SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 17, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Friedman, Saxe, Gische, JJ.

16346 Conergics Corporation, et al., Index 653724/12
Plaintiffs-Appellants-Respondents,

-against-

Dearborn Mid-West Conveyor Co., et al.,
Defendants-Respondents-Appellants,

Knox Lawrence International, LLC,
Defendant.

_____

Hunton & Williams LLP, New York (Joseph J. Saltarelli of counsel), for appellants-respondents.

Abbott Nicholson, PC, Detroit, MI (William Gilbride of the bar of the State of Michigan, admitted pro hac vice, of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered June 12, 2015, which denied plaintiffs' motion for summary judgment declaring, upon the fourth cause of action, that they are not obligated to indemnify defendants Dearborn Mid-West Conveyor Co. (Dearborn) and DMW Systems, Inc. (DMW) with respect to a Mexican tax audit of Dearborn for the tax year 2004, and dismissing Dearborn and DMW's counterclaims, and denied Dearborn and DMW's cross motion for summary judgment on their

counterclaims for breach of contract for refusing to provide such indemnification and for a declaration that plaintiffs are obligated to provide Dearborn and DMW with such indemnification, and dismissing plaintiffs' fourth cause of action, unanimously modified, on the law, to grant plaintiffs' motion, and it is declared that plaintiffs have no obligation to indemnify Dearborn and DMW with respect to the aforementioned tax audit, and otherwise affirmed, with costs.

The plaintiffs in this action are Conergics Corporation and its corporate parent, Tomkins Industries, Inc. (TII) (collectively, plaintiffs).[1] Before November 3, 2007, Conergics was the sole shareholder of Dearborn, a vendor of conveyor systems. On November 3, 2007, Conergics, TII and DMW, inter alia, entered into, and closed upon, a stock purchase agreement (the SPA) under which DMW agreed to purchase from Conergics 100% of the shares of Dearborn's issued and outstanding stock. The

[1]Unless otherwise indicated, the facts set forth herein are taken from the Joint Submission of Undisputed Facts that the parties filed with Supreme Court in connection with their respective motions for summary judgment. Although the names of Conergics and TII have been changed since November 3, 2007, this has no bearing on the issues raised by the appeal. For the sake of simplicity, we refer to plaintiffs by their respective former names, as they are identified in the caption of this matter.

SPA provides that it is governed by New York law.[2]

At the time DMW acquired Dearborn from Conergics, Dearborn was the subject of a pending audit by the Mexican tax authority, known as Servicio de Administración Tributaria (the SAT), for the 2004 tax year. This ongoing Mexican tax audit for 2004 (hereinafter, the first audit) was disclosed to DMW in section 2.9 of the disclosure schedule to the SPA. Article 8 ("Tax Matters") of the SPA requires Conergics (and TII, as guarantor of Conergics' indemnity obligations under the SPA) to indemnify DMW with respect to the first audit and with respect to any future tax audit of Dearborn, by any taxing authority, for any period ending on or before the closing date. Specifically, section 8.1(a) of the SPA provides in pertinent part that

> "the Seller [Conergics] shall indemnify the Buyer [DMW] and hold the Buyer harmless from and against . . . all Taxes of the Company [Dearborn] for all taxable periods, or portions thereof, ending on or before the Closing Date in excess of the amount of Taxes reflected in the determination of Net Working Capital (. . . including, without limitation, all Taxes relating to the Tax Audits listed in Section 2.9 of the Disclosure Schedule ('Pre-Closing Taxes')."

Section 8.1(c) of the SPA requires a party seeking indemnification with respect to a tax audit to give the other

---

[2]Defendant Knox Lawrence International, LLC was also a party to the SPA, but has defaulted in this action and is not participating in this appeal.

party "prompt[]" written notice of the commencement of such an audit, but further provides that "a failure to give such notice will not affect" the asserted indemnification right "except to the extent that [the indemnifying party] is actually prejudiced thereby." Section 8.1(c) of the SPA provides:

> "After the Closing Date, each Party to this Agreement (whether the Buyer or the Seller, as the case may be) shall promptly notify the other Party in writing of any demand, claim or notice of the commencement of a Tax Audit (as defined in Section 8.5[b]) received by such Party from any Taxing Authority or any other Person with respect to Taxes for which such other Party is liable pursuant to Article 6 [setting forth the SPA's general indemnification provisions] or this Article 8; provided, however, that a failure to give such notice will not affect such other Party's rights to indemnification under Article 6 or this Article 8 except to the extent that such Party is actually prejudiced thereby. Such notice shall contain factual information (to the extent known) describing the asserted Tax liability and shall include copies of the relevant portion of any notice or other document received from a Taxing Authority or any other Person in respect of any such asserted Tax liability."[3]

Section 13.8 of the SPA designates the recipients, addresses and manner of delivery for any notice required by the agreement.

---

[3]The parties implicitly agree that the clause following the semicolon at the end of the first sentence of section 8.1(c) was intended to provide that the indemnifying party's obligation to indemnify would be unaffected by late notice in the absence of actual prejudice, notwithstanding the presumably inadvertent use of the phrase "such other Party's right to indemnification." We note that tax indemnity obligations under the SPA could run either way, as DMW agreed to indemnify Conergics against any tax liability of Dearborn attributable to a period beginning after the closing date.

Notices to plaintiffs are to be sent to the attention of TII's general counsel at TII's offices in Dayton, Ohio, with a copy to the company's designated outside counsel.

Section 8.5(b) of the SPA grants Conergics the "sole right" to defend any tax audit concerning a period that ended before the closing date. Section 8.5(b) provides in pertinent part:

> "Notwithstanding any other provision in this Agreement, the Seller shall have the sole right to represent the Company's [Dearborn's] interests in any audit, examination or Proceeding by any Taxing Authority ('Tax Audit') with respect to taxable periods or portions thereof ending on or before the Closing Date, including, for the avoidance of doubt, the right to control any such Tax Audit, the right to settle, compromise and/or concede any such Tax Audit and the right to employ counsel of its choice at its expense."

In addition, section 8.5(a) of the SPA requires the parties to "cooperate fully" with each other "in connection with any Tax Audit (as defined in section 8.5[b]) with respect to Taxes," with "[s]uch cooperation [to] include the retention and (upon the other Party's request) the provision of records and information that are reasonably relevant to any such . . . Tax Audit and making employees available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder."

