SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 16, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3146-
3146A Index 651612/10

Ambac Assurance Corporation,
et al.,
Plaintiffs-Respondents,

-against-

Countrywide Home Loans, Inc.,
et al.,
Defendants,

Bank of America Corp.,
Defendant-Appellant.

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O'Melveny & Myers LLP, New York (Jonathan Rosenberg of counsel), for appellant.

Patterson Belknap Webb & Tyler LLP, New York (David W. Dykhouse and Joshua Kipnees of counsel), for respondents.

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Orders, Supreme Court, New York County (Eileen Bransten, J.), entered October 27, 2015, which denied defendant Bank of America Corp.'s (BAC) motion for summary judgment dismissing plaintiffs' (together, Ambac) successor-liability claims, and granted Ambac's motion for partial summary judgment on the continuity of ownership prong of the de facto merger claim, unanimously modified, on the law, to deny Ambac's motion and to

grant BAC's motion as to the implied assumption of liabilities claim, and otherwise affirmed, without costs.

Ambac, the insurer of a number of residential mortgage-backed securitizations originated by the Countrywide defendants (collectively, Countrywide), seeks to impose successor liability for fraud and breach of contract in connection with the securitizations upon BAC, which acquired substantially all of Countrywide's assets through a series of transactions that Ambac contends amounted to a de facto merger. Specifically, Ambac alleges that BAC acquired Countrywide in a transaction where Countrywide's shareholders became shareholders of BAC. Ambac further alleges that BAC subsequently integrated Countrywide's assets, through asset purchase agreements, so that Countrywide's former shareholders continued to have an interest in those assets through their interests in BAC's stock.[1]

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[1] In determining the question of de facto merger, we apply New York law. Although BAC is correct that the court erred in giving preclusive effect to its ruling in a prior case on the question of which state's law of de facto merger should apply (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 40 Misc 3d 643 [Sup Ct, NY County 2013]), BAC does not argue on appeal that the law of a state other than New York should apply under a choice of law analysis. Nor in response to a question at oral argument did BAC state that it was challenging the motion court's decision to apply New York law.

"[C]ontinuity of ownership is the touchstone of the [de facto merger] concept and thus a necessary predicate to a finding of a de facto merger" (*Matter of TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 210 [1st Dept 2015] [internal quotation marks omitted]). Continuity of ownership "exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction" (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 256 [1st Dept 2005]). "Stated otherwise, continuity of ownership describes a situation where the parties to the transaction become owners together of what formerly belonged to each" (*id.* [internal quotation marks omitted]).

Contrary to BAC's contention, neither *New York City Asbestos Litig.* nor *TBA Global* limits continuity of ownership to only those situations where the shareholder interests are acquired in the same transaction as the asset sale. Rather, if the shares are acquired "as an element of the asset purchase transaction[,]" continuity of ownership may exist (*TBA Global*, 132 AD3d at 210 n 16; *see Fitzgerald v Fahnestock & Co.*, 286 AD2d 573 [1st Dept 2001]; *Arnold Graphics Indus., Inc. v Independent Agent Ctr.*,

Inc., 775 F2d 38, 42 [2d Cir 1985] ["there is no requirement that all of the events that are necessary to a finding of de facto merger occur at the same time"]). Here, issues of fact exist as to whether, based on the multi-step transactions, Countrywide shareholders acquired ownership interests in BAC "as an element of" the subsequent asset purchases. Ambac points to evidence showing that BAC embarked upon the series of transactions as an integrated whole, that BAC began planning the asset sales before Countrywide shareholders acquired BAC stock, and that BAC always anticipated a transaction whereby BAC would acquire the assets of Countrywide.

We agree with BAC that there can be no continuity of ownership where the asset seller receives fair value consideration for its assets (*see TBA Global*, 132 AD3d at 210 ["The purpose of requiring continuity of ownership is to identify situations where the shareholders of a seller corporation retain some ownership interest in their assets after cleansing those assets of liability"] [internal quotation marks omitted]; *New York City Asbestos Litig.*, 15 AD3d at 258 ["the underlying rationale for imposing liability on a successor by merger [is] to ensure that a source remains to pay for the victim's injuries"] [internal quotation marks omitted]). Although BAC maintains that

it paid fair value for Countrywide's assets, Ambac points to evidence showing that large amounts of money Countrywide received in the asset sale were then cycled back to BAC and its subsidiaries. Thus, issues of fact exist as to whether the transactions were coordinated with the goal of combining BAC's and Countrywide's mortgage businesses while avoiding Countrywide's liabilities so as to benefit Countrywide's former shareholders at the expense of its creditors.

The motion court should have dismissed the implied assumption of liabilities claim. The asset purchase agreements include an express disclaimer regarding the assumption of the Countrywide liabilities at issue here. Further, the agreements provide that they can only be amended by a writing signed by each party. Thus, there can be no implied assumption of liabilities based on post-contractual statements or conduct that falls short of a new written contractual undertaking (*see Oorah, Inc. v Covista Communications, Inc.*, 139 AD3d 444, 445 [1st Dept 2016]).

Since there is evidence consistent with the claim that BAC

dominated and controlled Countrywide post-acquisition with respect to decisions that would have affected creditors like Ambac, the court correctly declined to dismiss the fact-laden alter-ego claim (*see Ledy v Wilson*, 38 AD3d 214 [1st Dept 2007]).

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

ENTERED: MAY 16, 2017

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16551 The People of the State of New York, Ind. 2309/12
Respondent,

-against-

Christopher Belliard,
Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (William Mogulescu, J. at plea; George R. Villegas, J. at sentencing), rendered March 1 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and a decision and order of this Court having been entered on January 7, 2016, holding the appeal in abeyance (135 AD3d 437 [1st Dept 2016]) and upon the stipulation of the parties hereto dated April 27, 2017,

It is unanimously ordered that the said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MAY 16, 2017

CLERK

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

3278-
3279-
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3282-
3283

Index 651217/15
651446/15

FIA Leveraged Fund Ltd., et al.,
Plaintiffs-Appellants,

-against-

Grant Thornton LLP,
Defendant-Respondent,

EisnerAmper LLP, et al.,
Defendants.

- - - - -

Massachusetts Bay Transportation Authority Retirement Fund, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Citco Fund Services (Cayman Islands) Ltd.,
Defendant-Respondent,

Citco Fund Services (Suisse) SA,
Defendant,

Citco Group Ltd., et al.,
Defendants-Respondents-Appellants.

_____

Reid Collins & Tsai LLP, New York (Rachel S. Fleishman of counsel), for appellants and appellants-respondents.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Robert N. Kravitz of counsel), for Citco Fund Services (Cayman Islands) Ltd., respondent, and respondents-appellants.

Morrison & Foerster LLP, New York (Grant J. Esposito of counsel), for Grant Thornton LLP, respondent.

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Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered May 12, 2016, to the extent appealed from as limited by the briefs, dismissing the complaint as against defendant Grant Thornton LLP, unanimously affirmed without costs. Appeal from order, same court and Justice, entered January 20, 2016, which, inter alia, granted Grant Thornton's motion to dismiss the complaint as against it pursuant to CPLR 3211, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Orders, same court and Justice, entered May 10, 2016, which, to the extent appealed from as limited by the briefs, denied the motions of defendants Citco Trading, Inc., Citco Global Custody (N.A.) N.V., Citco Banking Corp., SFT Bank N.V., Ermanno Unternaehrer, and Citco Group Limited to dismiss the complaint pursuant to CPLR 3211(a)(8), and granted all defendants' motions to dismiss the first through fifteenth causes of action pursuant to CPLR 3211(a)(1) and (7), unanimously modified, on the law, to deny Citco Fund Services (Cayman Islands) Ltd.'s (Citco Cayman) motion to dismiss the eleventh and twelfth causes of action as against it, to grant Citco Global's motion to dismiss for lack of personal jurisdiction, to deny Unternaehrer's motion to dismiss the eighth cause of action, and

to deny Citco Cayman's, Citco Trading, Citco Bank and SFT's, and Citco Group's motions to dismiss the fifteenth cause of action as against them, and otherwise affirmed, without costs.

Citco Cayman does not contest New York's jurisdiction over it. However, Citco Group (Citco Cayman's parent) is not subject to New York jurisdiction simply because Citco Cayman is (*see e.g. FIMBank P.L.C. v Woori Fin. Holdings Co. Ltd.*, 104 AD3d 602 [1st Dept 2013]; *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 308 [1st Dept 2003]). Plaintiffs failed to satisfy the four factors set out in *Volkswagenwerk AG. v Beech Aircraft Corp.* (751 F2d 117 [2d Cir 1984]), which we have adopted (*see e.g. FIMBank*, 104 AD3d at 603). For example, Citco Group's subsidiaries are not financially dependent on it; rather, since Citco Group is a holding company, it is financially dependent on its subsidiaries (*see Porter v LSB Indus.*, 192 AD2d 205, 214 [4th Dept 1993]).

If Citco Cayman's New York contacts cannot be imputed to its parent, a fortiori, they cannot be imputed to its siblings, Citco Trading, Citco Global, Citco Bank, and SFT (*see Matter of Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 230 F Supp 2d 403, 409 n 9 [SD NY 2002]).

Unternaehrer, who is allegedly a high-ranking Citco executive (plaintiffs use "Citco" to refer to all Citco

defendants), is a defendant in four causes of action relating to something the complaint calls the FIP Transaction. In opposition to defendants' motions to dismiss, plaintiffs submitted emails between Unternaehrer, on the one hand, and nonparty Alphonse Fletcher Jr. (Mr. Fletcher), the investment manager of those plaintiffs that are hedge funds, and an employee of nonparty Fletcher Asset Management (FAM), Mr. Fletcher's New York-based company, on the other, discussing how to structure the FIP Transaction, and a wire transfer instruction showing that Unternaehrer received payment in the FIP Transaction via a transfer to a New York bank. This is sufficient for specific personal jurisdiction under CPLR 302(a)(1) (*see e.g. Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 330-332, 339-341 [2012]; *C. Mahendra [NY], LLC v National Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 457 [1st Dept 2015]). In light of Unternaehrer's numerous other contacts with New York (e.g., leasing New York apartments from 1996 through 2005, meeting with Mr. Fletcher and other FAM employees in New York on many occasions between January 1999 and March 2007, and attending a FAM event in September 2007), it does not violate due process to exercise jurisdiction over him (*see generally Rushaid v Pictet & Cie*, 28 NY3d 316, 330 [2016]).

Plaintiffs established that Unternaehrer was acting as the

agent of Citco Trading, Citco Bank, and SFT, and therefore that New York can exercise jurisdiction over them. Plaintiffs showed that Unternaehrer "engaged in purposeful activities in this State in relation to [the] transaction [sued upon] for the benefit of and with the knowledge and consent of [these other] defendants and that they exercised some control over [him] in the matter" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *see generally New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 463-464 [1st Dept 2012]). Although Citco Trading's sale of nonparty Richcourt Holding Inc. (a British Virgin Islands company) was mostly conducted from London and closed in Monaco, Unternaehrer admitted that he had some email and telephone communications with representatives of Fletcher (Mr. Fletcher and his various companies) during the sales process. Indeed, Unternaehrer was both the manager for Citco's relationship with Fletcher and the Managing Director/CEO of Richcourt Holding and a director of six of its subsidiaries.

The claims against Citco Bank and SFT arise out of loans they made to plaintiff FIA Leveraged Fund Ltd. (Leveraged) and the manner in which those loans were repaid. The complaint alleges that Citco Bank and SFT "communicated regularly with FAM and [Mr.] Fletcher in New York via e-mail, phone, and mail

regarding Leveraged, the loans to Leveraged, and repayment of the loans. The Citco Lender Defendants directed ... their demands for repayment ... to [Mr.] Fletcher and FAM at their offices at 48 Wall Street." Neither Citco Bank nor SFT denied this in the affirmations they submitted in support of their motions to dismiss. In addition, Unternaehrer admitted that he had communications with Fletcher representatives about the loans.

New York does not have specific personal jurisdiction, however, over Citco Global. Citco Global's involvement in this case is that it provided consents on behalf of non-Series N investors in Leveraged to subordinate their interests to those of Series N so that three nonparty Louisiana pension funds would invest in Series N in 2008. In opposition to defendants' motion, plaintiffs submitted two documents from 2009. Neither has anything to do with the consents, and neither shows that Unternaehrer engaged in purposeful activity in New York in connection with the Citco Global consents.

