995], *affd* 87 NY2d 927 [1996], and *Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690-692 [1995]). These claims are, therefore, premature.

We reject plaintiff's argument that, because the summons with notice put defendants on notice of nonconforming mortgages, the late breach notices, although sent after the summons with notice was filed but before the filing of the complaint, "relate back" to the commencement of this action. Leaving aside the question of whether the notice served with the summons actually did provide notice of a claim for failure to cure and repurchase after notice[1], the breach notice cannot "relate back" because the inherent nature of a condition precedent to bringing suit is that it actually precedes the action. Plaintiff had no right to bring the action unless and until this condition was fulfilled. Even

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[1] The notice served with the summons stated that plaintiff intends to proceed against defendant with a claim that it was "aware from the Closing Date that the mortgage loans that [defendant] sold to the Trust were in breach of the [representations and warranties]" because "such breaches pervade the entire pool of loans." This summons with notice unmistakably apprised defendant that plaintiff intended to proceed against it on the basis of defendant's own awareness or discovery of the non-conforming mortgages. There is no language in this notice, however, demanding that defendant fulfill its obligations/right to cure before the commencement of an action.

were we persuaded that the belated breach notices in this case could relate back, the earliest date would be when the summons with notice was served. That date would still not suffice because, contractually, defendant must be afforded a 60-day period within which to cure before an action for breach of contract may be commenced. Plaintiff's argument would simply eviscerate the condition precedent of serving a breach notice, as required by the contract, and defendant's right to effect a pre-action cure.

Moreover, the notice that accompanies a summons when no complaint is filed at the commencement of an action fulfills a very different purpose than the breach notice required pursuant to the parties' agreements. A notice that accompanies a summons is simply to let a defendant know the claims being asserted (*see Pilla v La Flor De Mayo Express, Inc.*, 191 AD2d 224 [1st Dept 1993]). The contractual requirement of a breach notice, however, triggers the defendant's right/obligation to cure a claimed default and avoid a lawsuit. The concept of relation back in a pleading context concerns the adequacy of the notice given and is dependant upon the existence of a valid preexisting action (CPLR 203[f]*; Carrick v Central Gen. Hosp.*, 51 NY2d 242, 248 [1980]). A condition precedent, however, is a contractual obligation (see

MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640, 645 [2009]; *A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 31 [1998]; *Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]). Consequently,a pleading notice and a breach notice are not natural substitutes for one another.

Nomura (133 AD3d 96), relied upon by the dissent to support the application of relation back, is factually distinguishable. It involved several lawsuits by trustees against the same defendant. With respect to the relation back issue, the most important factual distinction between this case and *Nomura* is that the trustees actually sent presuit breach notices to the defendant in that case. Although the breach notices identified some, but not all, of the nonconforming mortgages for which the trustees ultimately sought relief, they expressly stated that the trustees were still investigating the matter and that further nonconforming mortgages might be discovered. To the extent the *Nomura* Court allowed the claims to proceed based upon defendant's independent knowledge of the nonconforming mortgages, we rule consistently. As for the relation back concept adopted in *Nomura*, the critical distinction is that the trustees in that case complied with the condition precedent of providing that defendant with notice of its default. Here, no such

precommencement breach notice was ever sent to GreenPoint, so its obligation to cure (repurchase) or otherwise respond was not triggered; the breach notices were only sent after the action was commenced. Furthermore, although the precommencement breach notices in *Nomura* did not specifically identify every alleged nonconforming mortgage, the trustees' presuit demands put the defendant on notice that the certificate holders whom the plaintiffs (as trustees) represented were investigating the mortgage loans and might uncover additional defective loans for which claims would be made (133 AD3d at 108). This did not occur here, and we do not believe *Nomura* should be extended to cover the claims at bar.

Accordingly, the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered March 4, 2015, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the breach of contract claim to the extent the claim is based upon cure demands made on defendant, and denied the motion to dismiss, that claim to the extent it is based upon allegations of defendant's independent discovery of breaches should be affirmed, with costs.

All concur except Acosta, J.P. who dissents in part in an Opinion.

ACOSTA, J.P. (dissenting in part)

While I agree that plaintiff timely commenced this put-back action based on allegations that defendant was aware of or discovered defects in the pool of loans, I respectfully disagree with the majority's holding that plaintiff's subsequent claims, based on postcommencement notices to defendant of defective loans, cannot relate back to the timely summons with notice. In my view, because that original pleading gave defendant notice of the transaction or occurrence to be proved – namely, the sale of a pool of loans – the claims later interposed in the complaint relate back to the timely commencement of the action, pursuant to CPLR 203(f) and this Court's decision in *Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc., Series 2006-FM2* (133 AD3d 96 [1st Dept 2015]).