At the time of the closing under the SPA, Dearborn was petitioning the Mexican Tribunal Federal de Justicia Fiscal y

Administrativa (in English, the Federal Tribunal of Fiscal and Administrative Justice) (hereinafter, the Tribunal Federal), a court that reviews the SAT's administrative determinations, to annul, on procedural grounds, the 2004 tax deficiency assessment that the SAT had rendered in the first audit in May 2007. In April 2008, the Tribunal Federal granted Dearborn's petition, resulting in the annulment of the SAT's May 2007 assessment without any ruling on the merits of the substantive issues raised by the first audit. Pursuant to its indemnification obligations under the SPA, Conergics reimbursed Dearborn for the legal fees (approximately US $66,000) the latter had incurred in obtaining the annulment of the tax assessment rendered in the first audit.

On April 19, 2012, the SAT sent a letter to Dearborn announcing its intention to reopen the audit of Dearborn's 2004 tax year (hereinafter, the second audit). The issue that was the basis for the second audit — whether certain expenses for which Dearborn had taken deductions in computing its 2004 taxes were properly deductible before the company had established a lawful domicile in Mexico — was the same issue that had been the basis for the first audit but had not been resolved in the earlier proceeding.

It is undisputed that DMW and Dearborn (collectively, defendants) did not furnish plaintiffs with written notice of the

second audit in the manner specified by section 13.8 of the SPA until January 24, 2014, 21 months after defendants had received notice of the second audit from the SAT in April 2012.[4] In the interim, Dearborn undertook its own defense of the second audit, both in dealing directly with the SAT and in court:

- On May 11, 2012, Dearborn initiated a proceeding in a Mexican federal court, known as an "Amparo," challenging the SAT's constitutional authority to conduct the second audit.

---

[4]Before Supreme Court, defendants argued that they complied with the requirement of section 8.1(c) of the SPA that they "promptly notify" plaintiffs of the second audit in May 2012, through two successive informal communications. Specifically, on May 4, 2012, Dearborn's Mexican outside accountant, Ernesto Mosso Valdez (Mosso), called Gustavo Lopez, the controller of a Mexican indirect subsidiary of TII, and told him about the initiation of the second audit. Thereafter, on May 12, 2012, Lopez sent an email to the assistant corporate secretary of TII, Kathy Sullivan, stating: "I know that Dearborn is not part of Tomkins any more, but for your information I received a call last Friday from the actual accountant telling me that Mexican Tax authorities will review once more the 2004 fiscal year. If Tomkins is still involved in any way please tell me and I will update you on new happenings." In ruling on the parties' respective summary judgment motions, Supreme Court rejected defendants' argument that these communications constituted the notice mandated by the SPA. In that regard, the court noted that Lopez was not an agent of any party to the SPA, that Sullivan was not a proper addressee of contractual notices under section 13.8 of the SPA, and that Lopez's informal email to Sullivan did not contain the information or documents required by section 8.1(c) of the SPA. Although defendants have appealed from the order under review, their brief does not challenge Supreme Court's holding that they failed to "promptly notify" plaintiffs of the second audit as required by the SPA, and that aspect of their appeal has therefore been abandoned (*see Central Laborers' Pension Fund v Blankfein*, 111 AD3d 40, 45 [1st Dept 2013]).

- On May 29, Dearborn's aforementioned Mexican outside accountant, Mosso, responded to the SAT's letter of April 19 and provided the SAT with various categories of documents it had requested.

- On October 31, 2012, the Mexican federal court rejected Dearborn's Amparo challenging the second audit. On November 28, 2012, Dearborn filed an appeal from this ruling.

- On September 13, 2013, the SAT issued an observation letter to Dearborn, setting forth proposed findings of the second audit.

- On October 15, 2013, Dearborn, through Mosso, its outside accountant, responded to the SAT's observation letter, denying that the company owed any taxes for 2004. This four-page response, which was not prepared by legal counsel, did not set forth a statute of limitations defense, but did assert that the SAT was not entitled to audit Dearborn a second time for the same tax year.

- On October 24, 2013, a Mexican federal appellate court affirmed the lower federal court's denial of Dearborn's Amparo the previous year.

- On November 19, 2013, the SAT issued a determination assessing against Dearborn a total amount due of MX $29,666,985.97 (approximately US $2.2 million) in unpaid 2004 taxes, surcharges and fines. This assessment was subject to review upon an administrative appeal (which had to be filed by February 11, 2014) or in an annulment proceeding before the Tribunal Federal.

After the SAT issued its adverse determination on November 19, 2013, defendants allowed two more months to pass before sending plaintiffs a letter, dated January 24, 2014, giving

notice of the second audit, demanding indemnification pursuant to the SPA, and warning that the deadline for an administrative appeal of the SAT's assessment was February 11, 2014 — then less than three weeks away. By letter dated January 30, 2014, plaintiffs, through their counsel, rejected the indemnification demand and declined to assume the defense of the second audit, taking the position that defendants' 21-month delay in giving notice had prejudiced Conergics by depriving it of its right to defend the audit under section 8.5(b) of the SPA. Thereafter, defendants, while maintaining their position that they are entitled to indemnification from plaintiffs, continued their defense of the second audit.[5]

In April 2014, plaintiffs filed an amended complaint in this action, which was then already pending concerning other disputes under the SPA. The amended complaint added a fourth cause of action seeking a declaration that plaintiffs are not obligated to

[5]On February 10, 2014, after plaintiffs rejected defendants' demand for indemnification, defendants filed an administrative appeal of the SAT's November 2013 tax assessment. On April 29, 2014, defendants' administrative appeal was denied and the assessment was confirmed. On August 12, 2014, defendants, through Mexican legal counsel, commenced an annulment proceeding in the Tribunal Federal seeking to overturn the assessment. The initial filing in the annulment proceeding was 146 pages long and included a statute of limitations argument. As of January 2015, when the motions resulting in the order appealed from were made, the annulment proceeding remained pending, and Dearborn, having posted a bond, had not yet paid the tax assessment.

indemnify defendants for the second audit by reason of defendants' failure to provide the notice required by the SPA and the consequent deprivation of plaintiffs' contractual right to control the defense of the audit. In response, defendants asserted three counterclaims relating to the indemnification dispute over the second audit: (1) for breach of plaintiffs' duty to indemnify for pre-closing tax liabilities under Article 8 of the SPA; (2) for breach of Article 6 of the SPA, the agreement's general indemnification provision; and (3) for a declaration that plaintiffs are obligated to indemnify defendants with respect to the second audit under the SPA. After engaging in discovery, the parties made competing motions for summary judgment on plaintiffs' fourth cause of action and defendants' counterclaims, based on a Joint Submission of Undisputed Facts. In addition, defendants submitted an affirmation of a Mexican attorney, Victor L. Bermudez Cancino, Esq. (the Cancino affirmation), opining, as more fully discussed below, that, under Mexican law, Dearborn had not been procedurally precluded from "rais[ing] any fact or issues pertaining to the determination of owed taxes and charges" at the time (January 2014) defendants notified plaintiffs of the second audit and demanded indemnification.