Plaintiffs allege that Citco Group is the alter ego of other Citco companies that actually committed the wrongdoing. Although the complaint alleges in conclusory terms that Unternaehrer acted as the agent of all of the named Citco defendants, we decline to find that he acted as Citco Group's agent. That would make it

too easy for plaintiffs to get around the parent-subsidiary test for jurisdiction.

The remaining possibility for obtaining jurisdiction over defendants-appellants is conspiracy jurisdiction (*see e.g. Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427 [1st Dept 2013]). Defendants contend that the complaint does not allege an agreement by the Citco defendants to participate in a conspiracy to defraud Massachusetts Bay Transportation Authority Retirement Fund (MBTARF) and that MBTARF failed to identify an overt act. However, we find that the complaint contains factual allegations from which such an agreement can be inferred (*see Abrahami v UPC Constr. Co.*, 176 AD2d 180 [1st Dept 1991]). It also alleges an overt act, namely, that alleged co-conspirators Mr. Fletcher and FAM took $7.1 million of MBTARF's investment in nonparty Fletcher Fixed Income Alpha Fund, Ltd. (Alpha) and used it in violation of Alpha's offering memorandum as partial repayment of Leveraged's loan to Citco Bank and SFT (*see Weinberg v Mendelow*, 113 AD3d 485, 487 [1st Dept 2014]).

Turning to the additional requirements for conspiracy *jurisdiction* (*see Lawati*, 102 AD3d at 428), we must examine Leveraged's and Fletcher Income Arbitrage Fund Ltd. (Arbitrage)'s conspiracy claims with respect to personal jurisdiction.

Leveraged and Arbitrage's conspiracy claims allege that Mr. Fletcher and FAM fraudulently transferred cash from plaintiff Fletcher International, Ltd. to Unternaehrer in the FIP Transaction. The transfer was made by instructing SFT to transfer money from FIP's account to Citco Bank's account at HSBC New York, for further credit to SFT, for further credit to Unternaehrer. Using a New York bank account for a fraudulent scheme constitutes a tort within New York (*see Banco Nacional Ultramarino v Chan*, 169 Misc 2d 182, 187-188 [Sup Ct, NY County 1996], *affd* 240 AD2d 253 [1st Dept 1997]).

MBTARF's conspiracy claim alleges that Mr. Fletcher and FAM made misrepresentations to it about how its investment would be used. It also alleges that they diverted its money. Drawing inferences in favor of plaintiffs (*see Rushaid*, 28 NY3d at 327; *Wilson v Dantas*, 128 AD3d 176, 182 [1st Dept 2015]), we find that the misrepresentation and diversion occurred in New York because FAM and Mr. Fletcher were located there.

We find that the additional *Lawati* factors (102 AD3d at 428) are satisfied as to Citco Group but not Citco Global. Since Citco Group is the parent, it is logical to infer that Citco Cayman (a New York co-conspirator because it has not contested jurisdiction) acted under its control. However, since Citco

Global is only a sibling of Citco Cayman, it is not as logical to infer that Citco Cayman acted under Citco Global's control.

Unlike Leveraged and Arbitrage, MBTARF is not subject to in pari delicto. Therefore, we reinstate its conspiracy claim (fifteenth cause of action) as against Citco Cayman, Citco Trading, Citco Bank, SFT, and Citco Group.

Leveraged and Arbitrage each assert a breach of contract claim against Citco Cayman based on their respective administrative services agreements. The two contracts in issue contain a choice of law clause providing that the agreements are "governed by and constructed in accordance with" Cayman law. Choice of law provisions apply to substantive issues (*Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410, 416 [2010]), and matters of procedure are governed by the law of the forum state (*Lerner v Prince*, 119 AD3d 122, 127 [1st Dept 2014]). In pari delicto is a substantive equitable defense (*see Ehrlich v Commercial Factors of Atlanta*, __ F Supp 2d __, 2017 WL 706322, *8, 2017 US Dist LEXIS 24385,*22 [ND NY 2017]; *In re Hellas Telecom. [Luxembourg] II SCA*, 524 BR 488, 532 [Bankr SD NY 2015]; *LaSala v Bank of Cyprus Pub. Co. Ltd.*, 510 F Supp 2d 246, 278 [SD NY 2007]). Thus, it is governed by the contracts' choice of law provisions. The question of whether a party is in pari delicto

is inextricably intertwined with the issues underlying the substantive claims brought by that party (*see Lerner v Prince*, 119 AD3d at 128). Therefore, Cayman law applies to the in pari delicto defense to the contract claims.

Under Cayman law, Citco Cayman would not be entitled to dismissal based on in pari delicto. Citco Cayman has not met its "'heavy burden'" of showing that "application of [foreign] law would be offensive to a fundamental public policy of this State" (*Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 632 [2006]). The fact that Cayman law takes a different approach to the adverse interest exception to imputation than that of New York law is not "truly obnoxious" (*Cooney v Osgood Mach.*, 81 NY2d 66, 79 [1993]), especially since the issue is whether a Cayman entity will be liable to two other Cayman entities. Thus, we reinstate Leveraged's and Arbitrage's contract claims against Citco Cayman (eleventh and twelfth causes of action).

We reinstate Arbitrage's fraudulent conveyance claim against Unternaehrer (eighth cause of action), because "*in pari delicto* is not a defense to a fraudulent conveyance suit" (*Matter of Verestar, Inc.*, 343 BR 444, 480 n 19 [Bankr SD NY 2006]).

Plaintiffs contend that, pursuant to New York's internal affairs doctrine, Cayman law (the law of Leveraged and

Arbitrage's place of incorporation) governs the issue whether Mr. Fletcher and FAM's wrongdoing will be imputed to Leveraged and Arbitrage for tort claims. However, the internal affairs doctrine does not apply to the adverse interest exception (*see Concord Capital Mgt., LLC v Fifth Third Bank*, 2011 WL 10564345, *11-12 [Sup Ct, NY County 2011], *affd sub nom. Concord Capital Mgt., LLC v Bank of America, N.A.*, 102 AD3d 406 [1st Dept 2013], *lv denied* 21 NY3d 851 [2013]). Internal affairs are matters of corporate governance (*see e.g. Richbell*, 309 AD2d at 301), while imputation is a question of *agency* (*see Kirschner v KPMG LLP*, 15 NY3d 446, 465 [2010]). We must determine which state has "the most significant relationship" with the issue of imputation (*see Indosuez Intl. Fin. v National Reserve Bank*, 98 NY2d 238, 245 [2002]). Both New York (the location of the alleged wrongdoers whose wrongdoing will be imputed) and the Cayman Islands (the location of the entities to which wrongdoing will be imputed) have some relationship with that issue. The law of the same state need not be applied to all the issues arising out of a tort claim (*Babcock v Jackson,* 12 NY2d 473, 484 [1963]; *see Simon v Philip Morris Inc.*, 2000 WL 1745265, *28, 2000 US Dist LEXIS 16713, *88-89 [ED NY, Nov. 16, 2000, No. 99 CV 1988]). However, the jurisdiction with the greatest "interest in litigation of the

underlying claims" also has "an acute interest in the availability of defenses to those claims" (*Cobalt Multifamily Invs. I, LLC v Shapiro*, 857 F Supp 2d 419, 434 [SD NY 2012]). Plaintiffs have chosen to sue defendants under New York law. They also allege that Grant Thornton's audits were performed in New York. Because we cannot conclude that the Cayman Islands has a more significant relationship to imputation than New York, we will apply New York law.

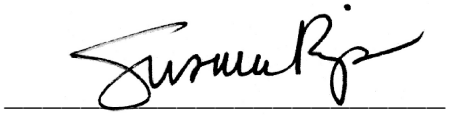
The in pari delicto issue may be resolved on the pleadings in this case (*see Kirschner*, 15 NY3d at 459 n 3). The complaints do not allege that Leveraged and Arbitrage were Mr. Fletcher and FAM's intended victims (*see id.* at 466) or that Mr. Fletcher and FAM's fraud was committed against Leveraged and Arbitrage rather than on their behalf (*see id.* at 466-467). The complaints show that "the corporate wrongdoer's fraudulent conduct enable[d] the business to survive – to attract investors" (*id.* at 468).

Even if, arguendo, the overpayment exception to in pari delicto survived *Kirschner*, neither Leveraged nor Arbitrage is a court-appointed trustee (*cf. Williamson v Stallone*, 28 Misc 3d 738, 754 [Sup Ct, NY County 2010]). Moreover, Leveraged and Arbitrage do far more than seek to recover overpayments.

Under New York law, the doctrine of in pari delicto is applicable to accounting malpractice claims (*Stokoe v Marcum & Kleigman LLP*, 135 AD3d 645 [1st Dept 2016]).

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

ENTERED: MAY 16, 2017



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Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber, Gesmer, JJ.

2777 The People of the State of New York, Ind. 2799/15
Respondent,

-against-

Anthony Dushain,
Defendant-Appellant.

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Marianne Karas, Thornwood, for appellant.

Darcel D. Clark, District Attorney, Bronx (Meaghan L. Power of counsel), for respondent.

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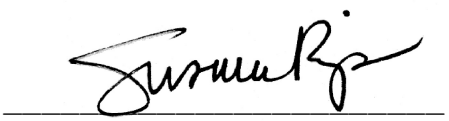
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Marc Whiten, J.), rendered December 10, 2015,

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: MAY 16, 2017



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

Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4003 Fiduciary Insurance Company of America, Plaintiff-Respondent, Index 156503/15

-against-

Medical Diagnostic Services, P.C., et al., Defendants,

Star of N.Y. Chiropractic Diagnostic, P.C., Defendant-Appellant.

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Law Office of Gregory A. Goodman, P.C., Hauppauge (Gregory A. Goodman of counsel), for appellant.

Rubin, Fiorella & Friedman LLP, New York (David F. Boucher, Jr. of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Shlomo Hagler, J.), entered January 6, 2017, which denied defendant Star of N.Y. Chiropractic Diagnostic, P.C.'s (Star) motion for attorneys fees against plaintiff, unanimously affirmed, with costs.

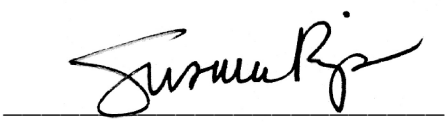
"It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule" (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 [2004]; *see also Gotham Partners, L.P. v High Riv. Ltd.*

Partnership, 76 AD3d 203, 205 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]). While an insured party may recover attorneys' fees where it successfully defends against its insurer's action seeking a declaratory judgment that it has no duty to defend or indemnify its insured (*see Underwriters Ins. Co.*, 3 NY3d at 597; *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21 [1979]), "[t]he reasoning behind [the award of such attorneys' fees] is that an insurer's duty to defend an insured extends to the defense of any action arising out of the occurrence, including a defense against an insurer's declaratory judgment action" (*Underwriters Ins. Co.*, 3 NY3d at 597-598). Here, plaintiff owes defendant Star no duty to defend, as Star is merely seeking reimbursement for chiropractic services rendered to the claimant in this no-fault action. While Star was assigned the claimant's rights for such reimbursement, the claimant was merely the injured party in the taxi at the time of the accident, and plaintiff owed no duty to defend the claimant. Star, as assignee of the claimant's rights, could acquire no greater rights than its assignor (*see New York & Presbyt. Hosp. v Country-Wide Ins. Co.*, 17 NY3d 586, 592 [2011]), and did not acquire any right to a defense from plaintiff. Thus, the court properly held that Star was not entitled to attorneys' fees in this case.

We have examined Star's remaining arguments, including its public policy argument, and find them to be unavailing.

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

ENTERED: MAY 16, 2017



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Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4004 In re Tiffany N. L.,

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

Marcelino L.,
Respondent-Appellant,

New York Foundling Hospital,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Daniel Gartenstein, Long Island City, for respondent.

Douglas H. Reiniger, New York, attorney for the child.