The majority holds that plaintiff's failure to fulfill a procedural prerequisite to suit (providing defendant with notice of the breaches and awaiting the expiration of a 60-day cure period before commencing this action) renders the relation-back doctrine inapplicable.[2] However, it supports this proposition

[2] Defendant primarily argues that the action is untimely because plaintiff failed to comply with the procedural condition precedent of making a demand prior to suit, pursuant to the third prong of the agreement's accrual provision (a provision that

with misplaced reliance on *ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, a case in which the plaintiffs "admittedly failed to fulfill the condition precedent" upon which *all* of their claims were based (25 NY3d 581, 599 [2015]). The failure to fulfill the condition prior to suit meant that the plaintiffs' action was not validly commenced (*id.* at 589), or, as this Court put it, "rendered their summons with notice a nullity" (*ACE Sec. Corp. v DB Structured Prods.*,

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purports to delay the accrual of a cause of action until [1] plaintiff's discovery of the breach, [2] defendant's failure to cure, repurchase, or substitute defective loans, and [3] plaintiff's demand upon defendant for compliance with the parties' agreement). This "demand requirement" is to be distinguished from the repurchase protocol's more general "notice requirement," which is not part of the accrual provision. The demand requirement is what defendant relies on as a procedural condition precedent (plaintiff "cannot sue for repurchase of loans without meeting the conditions to suit stated in the Accrual Clause, including the Demand Requirement").

However, as the motion court properly decided, the accrual provision is unenforceable. Indeed, this Court recently voided a nearly identical provision as against public policy, because it is essentially an attempt, agreed upon at the inception of liability, to delay the accrual of a cause of action based on an impermissible "discovery" rule (*Deutsche Bank Natl. Trust Co. v Flagstar Capital Mkts. Corp.*, 143 AD3d 15 [1st Dept 2016]). As a result, the demand requirement, contained within the accrual provision, is also unenforceable.

Thus, as the majority's opinion implies by omitting discussion of the accrual provision's demand requirement and focusing on the notice requirement, the notice requirement is the only provision in the repurchase protocol that can be construed as a procedural prerequisite to suit.

Inc., 112 AD3d 522, 523 [1st Dept 2013], *affd* 25 NY3d 581 [2015]). Consequently, there was no need for the Court of Appeals in *ACE* to consider the relation-back doctrine: There was simply no valid action to which the claims could relate back (25 NY3d at 589, 599; *see also Southern Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC*, 80 AD3d 505, 505-506 [1st Dept 2011] ["Relation back . . . is dependent upon the existence of a valid preexisting action"]).

Importantly, *ACE* did not foreclose the possibility that the relation-back doctrine could apply where, as here, a plaintiff timely commences a valid action on some claims, but has failed to fulfill a procedural prerequisite to suit with regard to subsequent claims.[3] This Court's subsequent decision in *Nomura* - which was published after the motion court's ruling in this case

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[3] The *ACE* Court did not address the import of a repurchase protocol that triggers a cure period in the event of "discovery by" the defendant. Here, however, the repurchase protocol provided a 60-day "cure period" beginning upon either (1) plaintiff's notice to defendant of breaches in the loans' representations and warranties, *or* (2) defendant's discovery of breaches.

As the majority recognizes, plaintiff was not required to provide notice to defendant before commencing an action based on allegations that defendant independently discovered breaches of the representations and warranties in the agreement. Therefore, we all agree that this action was timely commenced on those grounds.

- sheds light on this issue. In *Nomura*, this Court applied the relation-back doctrine to certain claims as to which the plaintiffs had failed to fulfill a condition precedent of providing notice and a cure period (133 AD3d at 108).[4] The *Nomura* Court correctly distinguished *ACE* and permitted relation back of the belated claims because, "[u]nlike the situation in *ACE*, there were some timely claims" to which the subsequent claims could relate back (*id.* [citation omitted]; *see also Mastr Adjustable Rate Mortgages Trust 2006-OA2 v UBS Real Estate Sec. Inc.*, 2016 WL 1449751, *5-6, 2016 US Dist LEXIS 49071, *16-18 [SD NY Apr. 12, 2016] [discussing *Nomura* and *ACE*, and "conclud(ing) that because the Complaint includes a timely contract claim, the Trusts may assert additional breach claims relating to the same contract, and that they relate back to the filing of the initial Complaint"]). Such is the case before us. Plaintiff's action was timely and validly commenced, providing the anchor to which the subsequent claims can be tethered.

I am unconvinced by the majority's attempt to distinguish *Nomura* on its facts. The majority accepts defendant's argument

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[4] This Court's decision in *Nomura* is currently pending on appeal to the Court of Appeals, although the briefs indicate that the relation-back issue is not part of that appeal.

against relation back because the plaintiff in *Nomura,* unlike plaintiff in this case, had sent presuit letters that "put [the] defendant on notice that [the plaintiffs] were investigating the mortgage loans and might uncover additional defective loans for which claims would be made" (133 AD3d at 108). This, however, is a distinction without a difference: The presuit notices in *Nomura* may have complied with the condition precedent related to the specific loans mentioned in those notices, and they may have put the defendant on notice that additional breaches might be discovered; however, those presuit notices had nothing to do with satisfying the procedural condition precedent with regard to the claims that related back (i.e., "claims relating to loans that [the] plaintiffs failed to mention in their breach notices or that were mentioned in breach notices sent less than 90 days before [the] plaintiffs commenced their actions" [*id.*]).