In the order appealed from, Supreme Court denied each side's motion for summary judgment. Initially, as previously noted, the

court held that defendants failed to comply with their obligation under section 8.1(c) of the SPA to "promptly notify" plaintiffs of the second audit, a determination that is not challenged on this appeal. However, the court, agreeing with defendants to the extent they argued that a finding that plaintiffs were "actually prejudiced" by this breach would require evidence of "tangible economic injury due to defendants' late notice," found that "all parties have failed to submit sufficient proof as to whether and to what extent plaintiffs may be actually prejudiced by the delay in notifying them in writing." The court rejected plaintiffs' claim that "actual prejudice is inherent as a matter of law in the denial of plaintiffs' right to control and choose counsel," concluding that plaintiffs were required to "demonstrate some tangible economic injury" to show that defendants' breach of the SPA by denying plaintiffs this right was material. The court also determined that the Cancino affirmation submitted by defendants failed to establish as a matter of law that plaintiffs had not been actually prejudiced by defendants' breaches of the SPA. Both sides have appealed.

We begin our analysis with the observation that the question presented by this appeal is not whether timely notice of the second audit was a condition precedent to plaintiffs' obligation to indemnify defendants with respect to that audit under the SPA.

As plaintiffs acknowledge, the plain language of the SPA precludes any reading of the prompt notice requirement as a condition precedent to the attachment of an obligation to indemnify. Section 8.1(c) expressly provides that lack of prompt notice "will not affect" the parties' respective indemnity rights and obligations "except to the extent that [the indemnitor] is actually prejudiced thereby." Thus, defendants' failure to notify plaintiffs of the second audit until 21 months after it was commenced — a breach of the SPA's notice provision that, to reiterate, is not disputed on this appeal — relieves plaintiffs of their indemnity obligations with respect to the second audit only in the event plaintiffs establish that this breach caused them "actual[] prejudice[]."

By the same token, neither does this appeal involve a dispute over the application of the "no prejudice" rule. Under the "no prejudice" rule — a common-law rule that has been legislatively abrogated as to insurance policies issued since January 17, 2009 (*see* Insurance Law § 3420[a][5], enacted by L 2008, ch 388) — "the notice provision for a primary insurer operates as a condition precedent and . . . the insurer need not show prejudice to rely on the defense of late notice" (*Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 581 [1992] [hereinafter, *Unigard I*], citing *Security Mut. Ins. Co. of N.Y. v*

Acker-Fitzsimons Corp., 31 NY2d 436, 440 [1972]; *see also American Home Assur. Co. v International Ins. Co.*, 90 NY2d 433 [1997] [applying the "no prejudice" rule to excess insurance policies]). As plaintiffs also acknowledge, analytically, the "no prejudice" rule — a rule of construction that is applied to insurance policies that are silent as to the effect of late notice in the absence of prejudice — could not apply to the notice requirement of section 8.1(c) of the SPA, which unequivocally states that lack of prompt notice will not affect any otherwise existing right to indemnification "except to the extent that [the indemnitor] is actually prejudiced thereby." This means that prejudice from late notice is to be demonstrated, not presumed.[6]

What we must determine, therefore, is the standard that plaintiffs must meet to demonstrate that the untimely notice of the second audit that they received caused them actual prejudice, and whether, on this record, that standard has been met. We agree with plaintiffs that, contrary to the view of Supreme Court and the position of defendants, in view of their "sole right"

[6]Since the express terms of the SPA's tax indemnity provision preclude application of the "no prejudice" rule, there is no occasion to consider whether the "no prejudice" rule can have any application to an indemnity provision in a stock or asset purchase agreement, as opposed to an insurance policy.

under the SPA to "control" the defense of the second audit (expressly including the rights to choose counsel and to settle), plaintiffs need not establish "tangible economic injury" to show that they have been actually prejudiced by the late notice.[7] Rather, to establish actual prejudice due to late notice, it suffices for an indemnitor afforded the right to control the defense of an idemnifiable claim to show that it was deprived of its right to exercise that right for a material portion of the proceedings on the claim. We need not plumb the minimum showing this would require because the 21-month period during which Dearborn defended the audit itself without notice to plaintiffs — including the entire pendency of the unsuccessful Amparo proceeding in Mexican federal court and the SAT's completion of its review of the relevant records and rendering of an adverse tax assessment, albeit one subject to administrative appeal and possible judicial annulment — more than meets the standard of a material deprivation of the right to control the defense of the audit. Indeed, this deprivation of plaintiffs' right to control the defense of the second audit constitutes an independent material breach of the SPA relieving plaintiffs of their

[7]Of course, a showing of "tangible economic injury" would establish actual prejudice. Plaintiffs concede, however, that, on this record, they have not proved that the late notice of the second audit caused them "tangible economic injury."

indemnity obligations with respect to this particular audit, without regard to the late notice.

Defendants argue that the standard for determining whether late notice of an indemnifiable claim has caused actual prejudice to the indemnitor should be a showing of "tangible economic injury." This standard is derived from *Unigard Sec. Ins. Co. v North Riv. Ins. Co.* (4 F3d 1049 [2d Cir 1993] [hereinafter, *Unigard II*]), a Second Circuit decision addressing the showing that a reinsurer — which, unlike an insurer, could not invoke the "no prejudice" rule — was required to make to establish prejudice from late notice. Although, as previously discussed, the "no prejudice" rule is also inapplicable in this case, critical differences between the rights with respect to control of the defense of the underlying claim held by a reinsurer, on the one hand, and by plaintiffs under the SPA, on the other hand, persuade us that the holding of *Unigard II*, assuming that it accurately states New York law with respect to reinsurers, has no application to an indemnitor having the "sole right" to control the defense of the claim, as do plaintiffs under the SPA.