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Order of fact-finding and disposition (one paper), Family Court, New York County (Clark V. Richardson, J.), entered on or about April 6, 2016, which, upon a finding of permanent neglect, terminated respondent father's parental rights to the subject child and transferred custody and guardianship of the child to petitioner agency and the Commissioner of New York City Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supported the determination that the father permanently neglected the subject child by failing to visit consistently and by failing to plan for her

future, despite the agency's diligent efforts to encourage and strengthen the parental relationship (*see* Social Services Law § 384-b[7][a], [c], [f]; *Matter of Star Leslie W.*, 63 NY2d 136, 140 [1984]; *Matter of Sheila G.*, 61 NY2d 368, 384-386 [1984]). The record shows that although the father was made aware of the need for him to, among other things, attend and complete a drug treatment program and obtain suitable housing, he refused to avail himself of these services and comply with his service plan. The father also failed to visit consistently with the child and behaved inappropriately during visits, frightening the child (*see Matter of Charles Michael J.*, 58 AD3d 401, 402 [1st Dept 2009]). Overnight, unsupervised visitation with the child was suspended after the child returned from such visits with injuries requiring medical treatment.

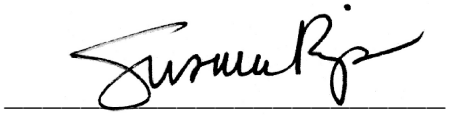
The record supports the determination that the child's best interests would be served by terminating the father's parental rights and freeing the child for adoption by her foster mother, with whom the child has lived since she was three days old, and who has met all of her special needs and wants to adopt her (*Matter of Star Leslie W.*, 63 NY2d at 147-148). There was no evidence that the father had any feasible plan to care for the child (*see Matter of Olushola W.A.*, 41 AD3d 179, 180 [1st Dept

2007]).

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

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

ENTERED: MAY 16, 2017



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Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4005 Leonora Alvarado, Index 20245/06
Plaintiff-Respondent,

-against-

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

_____

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

Devon M. Wilt, New York, for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 9, 2013, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

In this negligence action, plaintiff seeks damages for personal injuries resulting from an assault by a neighbor's boyfriend. Plaintiff claims that defendants failed to protect her after requesting her assistance as a translator in resolving a domestic dispute between the neighbor and her boyfriend, and that the boyfriend targeted her due to her involvement in this incident.

As plaintiff now concedes, this Court's decision on a prior

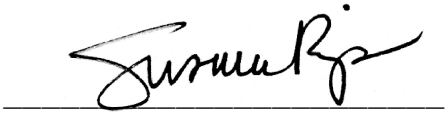
appeal, denying defendants' motion to dismiss (*see Alvarado v City of New York*, 60 AD3d 427 [1st Dept 2009]), is not dispositive of the instant motion, as "[t]he law of the case doctrine 'is inapplicable where, as here, a summary judgment motion follows a motion to dismiss'" (*191 Chrystie LLC v Ledoux*, 82 AD3d 681, 682 [1st Dept 2011]).

Defendants are entitled to summary judgment dismissing the complaint. Whether a special relationship exists is generally a question for the jury" (*Coleson v City of New York*, 24 NY3d 476, 483 [2014]). To establish that, plaintiff must prove that she justifiably relied on the municipality's affirmative undertaking to act on her behalf (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]). Even if a jury could have found that defendants told the boyfriend to leave the area and that they told plaintiff that they would be on patrol in the area, defendants established, as a matter of law, that plaintiff could not have justifiably relied on defendants' assurances after the boyfriend returned and asked to borrow her cell phone, and then crossed the street and sat on a bench before returning to attack her (*see Valdez v City of New York*, 18 NY3d 69, 75 [2011] at 82; *Brown v City of New York*, 73 AD3d 1113, 1115 [2d Dept 2010]). At that point, it was clear that defendants had not prevented the boyfriend from returning.

Given the foregoing determination, we need not address whether defendants' conduct was protected by governmental function immunity.

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

ENTERED: MAY 16, 2017



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Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4006 In re Frances Meyers, Index 100387/15
Petitioner-Appellant,

-against-

Department of Education of the
City of New York, et al.,
Respondents-Respondents.

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered January 6, 2016, to the extent appealed from as limited by the briefs, denying the petition to annul the determination of respondent New York City Department of Education (DOE), dated November 5, 2014, which sustained petitioner's unsatisfactory performance rating for the 2013-2014 school year, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's determination that petitioner's performance as a teacher of English as a second language during the 2013-2014 school year was unsatisfactory is not arbitrary and capricious (*see Matter of Richards v Board of Educ. of the City Sch. Dist.*

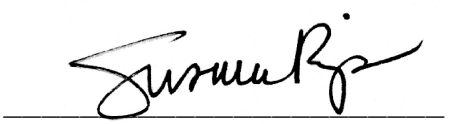
of the City of N.Y., 117 AD3d 605 [1st Dept 2014]; *Matter of Brennan v City of New York*, 123 AD3d 607 [1st Dept 2014]). The determination is rationally supported by the principal's detailed descriptions of petitioner's difficulties in developing learning objectives, using lesson plans, maintaining academic rigor, meeting students' varying needs, facilitating "accountable talk" through "higher order thinking questions," and actively engaging students, among other things, as well as managing her classroom, and petitioner's persistent failure to improve despite the ongoing individualized professional development support she received.

Petitioner's contention that she was not provided with sufficient time or feedback to remediate perceived deficiencies is belied by the record.

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

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

ENTERED: MAY 16, 2017



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Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4007- Index 105784/10
4008- 590780/10
4009- 590410/11
4010 & Janina Wilk, etc., 590789/11
M-2014 Plaintiff-Respondent,

-against-

Columbia University, et al.,
Defendants-Appellants,

A.C.T. Abatement Corporation, et al.,
Defendants-Respondents.

- - - - -

Columbia University, et al.,
Third-Party Plaintiffs-Appellants,

-against-

A.C.T. Abatement Corporation,
Third-Party Defendant-Respondent.

- - - - -

A.C.T. Abatement Corporation,
Second Third-Party/Fourth-Party
Plaintiff-Respondent,

-against-

Total Safety Consulting, LLC,
Second Third-Party/Fourth-Party
Defendant-Respondent.

- - - - -

Total Safety Consulting, LLC,
Third Third-Party Plaintiff-Respondent,

-against-

Breeze National, Inc.,
Third Third-Party Defendant-Respondent.

_____

French & Casey, LLP, New York (Douglas R. Rosenzweig of counsel), for appellants.

Zeitlin & Zeitlin P.C., Brooklyn (Nathan Belofsky of counsel), for Janina Wilk, respondent.

Law Office of Steven G. Fauth, LLC, New York (Kim H. Townsend of counsel), for A.C.T. Abatement Corporation, respondent.

Gruvman Giordano & Glaws, New York (Charles T. Glaws of counsel), for Total Safety Consulting, LLC, respondent.

Order, Supreme Court, New York County (George J. Silver, J.), entered December 22, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment as to liability under Labor Law § 240(1) against defendants/third-party plaintiffs Columbia University, the Trustees of Columbia University in the City of New York (collectively, Columbia) and Bovis Lend Lease, LMB, Inc. (Bovis); denied the branch of Columbia and Bovis's cross motion for summary judgment dismissing plaintiff's claims under Labor Law §§ 200, 240(1) and 241(6); denied the branch of Columbia and Bovis's cross motion seeking summary judgment on Bovis's claim for contractual indemnification against defendant/third-party defendant/second third-party/fourth-party plaintiff A.C.T. Abatement Corporation (ACT); denied the branch of Columbia and Bovis's cross motion seeking summary judgment on their common-law

indemnification and contribution claims against ACT; denied the branch of Columbia and Bovis's cross motion seeking summary judgment on their claims for contribution and contractual and common-law indemnification against defendant/second third-party/fourth-party defendant/third third-party plaintiff Total Safety Consulting, LLC (Total Safety); and granted Total Safety's cross motion for summary judgment dismissing all claims, cross claims, and counterclaims against it; and order, same court and Justice, entered September 27, 2016, which, upon reargument, granted ACT's cross motion for summary judgment dismissing all claims against it, thereby effectively denying both Columbia and Bovis summary judgment on their contractual indemnification claim against ACT, and otherwise adhered to the prior order, unanimously modified, on the law, to grant the branch of Columbia and Bovis's cross motion seeking summary judgment on their contractual indemnification claim against ACT, and deny ACT's cross motion for summary judgment dismissing that claim, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered September 27, 2016, which denied the motion by third third-party defendant Breeze National, Inc. to sever ACT's third-party action against Breeze, unanimously dismissed, without costs, as abandoned.

Plaintiff's decedent fell off an exterior scaffold and through a third floor window opening to an elevator shaft, suffering fatal injuries.

The motion court correctly granted plaintiff summary judgment on her Labor Law § 240(1) claim against Columbia (the building owner) and Bovis (the construction manager). It is uncontested that the scaffolding lacked a guardrail on the side adjacent to the window opening through which decedent fell (*see Celaj v Cornell*, 144 AD3d 590, 590 [1st Dept 2016]; *Crespo v Triad, Inc.*, 294 AD2d 145, 146 [1st Dept 2002]; *Barnaby v A. & C. Props.*, 188 AD2d 958, 959 [3d Dept 1992]). Given this violation of the Labor Law, decedent's alleged failure to tie his lanyard to the scaffold is not the sole proximate cause of his fall (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Guaman v 1963 Ryer Realty Corp.*, 127 AD3d 454, 455 [1st Dept 2015]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]).

Given the grant of partial summary judgment on plaintiff's Labor Law § 240(1) claim, Columbia and Bovis's arguments regarding plaintiff's Labor Law §§ 200 and 241(6) claims are academic (*Cronin v New York City Tr. Auth.*, 143 AD3d 419, 420 [1st Dept 2016]).

Columbia and Bovis are entitled to summary judgment on their

contractual indemnification claim against ACT, based on paragraph seven of ACT's contract with Breeze, which provides for indemnification for claims arising out of ACT's work even if ACT is not negligent (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *see Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]). The accident arose out of ACT's work, since ACT removed the window through which decedent fell (*see Murphy v Columbia Univ.*, 4 AD3d 200, 203 [1st Dept 2004]; *see also Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 274 [1st Dept 2007]). Given the foregoing, we need not reach Columbia and Bovis's claims against ACT for common-law indemnification and contribution (*see McGurk v Turner Constr. Co.*, 127 AD2d 526, 530 [1987]). In any event, the motion court correctly dismissed those claims (*see Martinez v 342 Prop. LLC*, 89 AD3d 468, 469 [1st Dept 2011]).

In the absence of evidence of Total Safety's negligence, the motion court correctly granted Total Safety summary judgment dismissing Columbia and Bovis's claims for contribution and for contractual and common-law indemnification, all of which require a finding of negligence (*see Martinez*, 89 AD3d at 469). To the extent that Columbia and Bovis argue that Total Safety negligently performed its contract with Columbia, "[c]laims based on negligent or grossly negligent performance of a contract are

not cognizable" (*Kordower-Zetlin v Home Depot U.S.A., Inc.*, 134 AD3d 556, 557 [1st Dept 2015] [internal quotation marks omitted]).

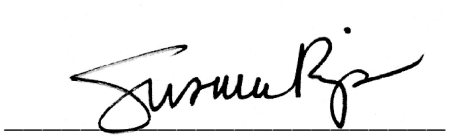
We have considered Columbia and Bovis's remaining arguments and find them unavailing.

M-2014 ***Janina Wilk v Columbia University***

Motion to strike portions of brief withdrawn pursuant to signed stipulation.

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

ENTERED: MAY 16, 2017



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Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4011 The People of the State of New York, Ind. 607/15
Respondent,

-against-

Chad Piersig,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

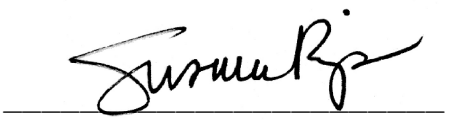
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Melissa Jackson, J.), rendered October 27, 2015,

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: MAY 16, 2017



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

Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4012 Amanda Lerner, Index 159038/12
Plaintiff-Respondent,

-against-

Friends of Mayanot Institute, Inc., et al.,
Defendants-Respondents-Appellants,

Tannenbaum Chabad House,
Defendant-Appellant-Respondent.

_____

Nicoletti Gonson Spinner LLP, New York (Benjamin N. Gonson of counsel), for appellant-respondent.

Wade Clark Mulcahy, New York (Peter A. Luccarelli III of counsel), for respondents-appellants.