In any event, while the plaintiffs' submission of presuit notices in *Nomura* supported the application of the relation-back doctrine, it was not necessary to the disposition of that issue. Here, as in *Nomura* (but not in *ACE*), "there were some timely claims" to which the subsequent, improperly noticed claims can relate back (*see id.*). Furthermore, as in *Nomura*, plaintiff "allege[d] that defendant already knew, based on its own due

diligence, that certain loans in the trusts at issue breached its representations and warranties" (*id.*). The majority's narrow reading of *Nomura* overlooks the liberal relation-back standard set forth in CPLR 203(f), and diverts attention from the "salient inquiry[,] . . . whether, as the statute provides, the original pleading gives notice of the transactions [or] occurrences . . . to be proved pursuant to the amended pleading" (*Giambrone v Kings Harbor Multicare Ctr.*, 104 AD3d 546, 548 [1st Dept 2013] [internal quotation marks omitted]).[5]

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[5] Under this standard, I would hold that plaintiff's original summons with notice gave defendant notice of the transactions or occurrences sought to be proved - namely, the securitization and sale of the loans. Whether defendant had notice of the particular *claims* in the later-filed complaint is immaterial (*see* CPLR 203[f]; *Koch v Acker, Merrall & Condit Co.*, 114 AD3d 596 [1st Dept 2014]; *Giambrone*, 104 AD3d at 547-548 [1st Dept 2013]; *Jennings-Purnell v Jennings*, 107 AD3d 513 [1st Dept 2013]).

The original pleading gave defendant notice that the action was one "for breach of contract . . . arising from Defendant's breaches of various representations and warranties regarding certain mortgage loans sold to the Trust"; that the "Closing Date" of the securitization transaction and creation of the Trust was May 31, 2007; that "Defendant made certain contractual representations and warranties in the Trust transaction documents concerning the mortgage loans it originated that were sold and securitized in the Trust"; and that the breaches of the representations and warranties "pervade[d] the entire pool of loans."

This was sufficient to put defendant on notice that plaintiff sought to prove the transaction from which the breaches allegedly arose and that additional claims of breaches in other loans might follow.

The implication of the majority's ruling is that *Nomura* was wrongly decided with respect to its application of the relation-back doctrine. Were the majority to sincerely apply its reading of *ACE* to the facts of *Nomura*, it would have to deem the relation-back doctrine inapplicable because, with at least some of their claims, the *Nomura* plaintiffs failed to comply with the procedural prerequisite of providing notice and allowing a cure period before commencing the action. Instead, the majority claims that its ruling is consistent with *Nomura*, resorting to an inconsequential factual distinction. Yet, as CPLR 203(f) and *Nomura* instruct, a claim may relate back, even where the plaintiff has failed to fulfill a procedural condition precedent, so long as there is a timely, valid action to which the claims can relate back (and where the original pleading gives notice of

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Although the majority apparently finds that the summons with notice could not fulfill the agreement's notice requirement ("[A] pleading notice and a breach notice are not natural substitutes for one another"), it overlooks the fact that the parties' contract did not specify any particular form of notice. The agreement does not define the term "notice," and Section 11 of the agreement, titled "Notices," merely specifies that notices "shall be in writing and shall be deemed to have been duly given if mailed, by registered or certified mail, return receipt requested, or, if by other means, when received by the other party at [specified addresses]." Accordingly, the agreement does not preclude a summons with notice from satisfying the notice requirement.

the transaction or occurrence to be proved). Although the prerequisite of notice and a cure period ordinarily gives a party an opportunity to avoid litigation, in these circumstances the condition is rendered irrelevant by plaintiff's having already commenced an action on related grounds. Moreover, as plaintiff did, in fact, issue breach notices as late as November 2013, it complied with the condition, and the cure period has lapsed.

Finally, plaintiff argues that any dismissal of its claims for failure to fulfill a condition precedent should be without prejudice, because CPLR 205(a)'s savings clause permits the refiling of such an action within six months of dismissal (*see Southern Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC* (104 AD3d 613 [1st Dept 2013], *supra*). I am inclined to agree, since a dismissal for failure to comply with a condition precedent is not a judgment on the merits (*see id.* at 613), and CPLR 205(a) "implements the vitally important policy preference for the determination of actions on the merits" (*Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 521 [2009] [internal quotation marks omitted]). Nonetheless, in these circumstances, since plaintiff timely and validly commenced an action on other claims that survive (as we unanimously agree), the savings statute is unnecessary, because the later-added

claims can be deemed to relate back to the timely filed summons with notice. As I see it, the majority's only real accomplishment in precluding the operation of the relation-back doctrine is that it prevents (or delays) a court from adjudicating these claims on their merits.

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

ENTERED: DECEMBER 29, 2016

CLERK