The Second Circuit decided *Unigard II* after receiving the New York Court of Appeals' answer to a certified question in the above-cited *Unigard I* (79 NY2d 576 [1992], *supra*). The certified question addressed in *Unigard I* was as follows: "Must a reinsurer

prove prejudice before it can successfully invoke the defense of late notice of loss by the reinsured?" (*id.* at 581 [internal quotation marks omitted]). The Court of Appeals answered this question in the affirmative — meaning that the "no prejudice" rule then applicable to primary insurers did not apply to reinsurers — based on the "significant and basic differences between primary insurance and reinsurance" (*id.* at 582).[8] In particular, the Court observed:

> "A reinsurer is not responsible for providing a defense, for investigating the claim or for attempting to get control of the claim in order to effect an early settlement. Unlike a primary insurer, it may not be held liable to the insured for a breach of these duties. Settlements, as well as the investigation and defense of claims are the sole responsibility of the primary insurer, and settlements made by the primary insurer are, by express terms of the reinsurance certificate, binding on the reinsurer. Thus, the failure to give the required prompt notice is of substantially less significance for a reinsurer than for a primary insurer" (*id.* at 583 [footnote omitted]).

After further noting that "the interests of a reinsurer and the ceding primary insurer with respect to a pending claim are generally identical" due to provisions of most reinsurance agreements that "leave[] reinsurers little room to dispute the

---

[8] "A certificate of reinsurance is a contract between two insurance companies in which the reinsured company agrees to cede part of its risk to the reinsurer in return for a percentage of the premium. A reinsurance contract operates solely between the reinsurer and the ceding company. It confers no rights on the insured" (79 NY2d at 582).

reinsured's conduct of the case" (*id.*), the Court of Appeals rejected the reinsurer's argument that it should have the benefit of the "no prejudice" rule because of its "right to associate" in the defense of the claim under the reinsurance agreement:

> "The 'right to associate' involves the right to consult with and advise the reinsured in its handling of a claim. Unigard [the reinsurer] argues that this right gives it an interest similar to that of a primary insurer and that it, therefore, must have early notice so that it may itself investigate the claim and foreclose the possibility of fraud. We agree that there are cases in which the reinsurer's right to associate may be impaired by late notice from the reinsured. Nonetheless, because of the critical distinctions between a primary insurer's right to control the investigation and defense of a claim and a reinsurer's 'right of association' with the ceding companies, we cannot agree with Unigard's contention that the risk of such impairment is sufficiently grave to warrant applying a presumption of prejudice" (*id.* at 584).

When the case returned to the Second Circuit, the federal court held, based on its understanding of the Court of Appeals' answer to the certified question in *Unigard I*, that the reinsurer had not demonstrated that it had been prejudiced by the late notice. The Second Circuit interpreted the Court of Appeals' opinion to "indicate[] that . . . the requisite prejudice is limited to economic injury" (*Unigard II*, 4 F3d at 1069). Accordingly, the Second Circuit concluded that the reinsurer, which "conced[ed] that it cannot show an economic loss while arguing that its lost right to associate constitutes the

requisite prejudice" (*id.*), had not carried its "burden of showing that it suffered *tangible economic injury* because [the reinsured] failed to give timely notice" (*id.* [emphasis added]).

Since the present case does not involve reinsurance, we need not consider whether the Second Circuit, in *Unigard II*, correctly interpreted the Court of Appeals' opinion in *Unigard I* as requiring a reinsurer mounting a late-notice defense to prove "tangible economic injury."[9] For purposes of this appeal, we assume that a reinsurer must prove that late notice caused it prejudice in the form of a quantifiable "tangible economic injury," and that impairment of the "right to associate" typically afforded to reinsurers does not suffice to this end, as the Second Circuit held in *Unigard II*. Even so, the broad and

---

[9]This Court is not bound, of course, by precedents of federal courts on pure issues of state law (*see e.g. Merrill Lynch, Pierce, Fenner & Smith v McLeod*, 208 AD2d 81, 83 [1st Dept 1995]). We note that neither the phrase "tangible economic injury," nor any phrase having a similar meaning (such as, for example, "pecuniary harm"), appears in the Court of Appeals' *Unigard I* opinion. We also note that the Court of Appeals stated in *Unigard I* that it "agree[d] that there are cases in which the reinsurer's right to associate may be impaired by late notice from the reinsured" (79 NY2d at 584). The question of whether the impairment of a reinsurer's right to associate could, in a proper case, constitute sufficient prejudice to support a late-notice defense was not before the Court of Appeals in *Unigard I*. The certified question simply asked whether a reinsurer "[m]ust . . . prove prejudice" in support of such a defense (*id.* at 581), not what would constitute sufficient prejudice for the defense to succeed.

exclusive "sole right to represent [Dearborn's] interests" in a tax audit conferred on plaintiffs by section 8.5(b) of the SPA is far more closely analogous to "a primary insurer's right to control the investigation and defense of a claim" (*Unigard I*, 79 NY2d at 584) than to a reinsurer's more limited right to associate. Thus, while plaintiffs still must prove actual prejudice to succeed on their late-notice defense, it would be inappropriate to import *Unigard II*'s requirement that prejudice be demonstrated by proof of "tangible economic injury" from the reinsurance context to this case, where plaintiffs had a right to control the defense of the indemnifiable claim far more substantial than a reinsurer's mere right to associate in the reinsured's conduct of its own defense.[10]

---

[10]We are not persuaded by the contrary holding of *CIH Intl. Holdings, LLC v BT United States, LLC* (821 F Supp 2d 604 [SD NY 2011]), relied upon by Supreme Court in the decision appealed from and by defendants in their briefs. In *CIH*, as here, the plaintiff sellers of a corporation agreed to indemnify the defendant buyer for certain tax losses (*id.* at 607). Similar to the SPA in the present case, the *CIH* agreement required the buyer to provide prompt notice of tax claims asserted by the Brazilian authorities and entitled the seller to "control the conduct" and settlement of proceedings involving tax claims subject to indemnification (*id.*), but provided that the buyer's failure to provide such notice would not defeat the sellers' indemnification obligation except to the extent the seller was "actually prejudiced" thereby (*id.* at 610). Relying solely on *Unigard II*, the *CIH* court concluded that the plaintiff seller must demonstrate "tangible economic injury" as a result of the late notice because "[a]n indemnitor's loss of the right to associate in the defense of claims is insufficient to constitute prejudice"

Having rejected the "tangible economic injury" standard for a showing of prejudice from late notice in the case of an indemnitor having (as do plaintiffs here) the "sole right" to control the defense and settlement of an indemnifiable claim, as noted, we hold that such late notice actually prejudices the indemnitor when it results in a material deprivation of the indemnitor's right to control the defense of the claim, a proposition that finds support in existing case law. For example, in *Wainco Funding v First Am. Title Ins. Co. of N.Y.* (219 AD2d 598 [2d Dept 1995]), the "no prejudice" rule did not apply to the title insurance policy at issue because, although the policy required the insured give the insurer prompt notice of lien foreclosure proceedings, it further provided — much like the SPA in this case — that failure to provide such notice would not affect the insured's rights "unless the [insurer] shall be actually prejudiced by such failure" (*id.* at 599 [internal