Condon & Associates, PLLC, Nanuet (Laura M. Catina of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered October 28, 2016, which, insofar as appealed from as limited by the briefs, denied defendant Tannenbaum Chabad House's (Tannenbaum) motion to dismiss for lack of personal jurisdiction and denied Tannenbaum's motion and defendants Friends of Mayanot Institute, Inc., and Mayanot Institute of Jewish Studies' (together Mayanot) cross motion for summary judgment insofar as they sought dismissal of the negligence and breach of contract claims, and all cross claims, unanimously modified, on the law,

to grant defendants' summary judgment motions, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing all claims in this action.

The record evidence supports the exercise of jurisdiction over Tannenbaum pursuant to CPLR 302(a)(1), under the theory that Tannenbaum transacted business in New York, through its employee, who regularly met with tour participants at JFK Airport for an orientation (*see Front, Inc. v Khalil*, 103 AD3d 481, 482 [1st Dept 2013], *affd* 24 NY3d 713 [2015]; *New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 464 [1st Dept 2012]).

Nevertheless, defendants are entitled to summary judgment. Even assuming that defendants had a duty to monitor the adult plaintiff and prevent her from engaging in excessive drinking, there was no reasonable action that they could have taken to prevent her from being assaulted by the young men whom she met and socialized with in a hotel bar and who undisputedly drugged her and subsequently assaulted her. The record evidence, including the testimony of plaintiff's roommate, shows that plaintiff voluntarily left the bar with one of the men, with no sign that she was incapacitated. Defendants had no duty to protect plaintiff against an unforeseeable criminal act, as they had no notice of prior similar acts (*see Brandy B. v Eden Cent.*

School Dist., 15 NY3d 297, 302 [2010]). In addition, under the circumstances presented, there is "no non-speculative basis for finding that any greater level of supervision than was provided would have prevented" the unforeseeable criminal assault, warranting dismissal of plaintiff's negligence claim (*Emmanuel B. v City of New York*, 131 AD3d 831, 833 [1st Dept 2015]).

Dismissal of the breach of contract claim is also warranted, as plaintiff has failed to point to any contractual provision in which any defendant undertook to protect her "at all times."

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

ENTERED: MAY 16, 2017

CLERK

Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4013-
4014-
4015 Index 157861/14

The Bank of New York Mellon
Trust Company, N.A., formerly
know as The Bank of New York
Trust Company, N.A., etc.,
Plaintiff-Respondent,

-against-

John D. Claypoole,
Defendant-Appellant,

New York City Parking Violations Bureau,
et al.,
Defendants.

_____

Rosenberg and Steinmetz P.C., Valley Stream (Rachelle Rosenberg of counsel), for appellant.

Eckert Seamans Cherin & Mellott, LLC, White Plains (Riyaz G. Bhimani of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan M. Kenney, J.), entered August 15, 2016, which, inter alia, denied defendant John D. Claypoole's motion for summary judgment dismissing the complaint as against him, and granted plaintiff's motion for summary judgment declaring the "first mortgage" a valid lien and directing that the satisfaction of mortgage be vacated and expunged, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered May

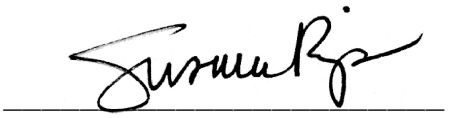
31, 2016 and June 1, 2016, unanimously dismissed, without costs, as subsumed in the appeal from the order and judgment.

The satisfaction of mortgage was void ab initio, because the party that filed it had already assigned away its interest under the mortgage. Consequently, this action seeking to vacate the satisfaction of mortgage pursuant to RPAPL article 15 is not time-barred under CPLR 213(6) (*see Faison v Lewis*, 25 NY3d 220, 224 [2015]; *see also Riverside Syndicate, Inc. v Munroe*, 10 NY3d 18, 24 [2008]).

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

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

ENTERED: MAY 16, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4016 Kuni Chen, Index 157055/15
Plaintiff-Appellant,

-against-

Donald R. Daly, et al.,
Defendants-Respondents.

_____

Kuni Chen, appellant pro se.

Winget, Spadafora & Schwartzberg, LLP, New York (Dianna D. McCarthy of counsel), for respondents.

_____

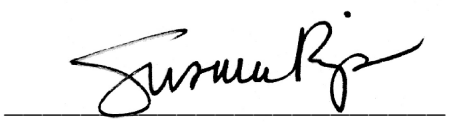
Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about January 19, 2016, which granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion for partial summary judgment, unanimously affirmed, without costs.

We affirm the dismissal of the complaint, albeit on different grounds than the motion court cited. Plaintiff failed to allege that defendants' purportedly negligent and fraudulent real estate appraisal, used for the purposes of settling a divorce action, caused him to overpay to buy out his property (*see e.g. Laub v Faessel*, 297 AD2d 28, 30-31 [1st Dept 2002]).

Despite his objections to the appraisal, plaintiff utilized it in acceding to the appraisal's valuation in a stipulation to settle the divorce action.

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

ENTERED: MAY 16, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4017 The People of the State of New York, Ind. 1440/14
Respondent,

-against-

Kevin Barton,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr. J.), rendered May 28, 2015, convicting defendant, after a jury trial, of robbery in the second degree (two counts) and robbery in the third degree, and sentencing him, as a second felony offender, to an aggregate term of five years, unanimously modified, on the law, to the extent of vacating the third-degree robbery conviction and dismissing that count, and otherwise 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]). We find no reason to disturb the jury's credibility determinations or its evaluation of the surveillance videotape depicting this shoplifting that escalated

into a robbery. The evidence showed that defendant and his accomplices used force against a store employee in order to retain possession of stolen merchandise. Defendant used force for that purpose personally, as well as being accessorially liable (*see* Penal Law § 20.00) for the use of such force by the others, even if the intent to use force in a joint effort to retain the merchandise arose spontaneously during the theft, rather than being planned in advance (*see People v Hudson*, 91 AD3d 489 [1st Dept 2012], *lv denied* 18 NY3d 995 [2012]). The evidence also supports the inference that although defendant surrendered some of the merchandise, he was aware that he was fleeing with the balance of it still in his bag.

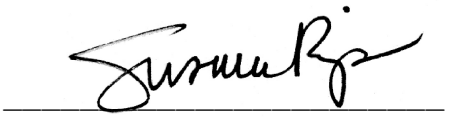
Defendant's challenge to the court's response to a hypothetical question posed by the deliberating jury is unpreserved and we decline to review it in the interest of justice. Although defense counsel proposed a response, a colloquy ensued in which the court explained its inability to answer the question as written, and counsel clearly acquiesced in the court's decision to ask the jury for clarification (*see People v Morales*, 137 AD3d 576, 577 [1st Dept 2016], *lv denied* 28 NY3d 972 [2016]). As an alternative holding, we find that the court responded meaningfully to the jury's note when it informed

it that its question was ambiguous and needed to be reformulated (*see People v Stokes*, __AD3d__, 2017 NY Slip Op 02897 [1st Dept 2017]; *People v Padua*, 297 AD2d 536, 537-539 [1st Dept 2002], *lv denied* 99 NY2d 562 [2002]). We reject defendant's arguments that the question needed no clarification, and that the court effectively refused to answer it. The jury neither rephrased its question, nor advised the court that it was unable to do so, and there is no indication that defendant was prejudiced by the court's response.

As the People concede, the third-degree robbery count should be dismissed as an inclusory concurrent count.

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

ENTERED: MAY 16, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4018-
4019 Index 650055/15

BP 399 Park Avenue LLC,
Plaintiff-Appellant,

-against-

Pret 399 Park, Inc., et al.,
Defendants-Respondents.

_____

Cozen O'Conner, New York (Menachem J. Kastner of counsel), for appellant.

Davis & Gilbert LLP, New York (Howard J. Rubin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about August 1, 2016, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing the second, fourth, and sixth causes of action as against defendant Pret A Manger (USA), Limited (Pret Parent), and denied plaintiff's cross motion for summary judgment on those causes of action and dismissing defendants' affirmative defenses, unanimously modified, on the law, to deny defendants' motion, and to grant plaintiff's motion as to the first, third, fourth, and fifth affirmative defenses and so much of the second affirmative defense as alleges waiver, and otherwise affirmed, without costs.

Plaintiff is the successor in interest to nonparty Citibank

N.A., as landlord under a lease with defendant Pret 399 Park, Inc. (Pret 399) – a wholly owned subsidiary of Pret Parent – as tenant. Plaintiff is correct that Pret Parent was Pret 399's assignee by operation of law (*see Mann v Munch Brewery*, 225 NY 189, 193 [1919]). Defendants did not dispute that Pret Parent – as opposed to Pret 399 – was the entity operating a café at the premises or that Pret Parent paid the rent (*see id.*). However, once Pret Parent surrendered possession of the premises, the privity of estate between it and plaintiff ceased to exist, and it no longer had to pay rent (*see id.* at 195). Plaintiff seeks rent only for the period after defendants surrendered possession. Thus, Pret Parent's liability depends on whether plaintiff can succeed on a theory of piercing the corporate veil of Pret 399.

To the extent the motion court required a showing of fraud to pierce the corporate veil, it erred (*see e.g. Lederer v King*, 214 AD2d 354 [1st Dept 1995]; *Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014]). However, Pret Parent's decision that Pret 399 would stop paying rent and breach the lease constitutes wrongdoing sufficient to pierce the corporate veil (*see Simplicity Pattern Co. v Miami Tru-Color Off-Set Serv.*, 210 AD2d 24 [1st Dept 1994]). The court also erred to the extent it ruled that Pret Parent could not be held liable

because it was not a signatory to the lease (*see A.W. Fiur Co. v Ataka & Co.*, 71 AD2d 370 [1st Dept 1979]).

In accordance with the foregoing, the first affirmative defense (failure to state a cause of action) and the fourth affirmative defense (the allegation that plaintiff's damages were caused solely by the acts and omissions of Pret 399, not by those of Pret Parent) should be dismissed. As to the third affirmative defense (plaintiff's failure to mitigate its damages), plaintiff was under no obligation to relet, or attempt to relet, abandoned premises (*Holy Props. v Cole Prods.*, 87 NY2d 130 [1995]). The fifth affirmative defense, which alleges that the claims are barred because plaintiff has been compensated by a letter of credit provided under article 31 of the lease, should be dismissed, because the letter of credit does not cover all of the rent remaining until the expiration of the lease. Nothing in article 31 indicates that the letter of credit is plaintiff's sole remedy; on the contrary, section 17.1(B) says that in the event of a breach by the tenant, the landlord has "the right to invoke any other remedy allowed by law or in equity."

The court correctly denied plaintiff's cross motion for summary judgment on its claims against Pret Parent. The affidavit that defendants submitted in reply on their motion and

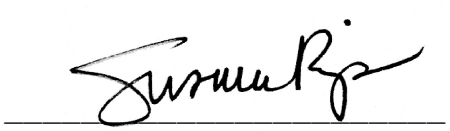
in opposition to plaintiff's cross motion – which should be disregarded on the motion (*see e.g. TrizecHahn, Inc. v Timbil Chiller Maintenance Corp.*, 92 AD3d 409, 410 [1st Dept 2012]) but may be considered in opposition to the cross motion – raises a triable issue of fact as to whether Citibank (plaintiff's predecessor) knew that it was contracting with an assetless entity (Pret 399) and could not recover against Pret Parent (*see e.g. Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 12-13 [1st Dept 2016]).

For the same reason, the court correctly refused to dismiss so much of the second affirmative defense as alleges estoppel; the affidavit raises a triable issue of fact as to whether Citibank received a benefit (a larger than usual security deposit) in exchange for entering into a lease with an assetless entity. However, so much of the defense as alleges waiver should be dismissed since defendants submitted no evidence of Citibank's

intent, such as an affidavit or deposition testimony by a Citibank employee, to relinquish its right to pursue Pret Parent (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]).

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

ENTERED: MAY 16, 2017



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Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4020 In re Ousmane D.,
Petitioner-Appellant,

-against-

Halimatou B.,
Respondent-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

_____

Order, Family Court, Bronx County (John J. Kelley, J.), entered on or about August 26, 2015, which, among other things, denied petitioner father's petition for sole legal and physical custody of the parties' minor child, and granted respondent mother's cross petition for custody and relocation, with parenting time to the father, unanimously affirmed, without costs.

Family Court's determination that the child's best interests would be served by awarding sole legal and physical custody of the child to the mother and allowing the mother to relocate with the child to the Gambia has a sound and substantial basis in the record (*Eschbach v Eschbach*, 56 NY2d 167 [1982] [custody]; *Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996] [relocation]; *see Matter of David J.B. v Monique H.*, 52 AD3d 414, 415 [1st Dept

2008]; *see also Matter of Alaire K.G. v Anthony P.G.*, 86 AD3d 216, 219 [1st Dept 2011]). Where, as here, Family Court had the benefit of a full evidentiary hearing, and its determination rests largely on the witnesses' demeanor and the credibility of their testimony, "its findings must be accorded the greatest respect" (*Matter of Elissa A. v Samuel B.*, 123 AD3d 638, 639 [1st Dept 2014] [internal quotation marks omitted]).

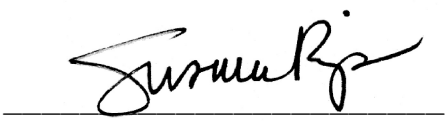
The evidence adduced at the hearing established that the mother has been the child's primary caretaker since his birth, and that the father played, at best, a peripheral role in the child's life. After moving out of the parties' apartment when the child was three months old, the father did not have any contact with him again until he was two years old. Even then, visitation was sporadic. When the child was almost three years old, the mother, who is originally from West Africa, moved with the child to the Gambia, where she has family, including the child's grandmother, living close by. As the court noted, at the time of the hearing, the child was living in the Gambia in a stable, loving home with the mother, his stepfather, and his half brother; he had his own bedroom and bathroom, and ample room to play; he attended a respected international school; and, unlike in New York, the mother had a work schedule that allowed her to

spend significant time with her children. The father's claims that the mother tried to alienate him from the child are not supported by the record.

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

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

ENTERED: MAY 16, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4021 In re Mohamed T. Index 530565/16

- - - - -

Metropolitan Hospital,
Petitioner-Respondent,

-against-

Mohamed T.,
Respondent-Appellant.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Maura M. Klugman of counsel), for appellant.

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

_____

Appeal from order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about September 14, 2016, which granted petitioner's request for respondent's continued retention for a period not to exceed 15 days from the date of the order, unanimously dismissed, without costs, as moot.

Respondent challenges the continuation of his civil commitment under Mental Hygiene Law § 9.39, asserting a failure of proof that he posed a substantial risk of physical harm to himself or others or that violent behavior placed others in reasonable fear of serious physical harm (*see Matter of Rueda v Charmaine D.*, 17 NY3d 522, 529-530 [2011]).

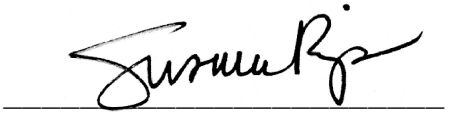
However, subsequent to the continuation of the commitment,

respondent was released, thereby mooting the controversy. The exceptions to the mootness doctrine are inapplicable because respondent failed to demonstrate that a continuation of a civil commitment under Mental Hygiene Law § 9.39, based on inadequate evidence, was likely to recur (*see Matter of Young [Jacobi Med. Ctr.]*, 124 AD3d 443, 444 [1st Dept 2015]).

Nonetheless, were we to reach the merits here, we note that petitioner Metropolitan Hospital failed to prove by clear and convincing evidence that respondent posed a substantial risk of physical harm to himself or others or that his behavior placed others in reasonable fear of physical harm. In particular, the trial court erroneously in relied on her observations of a non-testifying family member to conclude that respondent should remain in the hospital.

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

ENTERED: MAY 16, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4022 Norman D. Bloom, M.D., Index 150949/15
Plaintiff-Appellant,

-against-

NYU Langone Medical Center,
et al.,
Defendants-Respondents.

_____

Nathan L. Dembin & Associates, P.C., New York (Nathan L. Dembin of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Ricki E. Roer of counsel), for respondents.

_____

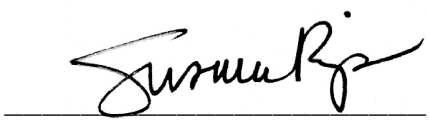
Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered March 9, 2016, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff, who had no express contract, cannot avoid the grievance process set forth in Public Health Law § 2801-b by casting his claims arising from the non-renewal of his admitting

privileges at defendant hospitals as contract or tort claims or claims for damages only (*Lobel v Maimonides Med. Ctr.*, 39 AD3d 275, 277 [1st Dept 2007]).

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

ENTERED: MAY 16, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4023 The People of the State of New York, Ind. 1820/07
Respondent,

-against-

Luis Rodriguez,
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 (Kelly L. Smith of counsel), for respondent.

_____

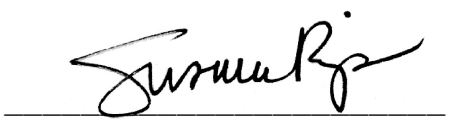
Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered February 19, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court 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 were outweighed by the seriousness of the underlying crime, which consisted of repeated sexual abuse of a five-year-old child.

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

ENTERED: MAY 16, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4024 In re MTA Bus Company, Index 160602/15
Petitioner,

-against-

New York State Division of
Human Rights, etc.,
Respondent.

_____

Steve S. Efron, New York, for petitioner.

Caroline J. Downey, New York State Division of Human Rights, Bronx (Aaron M. Woskoff of counsel), for respondent.

_____

Determination of respondent, dated August 19, 2015, which, in this employment discrimination proceeding brought pursuant to Executive Law § 298 (transferred to this Court by order of the Supreme Court, New York County [Geoffrey D. Wright, J.], entered April 13, 2016), after a hearing, found that petitioner's policy of disqualifying all employees with bipolar disorder from working as a bus operator was an unlawful discriminatory act, and ordered petitioner to pay a civil fine and penalty of $30,000, unanimously annulled, and the complaint dismissed, without costs.

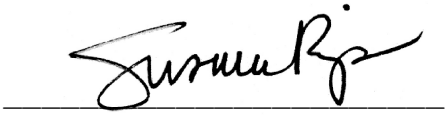
The record demonstrates, and respondent determined, that the complainant, a bus operator, was placed on restricted duty for reasons unrelated to his alleged disability of bipolar disorder, namely, his reckless driving record, and that petitioner was

justified in terminating him based on his conduct in vandalizing three buses in passenger service. Respondent awarded the complainant no damages. However, rather than dismissing the complaint, it proceeded to conclude that "[b]ecause [petitioner] has a blanket policy disqualifying all employees with bipolar disorder from being appointed to, or remaining in, the Bus Operator position and passenger service, and because [petitioner] does not individually assess the ability of those with bipolar disorder to perform the essential functions of the job, [petitioner's] policy violates the Human Rights Law." In making this determination without notice to petitioner that its policies were going to be reviewed, respondent denied petitioner its right to due process. While, upon its own motion, respondent may investigate and file a complaint alleging discriminatory practices (Executive Law §§ 295[6][b]; 297[1]), it did not do so here. It could not, while investigating the bus operator's complaint, which was filed solely on his behalf, find that he had not been discriminated against "and at the same time, make broad

findings and impose broad sanctions pertaining to petitioner['s] over-all operations" (*Hillside Hous. Corp. v State Div. of Human Rights*, 44 AD2d 539, 539 [1st Dept 1974]).

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

ENTERED: MAY 16, 2017



CLERK

Sweeny, J.P., Renwick, Andrias, Feinman, Gesmer, JJ.

4026N Richard Burbridge, et al., Index 651495/10
Plaintiffs-Appellants,

-against-

Soho Plaza Corp., et al.,
Defendants-Respondents.

_____

Spiegel Legal, LLC, Florida (Steven J. Spiegel of counsel), for appellants.

Gartner & Bloom PC, New York (Todd S. Shaw of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered May 17, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion to renew the denial of their motion to hold defendants in contempt, vacate the note of issue, and grant summary judgment, unanimously affirmed, without costs.

Plaintiffs assert that additional facts came to light after entry of the order denying a finding of contempt, including that, even though defendants' architect had attested previously that he had produced all relevant documents in his possession, he actually had six pages of relevant engineering reports in his possession which were ultimately produced. Supreme Court providently exercised its discretion in denying renewal. Upon

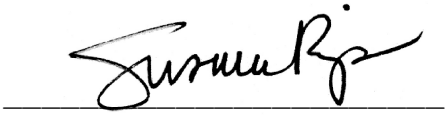
renewal, plaintiffs improperly changed legal theories as to why defendants should be held in contempt (*see Matter of Kopicel v Schnaier*, 145 AD3d 599, 599-600 [1st Dept 2016]). In addition, even if the architect was defendants' agent, it is not clear that defendants violated the prior order when they did not submit an affidavit on his behalf (*Casler v Casler*, 131 AD3d 664, 665 [2d Dept 2015]; *see also Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 402 [1st Dept 1996]). Further, plaintiffs have not actually shown that they were prejudiced by any delay.

In addition, Supreme Court properly refused to vacate the note of issue (22 NYCRR 202.21[e]) and/or waive the time limits for summary judgment (CPLR 3212[a]), as plaintiffs failed to make a showing of "good cause" for either relief. Under the instant circumstances, Rowland's production of six pages of engineering materials and Gibble's deposition testimony post-note of issue do not constitute unusual or unanticipated circumstances (*see* 22 NYCRR 202.21[d]; *Allen v Hiraldo*, 144 AD3d 434, 435 [1st Dept

2016]; *Price v Bloomingdale's*, 166 AD2d 151, 151-152 [1st Dept 1990]). In light of the foregoing, this Court need not reach the merits of plaintiffs' summary judgment motion.

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

ENTERED: MAY 16, 2017



CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4028 Claudia Evart, Index 161123/15
Plaintiff-Appellant,

-against-

Stefano Terzi, et al.,
Defendants-Respondents.

_____

Ogen & Sedaghati, P.C., New York (Eitan A. Ogen of counsel), for appellant.

Crisci Wesier & McCarthy, New York (Erin M. Crowley of counsel), for respondents.

_____

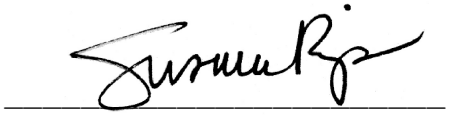
Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered January 4, 2017, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff made a prima facie showing in support of her motion for partial summary judgment by averring that she was lawfully in the crosswalk with the pedestrian signal in her favor when she was struck by defendants' car. However, in opposition, defendants presented alternative theories as to the cause of the

accident, thereby raising triable issues that preclude partial summary judgment (*see Mitchell v McGuire Co., Inc.*, 151 AD2d 355, 356 [1st Dept 1989]).

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

ENTERED: MAY 16, 2017



CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4029 In re Jose M. C.,
Petitioner-Appellant,

-against-

Liliana C.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Ira Treuhaft, New York, for respondent.

Jay A. Maller, New York, attorney for the child.

_____

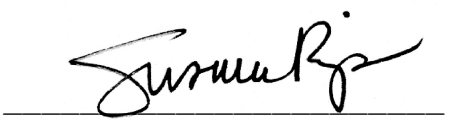
Order, Family Court, New York County (Carol Goldstein, J.), entered on or about April 15, 2016, which dismissed the father's petition to modify a final visitation order, unanimously affirmed, without costs.

The father has failed to establish that there has been a change of circumstances such that a modification would be in the child's best interests (*Matter of Luis F. v Dayhana D.*, 109 AD3d 731 [1st Dept 2013]). While the father maintains that he has relocated to New York, the trial court's finding to the contrary is entitled to deference. Regardless, the father does not have a residence of his own in Manhattan but sleeps on his mother's couch. The father has also failed to show that expanding visits would be in the child's best interests. The trial court found

that the child's needs were being well met in the mother's primary care and that the change proposed by the father would virtually eliminate all of the mother's leisure time with the child. Moreover, the child herself, who was 13 at the time of the hearing, does not wish to see the father more frequently (*see Matter of Liliana C. v Jose M.C.*, 128 AD3d 496 [1st Dept 2015]).

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

ENTERED: MAY 16, 2017



CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4030-
4031 Index 114295/11

Thomas Summer, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Ruckus 85 Corp.,
Defendant-Respondent,

Charles Grooms, et al.,
Defendants,

Yvette Georges Deeton,
Defendant-Appellant.