---

(*id.* at 612). In so concluding, the *CIH* court equated the reinsurer's right to associate in the defense addressed in the *Unigard* decisions, loss of which was held insufficient to demonstrate prejudice, with the contractual right of the indemnitor to "control the conduct" and settlement of the proceedings at issue in *CIH*, without considering the differences between the two rights. As explained above, the right to control the conduct and settlement of tax related proceedings at issue in *CIH* and in the present case is more akin to a primary insurer's right to investigate and defend a claim, which the Court of Appeals distinguished from a reinsurer's right of association in *Unigard I* (79 NY2d at 584).

quotation marks omitted]). The Second Department held that the insured's 20-month delay in notifying the insurer of a tax lien foreclosure proceeding "actually prejudiced" the insurer "[b]y depriving [it] of the opportunity to participate in the tax lien proceeding in any way" (*id.*).[11]

Similarly, in *American Ins. Co. v Fairchild Indus., Inc.* (56 F3d 435 [2d Cir 1995]) (hereinafter, *Fairchild*), with respect to insurance policies that — again, like the SPA — "required a showing of prejudice from late notice" (*id.* at 440), the Second Circuit, applying New York law, held that late notice that resulted in "the very deprivation of an opportunity to play a meaningful role in the studies and negotiations that determine the amount for which indemnification is sought is substantial prejudice to an insurer" (*id.*). In this regard, the *Fairchild* court observed:

> "An insurer cannot be expected to show precisely what the outcome would have been had timely notice been given. This uncertainty, however, is the result of the failure of the insured to comply with policy, and it should not be permitted to use that uncertainty as a

[11]While the insurer in *Wainco* did not receive notice of the foreclosure proceeding until after the insured had unsuccessfully appealed from an adverse judgment (219 AD2d at 599), the Second Department did not base its determination that the insurer had been prejudiced upon a finding that the insurer could have obtained a more favorable result had it participated in the defense of the proceeding.

weapon against the insurer" (*id.* at 440-441).[12]

In this case, we need not define the lower limit of what would constitute a material deprivation of plaintiffs' "sole right" to control the defense of the second audit under the SPA.

---

[12]*See also Hartford Fire Ins. Co. v Baseball Off. of Commr.* (236 AD2d 334 334 [1st Dept 1997] [even if the "no prejudice" rule did not apply to the subject excess insurance policy, the insureds' "late notification actually prejudiced the excess insurer" by "preclud(ing) a timely investigation of (the insureds') claims and the chance to effect an early settlement," where it was contended that the excess insurer had the duty to defend the underlying lawsuit], *lv denied* 90 NY2d 803 [1997]); *Hovdestad v Interboro Mut. Indem. Ins. Co.* (135 AD2d 783, 784 [2d Dept 1987] [noting in dictum that, although timely notice was a condition precedent to coverage under the subject insurance policy, "the prejudice to the insurer (was) evident" in that the insured's initially undertaking his own defense of the underlying claim "effectively deprived the (insurer) of the opportunity to participate in pretrial discovery proceedings when such would have been meaningful"]). *Wainco*, *Fairchild*, *Hartford*, and *Hovdestad* cannot be distinguished on the ground that they involved insurers to the extent their reasoning is not based on the "no prejudice" rule. In particular, *Wainco* and (in pertinent part) *Fairchild* concerned insurance policies to which the "no prejudice" rule did *not* apply. Although the case has not been cited by the parties, we note that *U.S. Bank Natl. Assn. TR U/A DTD 12/01/98 v Stewart Title Ins. Co.* (37 AD3d 822 [2d Dept 2007]), which cited but did not follow *Wainco*, is inapposite. In *U.S. Bank*, a title insurer unsuccessfully argued that the insured junior mortgagee's late notice of a foreclosure action by a senior mortgagee had prejudiced the insurer by preventing it from participating in the foreclosure action. This argument was rejected on the ground that, on the record in *U.S. Bank*, there was an "apparent lack of equity" in the property (37 AD3d at 825), so that any intervention by the insurer in the senior mortgagee's foreclosure action would have been futile. Unlike *U.S. Bank*, nothing in the record of this case establishes that plaintiffs' defense of the second audit would have been futile or no more successful than Dearborn's conduct of its own defense.

The 21-month period in which Dearborn defended the audit itself, without notice to plaintiffs — during which the SAT completed its review of the relevant records and reached an initial tax deficiency assessment, and including the entire pendency of an Amparo court proceeding that unsuccessfully sought to terminate the audit on constitutional grounds, as well as the unsuccessful appeal from the dismissal of the Amparo — unquestionably constituted a material deprivation of plaintiffs' "sole right to represent [Dearborn's] interests" in the second audit under section 8.5(b) of the SPA and, therefore, "actually prejudiced" plaintiffs within the meaning of section 8.1(c) of the SPA.[13] We note that this construction of section 8.1(c) does not leave the provision's actual prejudice requirement without effect, since notice that is not prompt may still come before the indemnitor has been materially deprived of its right to control the defense of an audit. Here, however, such was not the case.[14]

---

[13]Again, section 8.5(b) provides that plaintiffs' "sole right to represent [Dearborn's] interests" in a tax audit includes "the right to control any such Tax Audit, the right to settle, compromise and/or concede any such Tax Audit and the right to employ counsel of [plaintiffs'] choice at [their] expense."

[14]To reiterate, plaintiffs' obligation to indemnify defendants with respect to the second audit is excused not merely because plaintiffs were deprived of their contractual right to control the defense of the audit for some period of time, but because that deprivation was indisputably material.

The Cancino affirmation submitted by defendants does not lead us to reach a different conclusion. In that affirmation, a Mexican attorney opined that

> "all issues pertaining to the tax assessment, whether procedural or on the merits, may be raised in the Nullity petition in the annulment proceeding [which Dearborn commenced after plaintiff refused the demand for indemnification] even if they were not raised at any other means of defense [sic] previous to the SAT's assessment. Thus, under Mexican law and procedures, when the Nullity petition was filed (in I was informed in August 2014 [sic]), the taxpayer had the right and opportunity to raise any fact or issues pertaining to the determination of owed taxes and charges, as well as procedural issues present at the time of the SAT's commencement of the correspondence audit procedure and procedural issues that have arisen since that date."