_____

David E. Frazer, New York (James B. West of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for respondents-appellants.

Litchfield Cavo LLP, New York (Michael R. L'Homme of counsel), for respondent.

_____

Judgment and order and judgment (one paper), Supreme Court, New York County (Kathryn E. Freed, J.), entered September 3, 2015, to the extent appealed from as limited by the briefs, granting plaintiffs' cross motion for summary judgment on their first cause of action, denying defendant Yvette Georges Deeton's motion to dismiss the first cause of action, denying Deeton's motion for summary judgment as to her first counterclaim, and dismissing the complaint against defendant Ruckus 85 Corp.,

unanimously modified, on the law, to deny Ruckus's motion to dismiss the complaint against it, and otherwise affirmed, without costs. Appeals (Grooms defendants) from aforementioned judgment and order and judgment (one paper), unanimously dismissed, without costs, as abandoned.

It is undisputed that the December 16, 1998 amendments to the corporation's bylaws and certificate of incorporation required a legend on the stock certificates concerning the lack of a board of directors and the supermajority requirements for a quorum and to transact corporate business, which was never included on the stock certificates provided to three of the named plaintiffs, in violation of Business Corporation Law §§ 620 (b) and 616 (c). Accordingly, the court properly refused to apply the amendments (*see Model, Roland & Co v Industrial Acoustics Co.*, 16 NY2d 703, 705 [1965]; *Matter of Rye Psychiatric Hosp. Ctr.*, 66 NY2d 333, 337-338 [1985]).

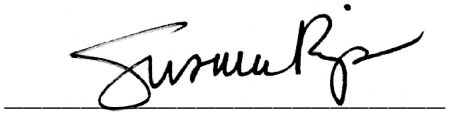
The corporation was a necessary party to the derivative claims since any recovery on those claims is for its benefit (*see*

Tobias v Tobias, 192 AD2d 438, 440 [1st Dept 1993]).

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

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

ENTERED: MAY 16, 2017



CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4032 King Range, Index 15144412/13
Plaintiff, 400162/13
400194/13

-against-

The Trustees of Columbia University
in the City of New York, et al.,
Defendants.

- - - - -

[And A Third-Party Action]

- - - - -

The Trustees of Columbia University
in the City of New York, et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

Total Safety Consulting, L.L.C.,
Second Third-Party Defendant,

City Safety Compliance Corp.,
Second Third-Party Defendant-Appellant.

- - - - -

[And Other Actions]

_____

Babchik & Young, LLP, White Plains (Jack Babchik and Melissa A. Peace of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Mark J. Volpi of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered June 13, 2016, which, inter alia, denied second third-party defendant City Safety Compliance Corp.'s motion to dismiss the second third-party complaint as against it or, in the

alternative, to sever that complaint from the main action, unanimously affirmed, without costs.

The motion court properly found that City Safety's substantial rights would not be prejudiced by its claimed lack of opportunity for meaningful discovery, in view of its ability to review existing discovery and obtain any required additional discovery "while this case makes its way up the trial calendar" (*see Marbilla, LLC v 143/145 Lexington LLC*, 116 AD3d 544 [1st Dept 2014]). Nor, as the motion court found, has City Safety been prejudiced by the delay in the commencement of the second third-party action. The note of issue was filed April 23, 2015. The second third-party complaint was filed September 22, 2015, after it "became evident" to defendants' counsel, on September 9, 2015, when they received expert disclosure from plaintiffs' counsel, that they had a cause of action against City Safety. Even if there was a delay, it did not rise to the level of the knowing and deliberate delay by the defendants in *Skolnick v Max Connor, LLC* (89 AD3d 443 [1st Dept 2011]), on which City Safety relies. Moreover, the issues of law and fact involved in the main and second third-party actions are intertwined, since the inspection of the job site by second third-party defendants was integral to plaintiffs' liability claims (*see Sichel v Community*

Synagogue, 256 AD2d 276 [1st Dept 1998]). It is also likely that almost all the same witnesses will be required (*see Williams v Property Servs.*, 6 AD3d 255, 256 [1st Dept 2004]).

City Safety's remaining contention, that it will be prejudiced by having the issues of indemnity and insurance tried before the jury that will consider the underlying liability claims, is unavailing.

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

ENTERED: MAY 16, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4035 The People of the State of New York, Ind. 4199/14
Respondent,

-against-

Hamadou Barry,
Defendant-Appellant.

_____

Galluzzo & Arnone LLP, New York (Matthew Galluzzo of counsel), for appellant.

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

_____

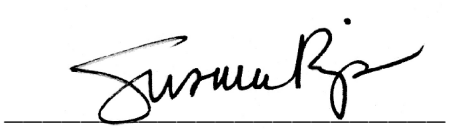
Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered September 10, 2015, convicting defendant, after a nonjury trial, of forcible touching, and sentencing him to a term of one year, unanimously affirmed.

The record supports the court's determination that, notwithstanding an unduly suggestive lineup, the victim had an independent source for an in-court identification of defendant (*see Neil v Biggers*, 409 US 188, 199-200 [1972]; *People v Williams*, 222 AD2d 149, 153 [1st Dept 1996], *lv denied* 88 NY2d 1072 [1996]). The victim recognized defendant as someone she had

encountered numerous times in the area of her work over the course of approximately two years, and she had ample opportunity to view her assailant during the crime, for a period of minutes under good lighting conditions.

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

ENTERED: MAY 16, 2017



CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4036-
4036A Index 600222/10

David Lipman,
Plaintiff-Appellant,

-against-

Ira Shapiro,
Defendant-Respondent.

_____

Judd Burstein, P.C., New York (G. William Bartholomew of counsel), for appellant.

Coti & Sugrue, New York (Stephen R. Sugrue of counsel), for respondent.

_____

Orders, Supreme Court New York County (O. Peter Sherwood, J.) entered March 4, 2016, which denied plaintiff's motion for summary judgment, and granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In a prior action, plaintiff sought to retain the deposit made by nonparties David Kaplan and Marcia Kaplan after they defaulted under purchase agreements and an assignment agreement for two condominium units that plaintiff had received pursuant to a contract with nonparty Slazer Enterprises LLC (*see Kaplan v Madison Park Group Owners, LLC*, 94 AD3d 616 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]). We rejected plaintiff's claim on the

ground that neither plaintiff nor the condominium sponsor ever sent the default notice required under the purchase agreements.

In this action, plaintiff alleges that defendant, Slazer's principal, engaged in fraud and tortiously interfered with the assignment agreement by failing to cause a notice of default to be served on the Kaplans, despite plaintiff's requests, and by falsely promising that he would "fix things" with the Kaplans to make sure they closed, and that he told plaintiff that plaintiff did not need to do anything. Plaintiff further alleges that defendant, for financial motives of his own, prevented the sponsor from sending the default notice and, after the Kaplan deal fell through, purported to renegotiate with plaintiff to buy the units at a discount while secretly negotiating to sell them to another purchaser.

Plaintiff's submissions in support of his motion – his unverified complaint and his own bare affidavits providing no detail about when he or his attorneys requested that a default notice be issued – fail to establish prima facie his entitlement to summary judgment on his claims (*see e.g. Deephaven Distressed Opportunities Tradings, Ltd. v 3V Capital Master Fund Ltd.*, 100 AD3d 505, 506-507 [1st Dept 2012]). An adverse inference that may be drawn against defendant based on his invocation of his

Fifth Amendment rights at deposition cannot substitute for evidence establishing plaintiff's case (*see Steinbrecher v Wapnick*, 24 NY2d 354, 365 [1969]; *Matter of DeBonis v Corbisiero*, 155 AD2d 299 [1st Dept 1989], *lv denied* 75 NY2d 709 [1990], *cert denied* 496 US 938 [1990]).

Defendant demonstrated conclusively his entitlement to summary dismissal of the complaint. There is no evidence, in support of the fraud claim, that plaintiff justifiably relied on defendant's alleged representations that he would fix things with the Kaplans (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Moreover, the alleged promises were based on a future event, not an existing fact (*see Lanzi v Brooks*, 43 NY2d 778 [1977]; *Board of Mgrs. of 147 Waverly Place Condominium v KMG Waverly, LLC*, 129 AD3d 549 [1st Dept 2015]). There is also no evidence that plaintiff or his attorney was precluded from taking direct action against the Kaplans. Nor is there evidence that plaintiff relied on the alleged renegotiations of the apartment purchase or that he was harmed by such reliance.

As to the tortious interference claim, the record shows that defendant did not procure the Kaplans' breach of the assignment agreement (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424

[1996]). By the time of defendant's alleged refusal or failure to serve a default notice, the Kaplans had already breached the agreement by failing to attend the closing. The record also shows that the Kaplans did not perceive their refusal to close as a default. Thus, to the extent the Kaplans' obligations included the obligation to cure their default, it is clear that, even if defendant had served a default notice, they would not have satisfied that obligation (*see Sun Gold, Corp. v Stillman*, 95 AD3d 668 [1st Dept 2012]; *Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]).

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

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

ENTERED: MAY 16, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4037 Miguel Angel Mendoza, et al., Index 20141/13
Plaintiffs-Respondents,

-against-

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

Hunts Point Terminal Market Inc.,
et al, Inc.,
Defendants.

_____

Weiser & McCarthy, New York (David P. Weiser of counsel), for appellants.

Glenn Finley & Associates, Bronx (Glenn Finley of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered August 15, 2016, which denied defendants the City of New York, the New York City Economic Development Corporation, and the New York City Department of Small Business Services' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

As an initial matter, plaintiffs do not challenge defendants' contention that the New York City Economic Development Corporation, and the New York City Department of Small Business Services are not proper parties to this action,

and the complaint should have been dismissed as to these defendants.

We find that the City was entitled to summary judgment because it was an out-of-possession landlord that was not responsible for the repair or maintenance of the area where plaintiff Miguel Angel Mendoza's accident occurred, and plaintiffs failed to submit any evidence to raise an issue of fact as to whether the area where the accident occurred constituted a structural defect (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [1st Dept 2011]).

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

ENTERED: MAY 16, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4038-
4038A The People of the State of New York,
Respondent,

-against-

Tyshawn Riley,
Defendant-Appellant.

Ind. 3721/14
SCI 4092/15

Seymour W. James, Jr., The Legal Aid Society, New York (Rachel L. Pecker of counsel), for appellant.

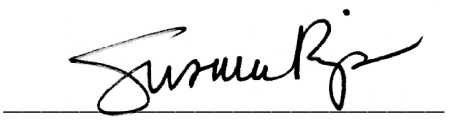
Cyrus R. Vance, Jr., District Attorney, New York (Amanda Katherine Regan of counsel), for respondent.

Appeals having been taken to this Court by the above-named appellant from the judgments of the Supreme Court, New York County, rendered September 3, 2015 (Patricia Nuñez, J.), and September 17, 2015 (Richard Weinberg, J.),

Said appeals 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: MAY 16, 2017



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

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4040 Richard Coon, Index 151674/12
Plaintiff-Respondent,

-against-

Hotel Gansevoort Group, LLC,
Defendant-Respondent,

Security Services Inc., et al.,
Defendants-Appellants.

_____

Lewis Johs Avallone Aviles, LLP, New York (Dylan Braverman of counsel), for appellants.

Sanocki Newman & Turret, LLP, New York (Joshua Fogel of counsel), for Richard Coon, respondent.

Perez & Cariello, Uniondale (Edgar Matos of counsel), for Hotel Gansevoort Group, LLC, respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about November 23, 2015, which, to the extent appealed from as limited by the briefs, denied defendant Security Services Inc.'s (SSI) motion for summary judgment dismissing the amended complaint and all cross claims asserted against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Summary judgment was warranted in this personal injury action, where SSI, an independent security contractor for defendant hotel, established that it did not owe plaintiff a duty

of care (*see Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). The oral contract between SSI and the hotel did not extend, contractually, to plaintiff, a hotel patron who was allegedly assaulted, without warning, by another patron while the assailant was being escorted out of the hotel by an employee of SSI (*see Mitchell v Long Acre Hotel*, 147 AD3d 567, 567 [1st Dept 2017]). Nor did any of the *Espinal* exceptions apply (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138-139, 140 [2002]; *Mitchell*, 147 AD3d at 567).

Given the foregoing determination, and in the absence of any arguments that SSI breached its duty to the hotel, SSI is entitled to summary judgment dismissing the hotel's cross claims against it for contribution and common-law indemnification (*see Schultz v Bridgeport & Port Jefferson Steamboat Co.*, 68 AD3d 970, 972 [2d Dept 2009]).

The motion court providently exercised its discretion in granting SSI, upon "good cause shown," leave to file its belated summary judgment motion (CPLR 3212[a]), where SSI's counsel was not notified that plaintiff had e-filed the note of issue, the parties continued to engage in discovery after the filing of the

note of issue, and plaintiff filed the note of issue more than one month before the deadline stipulated to by the parties (*see Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 108-109 [1st Dept 2006]).

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

ENTERED: MAY 16, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4042 In re Kosciuszko Plaza LLC, Index 161835/15
Petitioner-Appellant,

-against-

New York City Department
of Housing Preservation
and Development,
Respondent-Respondent.

_____

Bernstein Cherney LLP, New York (Hartley T. Bernstein of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Andrea M. Chan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 27, 2016, which, inter alia, granted respondent's motion to dismiss as untimely the petition brought pursuant to CPLR article 78 to annul respondent's determination, dated January 13, 2015, denying petitioner's application for tax benefits under the J-51 Tax Incentive Program, unanimously affirmed, without costs.

Respondent's letter, dated January 13, 2015, informing petitioner that it had determined that petitioner's project was ineligible for J-51 benefits was final and binding on petitioner, and the four-month statute of limitations began to run on petitioner's receipt of it (*see Matter of Best Payphones, Inc. v*

Department of Info. Tech. & Telecom. of City of N.Y., 5 NY3d 30, 34 [2005]; *Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998]). As petitioner acknowledges, the agency's rules do not expressly provide for administrative review of the denial of a petition for J-51 benefits. Nor did petitioner's request for reconsideration and respondent's rejection of the request extend the statutory limitation period (*Matter of Fiore v Board of Educ. Retirement Sys. of City of N.Y.*, 48 AD2d 850 [2d Dept 1975], *affd for the reasons stated* 39 NY2d 1016 [1976]; *see also Matter of Baloy v Kelly*, 92 AD3d 521 [1st Dept 2012]).

In light of the foregoing, we do not address petitioner's remaining arguments.

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

ENTERED: MAY 16, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4043 First Manhattan Energy Corporation, Index 650106/16
Plaintiff-Respondent,

-against-

David Q. Meyer,
Defendant-Appellant.

_____

David Q. Meyer, appellant pro se.

LoPresti & O'Reilly, LLP, New York (Cornelius J. O'Reilly of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 28, 2016, which denied defendant David Q. Meyer's motion to dismiss the complaint as against him, unanimously modified, on the law, to grant the motion as to the breach of contract cause of action, and otherwise affirmed, without costs.

Plaintiff alleges that defendant Meyer failed to release funds that plaintiff deposited into Meyer's lawyer trust account to be held in escrow. Plaintiff had entered into the escrow agreement with a New York law firm, which had designated defendant, a California attorney, as its agent, pursuant to an agreement with defendant. Defendant moved to dismiss on the ground, inter alia, of lack of jurisdiction over him, arguing

that he was a California lawyer with no presence in New York, was not party to the escrow agreement, and did not transact business in New York.

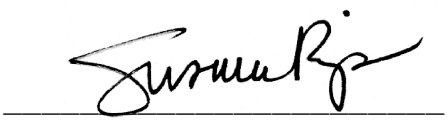
Plaintiff made a sufficient showing of jurisdiction pursuant to CPLR 302(a)(1) to withstand dismissal (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988] ["proof of one transaction in New York is sufficient to invoke jurisdiction"]). The record establishes prima facie that defendant, while not a party to the instant escrow agreement, was designated in the escrow agreement as the "Assigned Escrow Agent[]" into whose account the funds would be deposited, and that he accepted the funds pursuant to the agreement. In so doing, pursuant to his agreement with the New York escrowee, defendant "affected local commerce" in New York by "chang[ing] [plaintiff's] economic position," and in receiving the funds into his California account via wire transfer, he transacted business here by availing himself of modern technology to participate in and confer upon himself the benefit of the transaction while living and physically working elsewhere (*see Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 245 [2d Dept 2005]).

Because defendant was not party to the escrow agreement, the claim alleging breach of the escrow agreement fails to state a

cause of action against him (*see Perrotti v Becker, Glynn, Melamed & Muffly, LLP*, 82 AD3d 495, 499 [1st Dept 2011]). However, the complaint states causes of action against him for breach of fiduciary duty (*see Greenapple v Capital One, N.A.*, 92 AD3d 548, 549 [1st Dept 2012]), conversion (*see Swift Funding, LLC v Isacc*, 144 AD3d 471, 472 [1st Dept 2016]), and unjust enrichment (*see generally Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

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

ENTERED: MAY 16, 2017



CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4044 Jose Cerrato, et al., Index 303440/09
Plaintiffs-Appellants,

-against-

Dee Corporation, et al.,
Defendants,

Sharon Hakmon, et al.,
Defendants-Respondents.

_____

Rosalyn Maldonado, P.C., Valley Stream (Rosalyn Maldonado of counsel), for appellants.

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Eric J. Mandell of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about December 28, 2015, which granted the individual defendants' motion for summary judgment dismissing the action as against them, unanimously affirmed, without costs.

This action alleges negligence in, inter alia, the architectural design and construction of plaintiffs' new 3-family home. The individual defendants established prima facie entitlement to summary judgment by submitting documentary evidence, deposition testimony, and affidavits that demonstrated that they acted in a representative capacity as agents of corporate entities that served legitimate business purposes, and

that stated that defendants did not contract with plaintiffs purchasers in their personal capacities (*see generally Sound Communications, Inc. v Rack & Roll, Inc.*, 88 AD3d 523 [1st Dept 2011]; *Brito v DILP Corp.*, 282 AD2d 320 [1st Dept 2001]).

The burden shifted to plaintiffs, who did not demonstrate that defendants dominated the corporate entities they represented by, inter alia, ignoring corporate formalities and engaging in self-dealing in order to perpetuate a fraud or wrong against plaintiffs (*see TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 90 [1st Dept 2015]; *Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 12-13 [1st Dept 2016]). The record lacks evidence to suggest that either individual defendant dominated the corporation he represented, thus undermining plaintiffs request to pierce the corporate veil (*see Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014]).

Further, insofar as a contractual relationship between the nonparty architectural corporation and plaintiffs was lacking, we find unavailing plaintiffs' contention that they submitted facts to raise a triable issue that they had a near privity relationship with the individual defendant architect who allegedly self-certified the construction work to the local

building department in order to secure a temporary certificate of occupancy. Plaintiffs did not offer evidence as would raise a triable issue that the architect knew or could have known that plaintiffs were involved with the property and were relying upon his alleged certified statements that pertained to the building construction (*see Sykes v RFD Third Ave. 1 Assoc., LLC*, 67 AD3d 162, 165-166 [1st Dept 2009], *affd* 15 NY3d 370 [2010]; *North Star Contr. Corp. v MTA Capital Constr. Co.*, 120 AD3d 1066, 1069-1071 [1st Dept 2014]).

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

ENTERED: MAY 16, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4045N Alwin Dworman, etc., Index 651802/16
Plaintiff-Respondent,

-against-

Carard Management Corp., et al.,
Defendants-Appellants,

Gary Adelman,
Defendant.

_____

Morrison Cohen LLP, New York (Thomas B. Gardner of counsel), for appellants.

Mintz, Levin, PC, New York (Christopher J. Sullivan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 30, 2017, which denied defendants Carard Management Corp. and Dean Palin's motion to stay the action pending arbitration, unanimously affirmed, without costs.

The arbitration demands, which identify the issues to be arbitrated, and the claims asserted in the complaint are not "inextricably intertwined" so as to warrant staying the judicial proceeding lest the resolution of the arbitrable issues narrow or

resolve the non-arbitrable issues (*see County Glass & Metal Installers, Inc. v Pavarini McGovern, LLC*, 65 AD3d 940, 940 [1st Dept 2009] [internal quotation marks omitted]). Moreover, no defendant in this action is a party to the arbitration.

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

ENTERED: MAY 16, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4046N Frank Caesar, Index 157852/13
Plaintiff-Appellant,

-against-

Harlem USA Stores, Inc.,
Defendant-Respondent.

_____

Friedman Sanchez, LLP, Brooklyn (Jeffrey Bloomfield of counsel), for appellant.

Donaldson & Chilliest, New York, (Anthony S. Chilliest of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 18, 2016, which, to the extent appealed from as limited by the briefs, granted defendant's motion to vacate the default judgment against it on the condition that defendant answer or respond within 20 days, unanimously affirmed, without costs.

Plaintiff brought this action against defendant after allegedly slipping and falling down a staircase at a retail clothing store located at 2309 Frederick Douglas Boulevard, New York, New York. The motion court properly granted defendant's motion to vacate the default judgment against it.

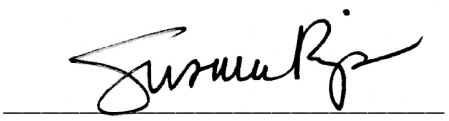
Defendant submitted a reasonable excuse for its default (*see* CPLR 5015[a][1]; *Eugene Di Lorenzo, Inc. v A. C. Dutton Lbr. Co.*,

67 NY2d 138, 141 [1986]) via an affidavit from its president that shows that the wrong address was used for service of process.

Defendant also established a meritorious defense (*see Eugene Di Lorenzo, Inc.*, 67 NY2d at 141; *Stillwell Café, Inc. v 1680 Eastchester Realty Corp.*, 145 AD3d 645, 646 [1st Dept 2016]), as its president denied that it operated a retail clothing store at the address where plaintiff was injured. Moreover, the clothing stores operated by defendant have no staircases, as they are entirely located on the ground floor. Defendant further provided evidence demonstrating that another entity was operating at the address where plaintiff's accident occurred.

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

ENTERED: MAY 16, 2017



CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3145-
3145A Index 651612/10

Ambac Assurance Corporation, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Countrywide Home Loans, Inc., et al.,
Defendants-Respondents-Appellants,

Bank of America Corp.,
Defendant.

- - - - -

The Association of Financial Guaranty Insurers and the Securities Industry and Financial Markets Association,
Amici Curiae.

_____

Patterson Belknap Webb & Tyler LLP, New York (Peter W. Tomlinson and Harry Sandick of counsel), for appellants-respondents.

Simpson Thacher & Bartlett LLP, New York (Joseph M. McLaughlin and Shannon K. McGovern of counsel), for respondents-appellants.

Orrick, Herrington & Sutcliffe LLP, New York (Richard A. Jacobsen of counsel), for the Securities Industry and Financial Markets Association, amicus curiae.

Axinn Veltorp & Harkrider LLP, New York (Donald W. Hawthorne of counsel), for the Association of Financial Guaranty Insurers, amicus curiae.

_____

Orders, Supreme Court, New York County (Eileen Bransten, J.), entered on or about October 27, 2015, modified, on the law, to the extent indicated herein, and otherwise affirmed, without costs.

Opinion by Richter, J.P. All concur.

Order filed.

CORRECTED OPINION - MAY 16, 2017

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rosalyn H. Richter, J.P.
Sallie Manzanet-Daniels
Judith J. Gische
Troy K. Webber
Marcy L. Kahn, JJ.

3145-3145A
Index 651612/10

_____x

Ambac Assurance Corporation, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Countrywide Home Loans, Inc., et al.,
Defendants-Respondents-Appellants,

Bank of America Corp.,
Defendant.

- - - - -

The Association of Financial Guaranty Insurers and the Securities Industry and Financial Markets Association,
Amici Curiae.

_____x

Cross appeals from the orders of the Supreme Court, New York County (Eileen Bransten, J.), entered on or about October 27, 2015, which granted in part and denied in part plaintiffs' and the Countrywide defendants' respective motions for summary judgment.

Patterson Belknap Webb & Tyler LLP, New York (Peter W. Tomlinson, Harry Sandick and Robert P. LoBue of counsel), for appellants-respondents.