Initially, we find that the Cancino affirmation, which does not include a single citation to, or quoted excerpt from, any Mexican statute, regulation, rule, or decision of a court or administrative tribunal, is too vague and conclusory to provide us with "sufficient information" to enable us to take judicial notice of Mexican law under CPLR 4511(b) (*see Warin v Wildenstein*

Hypothetically, had Dearborn initially responded to the SAT but then notified plaintiffs and tendered the defense to them before the audit reached a critical stage, we might have reached a different result. In fact, however, plaintiffs did not receive notice until after the SAT had completed its review of the relevant records and had rendered an adverse assessment, which would become final unless successfully appealed or judicially annulled. As a matter of law, this constituted a material deprivation of plaintiffs' "sole right" to control the defense of the audit under the SPA.

& Co., 297 AD2d 214, 215 [1st Dept 2002]). However, even if the Cancino affirmation is taken at face value, it does not negate plaintiffs' showing that they were prejudiced by being completely deprived of their right to defend the second audit for nearly two years. While it is of course impossible to reconstruct what would have happened had plaintiffs undertaken the defense of the second audit from the outset, as was their "sole right" under the SPA, it is possible that they would have chosen to settle the matter at an early stage, thereby avoiding further defense costs. Similarly, whether plaintiffs chose to fight the audit or to settle, it is possible that plaintiffs would have achieved a more favorable result than the assessment of approximately US $2.2 million that the SAT rendered against Dearborn before the latter finally tendered its defense to plaintiffs. To paraphrase one of the decisions cited above, plaintiffs "cannot be expected to show precisely what the outcome would have been had timely notice been given. This uncertainty, however, is the result of the failure of [defendants] to comply with the [SPA], and [they] should not be permitted to use that uncertainty as a weapon against [plaintiffs]" (*Fairchild*, 56 F3d at 440-441).

An additional ground for relieving plaintiffs of their indemnity obligations with respect to the second audit — independent of defendants' failure to give timely notice — is

that the deprivation of plaintiffs' "sole right" to defend the audit for 21 months, until after the SAT had completed its review and rendered an adverse assessment, constituted a sufficiently material breach of the indemnity provisions of the SPA to excuse plaintiffs' duty to indemnify with respect to this audit (*see Unigard I*, 79 NY2d at 584 [noting "the general contract law principle that a breach will excuse performance (by the party not in breach) . . . if it is material or demonstrably prejudicial"]; *see also id.* at 581 ["ordinarily one seeking to escape the obligation to perform under a contract must demonstrate a material breach or prejudice (by the other party)"]). Hypothetically, if defendants had given plaintiffs timely notice of the commencement of the second audit, but had refused to honor plaintiffs' "sole right" to conduct the defense of the audit for 21 months, the failure to tender the defense of the audit would unquestionably constitute a material breach excusing plaintiffs' performance. The conclusion should be no different simply because the same situation results from defendants' failure to give notice of the audit for 21 months. In this regard, under the familiar principles that "a contract should be read as a whole, and every part will be interpreted with reference to the whole" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] [internal quotation marks omitted]), and that "[a]ll parts of an agreement

are to be reconciled, if possible, in order to avoid inconsistency" (*National Conversion Corp. v Cedar Bldg. Corp.*, 23 NY2d 621, 625 [1969]), a material deprivation of plaintiffs' "sole right" to defend the second audit that has resulted from late notice should, as noted, be deemed to have "actually prejudiced" plaintiffs within the meaning of the relevant notice provision of the SPA.[15]

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

ENTERED: NOVEMBER 17, 2016

CLERK

[15]Defendants argue that plaintiffs' right under section 8.5(b) of the SPA to control the defense of a tax audit for which plaintiffs had an indemnity obligation under section 8.1(a) "did not go to the 'root' of the [SPA] transaction" and, therefore, defendants' breach of the former provision should not excuse plaintiffs' performance under the latter provision. This argument is misplaced. Plaintiffs are not arguing that the deprivation of their right to defend the audit should excuse them of their obligations under the SPA in toto, but only of their directly corresponding obligation to indemnify defendants with respect to this particular audit. Plaintiffs' bargained-for "sole right" to defend a tax audit as to which they have indemnity obligations certainly does go to the root of their agreement to provide such indemnification.

Tom, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

14485 Emelyn Burgos, Index 107605/10
Plaintiff-Respondent,

-against-

MTA Bus Company, et al.,
Defendants-Appellants.

_____

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Arlene P. Bluth, J.), entered September 17, 2013,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 23, 2015,

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

ENTERED: NOVEMBER 17, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

1000N Bryan Higgins, et al., Index 301345/13
Plaintiffs-Respondents,

-against-

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

_____

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for appellants.

Papa Depaola & Brounstein, Bayside (Michael E. Soffer of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered June 13, 2014, which granted plaintiffs' motion for leave to amend the complaint to substitute Officer Christopher Crocitto for defendant "John Doe," and to add Officer Matthew Palmerini as a defendant, unanimously modified, on the law, to deny the motion insofar as it seeks to assert against Crocitto and Palmerini so much of the second, fifth and eighth causes of action of the amended complaint as are based on allegations of false arrest and excessive force in violation of 42 USC § 1983, and otherwise affirmed, without costs.

On September 4, 2010, Officers Manuel Barreto, Christopher Crocitto, and Matthew Palmerini of the New York City Police Department stopped a vehicle occupied by plaintiffs Bryan Higgins, Michael Vaughn, and Joseph Tarrant, based on a traffic

violation. According to the subsequent criminal complaint signed by Officer Barreto, the officers observed an open container of alcohol inside the vehicle and asked plaintiffs to exit. Upon plaintiffs' exit, the officers observed a small vial of crack cocaine inside the vehicle, and, upon a further search, discovered a large bag of crack cocaine in the glove compartment. The three plaintiffs were arrested and charged with possession of cocaine. On September 28, 2012, the criminal complaints were dismissed.

On February 26, 2013, plaintiffs commenced an action against the City of New York, Officer Barreto, and Officer Barreto's unidentified partner, sued as "John/Jane Doe I," asserting, inter alia, causes of action for malicious prosecution under state and federal law and causes of action for false arrest and excessive force under state and federal law.[1] By stipulation dated October 21, 2013, the state-law claims for false arrest and excessive force, but not the corresponding federal claims, were dismissed with prejudice. On April 4, 2014, plaintiffs moved for leave to amend the complaint, as here relevant, to substitute Officer Crocitto for the Doe defendant and to add Officer Palmerini as a

[1]In support of their claims, plaintiffs contended, inter alia, that the officers fabricated the evidence of cocaine in the vehicle.

defendant on the claims for malicious prosecution under state law (the first, fourth and seventh causes of action) and on the claims for false arrest, excessive force and malicious prosecution in violation of 42 USC § 1983 (the second, fifth and eighth causes of action). Supreme Court granted the motion. Upon defendants' appeal, for the reasons discussed below, we modify to deny the motion with respect to the federal claims for false arrest and excessive force, and otherwise affirm.