Simpson Thacher & Bartlett LLP, New York (Joseph M. McLaughlin, Shannon K. McGovern and David J. Woll of counsel), and Goodwin Procter LLP, New York (Brian D. Hail of counsel), for respondents-appellants.

Orrick, Herrington & Sutcliffe LLP, New York (Richard A. Jacobsen of counsel), for the Securities Industry and Financial Markets Association, amicus curiae.

Axinn Veltorp & Harkrider LLP, New York (Donald W. Hawthorne of counsel), for the Association of Financial Guaranty Insurers, amicus curiae.

RICHTER, J.P.

In this action, Ambac, a financial guaranty insurer, seeks to hold Countrywide liable in connection with 17 residential mortgage-backed securitizations sponsored by Countrywide[1]. Upon Countrywide's application, Ambac issued unconditional and irrevocable insurance policies for the transactions, guaranteeing the payments of principal and interest to the securitizations' investors. In its complaint, Ambac alleges, inter alia, that (i) Countrywide breached various contractual representations and warranties relating to the loans and its business practices; and (ii) Countrywide fraudulently induced Ambac to issue the insurance policies by making false statements about Countrywide's operations and the loans. Both Ambac and Countrywide sought summary judgment on a number of issues. The motion court granted in part and denied in part each of the parties' motions. Both parties now appeal.

We agree with Countrywide that Ambac is required to prove all of the elements of its fraudulent inducement claim, including justifiable reliance and loss causation. The elements of a fraud cause of action are long-settled. To establish fraud, a

[1]Plaintiffs, Ambac Assurance Corporation and the Segregated Account of Ambac Assurance Corporation, are collectively referred to as Ambac. The Countrywide defendants are collectively referred as Countrywide.

plaintiff must show "a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016] [internal quotation marks omitted] [alteration in original]; *see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

The element of justifiable reliance is "essential" to any fraud claim (*Basis Yield Alpha Fund Master v Morgan Stanley*, 136 AD3d 136, 140 [1st Dept 2015]; *see Danann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959] [it is a "fundamental precept" that reliance must be justifiable in order to state a cause of action for fraud]). The Court of Appeals recently reaffirmed, in a fraud action brought by a financial guaranty insurer like Ambac here, the necessity of proving justifiable reliance (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015] ["To plead a claim for fraud in the inducement . . . , [a] plaintiff must allege facts to support the claim that it justifiably relied on the alleged misrepresentations"]).

A plaintiff asserting a fraud claim must also "demonstrate that a defendant's misrepresentations were the direct and proximate cause of the claimed losses" (*Vandashield Ltd v*

Isaacson, 146 AD3d 552, 553 [1st Dept 2017] [internal quotation marks omitted]). "To establish causation, [a] plaintiff must show both that [the] defendant's misrepresentation induced [the] plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which [the] plaintiff complains (loss causation)" (*Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]). "Loss causation is the fundamental core of the common-law concept of proximate cause" and "[a]n essential element" of a fraud claim (*id.*). This Court has repeatedly reaffirmed this principle (*see e.g. Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgt. Co.*, — AD3d —, 2017 NY Slip Op 01644 [1st Dept 2017]; *Gregor v Rossi*, 120 AD3d 447, 448 [1st Dept 2014]; *Nam Tai Elec., Inc. v UBS PaineWebber Inc.*, 46 AD3d 486, 488 [1st Dept 2007]; *Water St. Leasehold LLC v Deloitte & Touche LLP*, 19 AD3d 183, 185 [1st Dept 2005], *lv denied* 6 NY3d 706 [2006]).

There is no merit to Ambac's contention that Insurance Law § 3105 dispenses with the common-law requirement of proving justifiable reliance and loss causation. Nor can that statute be used affirmatively as a basis to recover monetary damages. Insurance Law § 3105 provides that a material misrepresentation "shall avoid [a] contract of insurance" and "defeat recovery thereunder" (Insurance Law § 3105[b][1]). This Court recently

observed that "Insurance Law § 3105 does not, by its terms, create a cause of action, but merely codifies common law [insurance] principles" (*CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC*, 146 AD3d 60, 68 [1st Dept 2016];[2] *see* Kaplan & Gross, Commentaries on the Revised Insurance Law of New York § 149 at 338 [1940] [predecessor statute to section 3105 "restates generally, . . . in codified form, common law principles long established in the field of insurance"]).

At the outset, we note that, in its complaint, Ambac does not even reference Insurance Law § 3105, and pleads only common-law fraudulent inducement. Nevertheless, Ambac contends that its fraud claim is "informed" by that statute. By its express terms, Insurance Law § 3105 has no applicability here. It merely permits an insurer, in the event of a material misrepresentation, to either "avoid [a] contract of insurance" (i.e., pursue the remedy of rescission) or "defeat recovery" under the insurance contract (i.e., defeat an insured's claim for payment) (Insurance Law § 3105[b][1]; *see 128 Hester LLC v New York Mar. & Gen. Ins. Co.*, 126 AD3d 447, 447 [1st Dept 2015] ["a

[2] In *CIFG*, we addressed the limited question of whether a certain entity was an "applicant for insurance" within the meaning of Insurance Law § 3105 (*see* 146 AD3d at 66). The parties there did not raise the issue presented here of whether that statute could be used as an affirmative basis to pursue monetary damages.

material misrepresentation made at the time an insurance policy is being procured may lead to a policy being rescinded and/or avoided"]).

Cases applying Insurance Law § 3105 arise in the context of either a declaratory judgment action by an insurer seeking rescission of an insurance policy or an insurer asserting a defense to an insured's claim for payment under the policy (*see e.g. Arch Specialty Ins. Co. v Kam Cheung Constr., Inc.*, 104 AD3d 599 [1st Dept 2013]; *Rampersant v Nationwide Mut. Fire Ins. Co.*, 71 AD3d 972 [2d Dept 2010]; *Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD3d 412 [1st Dept 2009]; *Vebeliunas v American Nat. Fire Ins. Co.*, 156 AD2d 555 [2d Dept 1989]). Here, Ambac seeks neither to rescind the policies, which are unconditional and irrevocable, nor to defeat a claim by an insured for payment. Instead, Ambac seeks to assert Insurance Law § 3105 as an affirmative claim seeking monetary damages. Under these circumstances, Insurance Law § 3105 is not applicable.[3]

Furthermore, Insurance Law § 3105 contains no language suggesting that the legislature intended to relax the well-

[3] We recognize that *MBIA Ins. Corp. v Countrywide Home Loans, Inc.* (105 AD3d 412 [1st Dept 2013]) interpreted Insurance Law § 3105 differently and found that the plaintiff was not required to establish loss causation to prevail on its fraud claim. We decline to follow that part of the decision.

settled elements of a common-law fraud cause of action. Statutes in derogation of the common law must be strictly construed (*see Artibee v Home Place Corp.*, 28 NY3d 739, 748 [2017]). "The common law is never abrogated by implication, but on the contrary it must be held no further changed than the clear import of the language used in a statute absolutely requires" (*Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457, 465 [1993], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 301[b]). Here, the words "fraud," "justifiable reliance" and "causation" appear nowhere in the statute. Nor does Ambac cite to any statement of legislative intent or legislative history indicating that Insurance Law § 3105 was intended to alter the essential elements of a fraud claim.[4]

The court correctly found that Ambac is not entitled to damages amounting to all claims payments it made or will make under the policies, regardless of whether they arise from a breach or misrepresentation. Although Ambac describes the relief it seeks as compensatory damages, it is no different from rescissory damages to which Ambac is not entitled (*see MBIA Ins.*

[4] For the same reasons, Insurance Law § 3106, which allows an insurer, under certain circumstances, to "avoid an insurance contract" and "defeat recovery thereunder" for a breach of warranty (§ 3106[b]), is not applicable to Ambac's breach of warranty causes of action, and does not alter the elements of a common-law breach of contract claim.

Corp., 105 AD3d at 412 [precluding financial guaranty insurer that has issued irrevocable policies from obtaining rescissory damages]; *Assured Guar. Mun. Corp. v RBS Sec., Inc.*, 2014 WL 1855766, *2, 2014 US Dist LEXIS 63811, *4-5 [SD NY May 8, 2014, No. 13-Civ-2019 (JGK)] ["The plaintiff cannot escape the language of its pleadings by labeling the rescissory damages it seeks as 'compensatory damages'"]).

We are persuaded by the arguments made by amicus curiae Securities Industry and Financial Markets Association that sound policy reasons support our conclusion. Ruling otherwise would inequitably allow Ambac to recoup the money it paid out for loans that complied with all warranties, and for which there were no misrepresentations, but which resulted in default due to the housing market collapse or other risks Ambac insured against. By issuing the irrevocable insurance policies, Ambac accepted the risk that an economic downturn could cause the loans to default and trigger its obligation to pay.

The court improperly found that the "repurchase protocol" is not Ambac's sole remedy for its claims of breaches of various contractual representations and warranties. Section 2.01(l) of the agreements broadly provides that "the remedy with respect to *any defective Mortgage Loan . . . shall be limited* to [the repurchase protocol]" (emphasis added). The plain language of

this provision indicates that the repurchase protocol applies to a breach of any representation or warranty relating to defective loans, and not just those specifically incorporated into section 2.01(l). Ambac cannot avoid the consequences of the sole remedy provision by relying on what it terms "transaction-level" representations about Countrywide's operations and financial condition, because the heart of Ambac's lawsuit is that it was injured due to a large number of defective loans (*see Assured Guar. Corp. v EMC Mtge., LLC*, 39 Misc 3d 1207[A], 2013 NY Slip Op 50519[U], *4-6 [Sup Ct, NY County 2013]). Ambac's reliance on *Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.* (133 AD3d 96 [1st Dept 2015]) is unavailing because the sole remedy provision in that case was narrower than the one here (*id.* at 101).

The motion court should not have dismissed Ambac's sixth cause of action to the extent it seeks reimbursement of certain claims payments. The plain language of Section 3.03(b) of the relevant agreements entitles Ambac to "reimbursement from Countrywide" and "full recourse against Countrywide" for claims paid as a result of Countrywide's failure to abide by the repurchase protocol (*see Syncora Guar. Inc. v EMC Mtge., LLC*, 39 Misc 3d 1211[A], 2013 NY Slip Op 50569[U], *4-6 [Sup Ct, NY County 2013]). Section 3.03(b) makes clear that the sole remedy

provision does not apply to such reimbursement claims.

However, the court correctly found that Section 3.03(c) does not evince an "unmistakably clear" intent to permit Ambac to seek reimbursement for attorneys' fees incurred in its litigation against Countrywide (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]). It cannot be said that the language in that section is "exclusively or unequivocally referable to claims between the parties themselves or support[s] an inference that [Countrywide] promised to indemnify [Ambac] for counsel fees in an action on the [insurance] contract[s]" (*id.*; *see Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 206 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]).

The court erred in interpreting the "No Default" and "No Material Monetary Default" representations and warranties, as a matter of law, to include borrower misrepresentation. "[T]he better course is to hold a trial to inquire into and develop the facts to clarify the relevant legal principles and their application to" these representations and warranties (*Bear Stearns Mtge. Funding Trust 2007-AR2 v EMC Mtge. LLC*, 2014 WL 2469668, *2 ¶ 6 [Del Ch, June 2, 2014, No. 6861-VCL]). Similarly, we find that disputed issues of fact exist with respect to whether the Title Insurance representation and warranty was intended to apply to every loan, including the 1,311

loans under $100,000, and as to whether Countrywide satisfied this representation and warranty with respect to certain loans. Likewise, Ambac has not shown, as a matter of law, that 85 "stated-value loans" were subject to the "Qualified Appraiser" representation and warranty.

Finally, the court correctly found that Countrywide failed to present sufficient evidence on its summary judgment motion to establish that Ambac's alleged purchase of discounted bonds in the securitizations mitigated its losses. In the absence of a more complete record, we decline to render what would essentially be an advisory opinion as to whether, if Countrywide obtains further information about Ambac's alleged purchase of these bonds, it can present this evidence at trial.

Accordingly, the orders of the Supreme Court, New York County (Eileen Bransten, J.), entered on or about October 27, 2015, which granted in part and denied in part plaintiffs' and

the Countrywide defendants' respective motions for summary judgment, should be modified, on the law, to the extent indicated herein, and otherwise affirmed, without costs.

All concur.

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

ENTERED: MAY 16, 2017

CLERK