Turning first to the false arrest and excessive force claims under 42 USC § 1983, we note that it is uncontroverted that the three-year statute of limitations governing these federal causes of action (*see Veal v Geraci*, 23 F3d 722, 724 [2d Cir 1994]) accrued on September 4, 2010, the date of plaintiffs' arrest, and expired on September 4, 2013. Thus, it is undisputed that the federal false arrest and excessive force claims were time-barred on April 4, 2014, the date of plaintiffs' motion to amend the complaint to assert those claims against Officers Crocitto and Palmerini. Defendants argue that plaintiffs should not have been permitted to interpose these time-barred claims against Officers Crocitto and Palmerini because, with respect to Officer Crocitto, plaintiffs failed to satisfy the requirements of CPLR 1024 for substituting Crocitto for the Doe defendant, and, with respect to both officers, the relation-back doctrine of CPLR 203(b) and (c)

does not apply. The argument concerning the relation-back doctrine has merit, making it unnecessary for us to consider the argument concerning CPLR 1024.

Under the relation-back doctrine of CPLR 203(b) and (c), new parties may be joined as defendants in a previously commenced action, after the statute of limitations has expired on the claims against them, where the plaintiff establishes that each of the following three criteria are satisfied. First, the plaintiff must show that the claims against the new defendants arise from the same conduct, transaction, or occurrence as the claims against the original defendants. Second, the plaintiff must show that the new defendants are "united in interest" (CPLR 203[b], [c]) with the original defendants, and will not suffer prejudice due to lack of notice. Third, the plaintiff must show that the new defendants knew or should have known that, but for the plaintiff's mistake, they would have been included as defendants (*see Buran v Coupal*, 87 NY2d 173, 178 [1995]; *see also Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615 [1st Dept 2014]). Here, the second of these elements — unity of interest between the original defendant and the proposed additional defendants — is absent, and so the assertion of the federal false arrest and excessive force claims against Officers Crocitto and Palmerini does not relate back to the original commencement of the action.

The requirement of unity of interest is "more than a notice provision" (*Mongardi v BJ's Wholesale Club, Inc.*, 45 AD3d 1149, 1151 [3d Dept 2007] [internal quotation marks omitted]). The test is whether "the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other" (*Vanderburg v Brodman*, 231 AD2d 146, 147-148 [1st Dept 1997] [internal quotation marks omitted]). Thus, unity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other (*see Mondello v New York Blood Ctr.--Greater N.Y. Blood Program*, 80 NY2d 219, 226 [1992]; *Brunero v City of N.Y. Dept. of Parks & Recreation*, 121 AD3d 624, 626 [1st Dept 2014]). Unity of interest fails if there is a possibility that the new defendants may have a defense unavailable to the original defendants (121 AD3d at 625; *Mercer v 203 E. 72nd St. Corp.*, 300 AD2d 105 [1st Dept 2002]; *Montalvo v Madjek, Inc.*, 131 AD3d 678, 680 [2d Dept 2015]; *Mongardi*, 45 AD3d at 1151).

Plaintiffs argue that Officers Crocitto and Palmerini are united in interest with the City of New York, one of the original defendants, because the officers are employees of the City. It is undisputed, however, that the City cannot be held vicariously liable for its employees' violations of 42 USC § 1983. Rather,

the City can be held liable under 42 USC § 1983 only for violating that statute through an unconstitutional official policy or custom (*see Liu v New York City Police Dept.*, 216 AD2d 67 [1st Dept 1995], *lv denied* 87 NY2d 802 [1995], *cert denied* 517 US 1167 [1996]; *Jackson v Police Dept. of City of N.Y.*, 192 AD2d 641 [2d Dept 1993], *lv denied* 82 NY2d 658 [1993], *cert denied* 511 US 1004 [1994]). Thus, it simply cannot be said that the fortunes in this action of the City and of either Officer Crocitto or Officer Palmerini "stand or fall together and that judgment against one will similarly affect the other" (*Vanderburg*, 231 AD2d at 148 [internal quotation marks omitted]).[2] Because the City has no vicarious liability for Officers Crocitto's and Palmerini's alleged misconduct under 42 USC § 1983, the two officers are not united in interest with the City with respect to the federal false arrest and excessive force claims against them, and the interposition of those claims against the officers does not relate back to the commencement of

[2]Specifically, if plaintiffs proved that Officer Crocitto and Palmerini violated 42 USC § 1983, but failed to show that the officers were acting pursuant to an official custom or policy of the City, the officers would be liable while the City would not. On the other hand, if plaintiffs proved that Officer Barreto violated their rights pursuant to an unconstitutional policy of the City, but failed to show that Officers Crocitto and Palmerini directly violated plaintiff's federal rights, the City would be liable while the officers would not.

the action against the City for purposes of the statute of limitations.

Plaintiffs argue that unity of interest exists, notwithstanding the City's undisputed lack of vicarious liability on the subject claims against the two officers. In their appellate brief, plaintiffs contend:

> "Whether two parties are united in interest does not depend upon the specific type of causes of action brought against the respective parties. Rather, it depends on the transactions or occurrences underlying those causes of action, and the jural relationship of the parties. Indeed, the test is conduct specific, not claim specific" (citation omitted).

Plaintiffs' theory that the test for unity of interest is "not claim specific" is inconsistent with this Court's precedent. In *Brunero* (121 AD3d 624 [1st Dept 2014], *supra*), the plaintiff had been injured in Central Park by a maintenance vehicle and commenced an action asserting causes of action for negligence and gross negligence against the City. Shortly after the statute of limitations expired, the City disclosed that the driver of the vehicle had been an employee of nonparty Central Park Conservancy (CPC), which had entered into an agreement with the City to provide maintenance services in Central Park. The agreement provided that the City would indemnify CPC for liability arising from CPC's negligence but not for liability arising from CPC's gross negligence. This Court held that the City and CPC were

united in interest with respect to the negligence claim against CPC but not with respect to the gross negligence claim, and therefore allowed the plaintiff to add CPC as a defendant on the negligence claim but not on the gross negligence claim (*id.* at 626). Similarly, here, the City cannot be held vicariously liable on the claims against Officers Crocitto and Palmerini under 42 USC § 1983. Accordingly, there is no unity of interest between the City and the officers with respect to those claims, and the federal false arrest and excessive force claims, which accrued more than three years before plaintiffs moved to add the officers as defendants, are therefore time-barred as against the officers.

Plaintiffs' theory that the potential vicarious liability required to support a finding of unity of interest "need only be theoretically possible," and need not necessarily apply to the particular claim sought to be asserted against the proposed new defendant, finds no support in the case law on which plaintiffs rely. *Pendleton v City of New York* (44 AD3d 733 [2d Dept 2007]) addressed only whether proposed new claims against the same municipal defendants that had been named in the original complaint related back to the commencement of the action. The case did not involve an attempt to add any new defendants and, therefore, does not even refer to the concept of unity of

interest, which has no relevance where the plaintiff does not propose to add a new defendant (*see Buran*, 87 NY2d at 178 ["allowing the relation back of amendments adding new defendants implicates more seriously . . . policy concerns (regarding fairness to defendants) than simply the relation back of new causes of action since, in the latter situation, the defendant is already before the court"]).

Also unavailing is plaintiffs' reliance on *Cuello v Patel* (257 AD2d 499 [1st Dept 1999]), a wrongful death action against a hospital in which, after the expiration of the statute of limitations, we permitted the plaintiff to add as a defendant a physician allegedly employed by the hospital, based on the fact that, "as to the claim asserted against [the physician], and assuming an employment relationship is established, the fate of the [hospital] and [the physician] would rise and fall together" (*id.* at 500). Stated otherwise, because the hospital was potentially vicariously liable for any negligence of the physician whom the plaintiff sought to add as a defendant, the requirement of unity of interest between the hospital and the physician was satisfied so as to permit adding the physician as a defendant after the expiration of the limitations period. By contrast, in this case, as previously discussed, as to the federal false arrest and excessive force claims sought to be

asserted against Officers Crocitto and Palmerini, the fortunes of the City and the officers will not "rise and fall together," because the City is not vicariously liable for the officers' alleged violations of 42 USC § 1983.

Finally, Supreme Court properly permitted plaintiffs, under CPLR 3025(b), to amend the complaint to add Officers Crocitto and Palmerini as defendants with respect to the timely malicious prosecution claims, under both federal and state law, the timeliness of which is not in dispute. Contrary to defendants' contention, these claims are not palpably insufficient or clearly devoid of merit (*see MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). Defendants argue that neither officer could be deemed to have participated in the "initiation" of the criminal proceedings against plaintiffs. However, for purposes of surviving a pleading motion, the complaint sufficiently

alleges that the officers "play[ed] an active role in the prosecution" (*Bermudez v City of New York*, 790 F3d 368, 377 [2d Cir 2015] [internal quotation marks omitted]).

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

ENTERED: NOVEMBER 17, 2016

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2219 The People of the State of New York, Respondent, Ind. 6304/08

-against-

Joseph R. Terry, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Frieman of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Carol Berkman, J. at motions; Charles H. Solomon, J. at jury trial and sentencing), rendered July 20, 2010, convicting defendant of robbery in the first degree, two counts of robbery in the second degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 17 years, held in abeyance and the matter remitted for a suppression hearing.

In *People v Wynn* (117 AD3d 487 [1st Dept 2014]), we held that the court erred in summarily denying the motion of defendant's codefendant to suppress statements and physical evidence as the fruits of an unlawful arrest, notwithstanding the conclusory nature of the factual allegations in her suppression motion, where "[a]lthough the People provided defendant with

extensive information about the facts of the crime and the proof to be offered at trial, they provided no information whatsoever, at any stage of the proceedings, about how defendant came to be a suspect, and the basis for her arrest, made hours after the crime at a different location" (*id.* at 487-488). Because the factual allegations in the People's pleadings and relevant disclosures were materially the same in this case, we conclude that defendant's motion to suppress, although it asserted nothing more than that probable cause was lacking, was sufficient under the circumstances to entitle him to a hearing. Unlike the situation in *People v Lopez* (5 NY3d 753, 754 [2005]), defendant's statement did not "on its face show[] probable cause for defendant's arrest."

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

ENTERED: NOVEMBER 17, 2016

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2221 In re Keniya G., and Others,

Children Under Eighteen Years
of Age, etc.,

Avery P.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Richard Dearing of counsel), for respondent.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the children.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about September 9, 2015, which to the extent appealed from as limited by the briefs, determined that appellant was a person legally responsible for the subject child M.W., and neglected her and derivatively neglected the other subject children, unanimously affirmed, without costs.

A person legally responsible for a child is defined as the child's "custodian, guardian, or any other person responsible for the child's care at the relevant time." A "[c]ustodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person

causes or contributes to the . . . neglect of the child" (Family Ct Act § 1012[g]). A person who "acts as the functional equivalent of a parent in a familial or household setting" is a person legally responsible for a child's care (*see Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]).

The determination of whether a particular person has acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry which will vary according to the circumstances in each case. Factors to be considered include the frequency and nature of the contact, the nature and extent of the control exercised by appellant over the child's environment, the duration of appellant's contact with the child, and appellant's relationship with the child's parent (*Matter of Trenasia J. [Frank J.]*, 25 NY3d 1001, 1004 [2015], citing *Matter of Yolanda D.* at 796).

Appellant testified that he cared for the younger children every work day by taking them to school and picking them up, preparing meals, cleaning the home, preparing the children's clothing, grocery shopping, and providing financial assistance to the household. The school social worker and appellant both testified that M.W. lived in the home in September 2014, when the incident took place. Although appellant later changed his testimony concerning her residence, the court properly credited

his initial statement and found that he was a person legally responsible for M.W. Given her age, she did not require the same hands-on care as the younger children, but his testimony reflected that he contributed to the functioning of the household of which she was a part and had frequent regular contact with her (*see Matter of Kevin N. [Richard D.]*, 113 AD3d 524 [1st Dept 2014]).

The court properly concluded that M.W.'s out-of-court statement to the school social worker that appellant had made a sexually threatening comment to her was corroborated by his criminal history of pleading guilty to raping two girls only a year or two younger than Miranda and the determination that he was a level three violent sex offender at high risk of recidivism (*see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 118-119 [1987]; *Matter of Christina F.*, 74 NY2d 532, 536 [1989]).

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

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

ENTERED: NOVEMBER 17, 2016

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2222 In re Richard Sherman, Index 101407/14
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal, et al.,
Respondents-Respondents.

_____

Herrera Law Firm, New York (Nicomedes Sy Herrera of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Bethany Davis Noll of counsel), for New York State Division of Housing and Community Renewal, respondent.

Gutman, Mintz, Baker & Sonnenfeldt, LLP, New Hyde Park (Moses Ginsberg of counsel), for Southbridge Towers, Inc., respondent.

_____

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered March 25, 2015, granting respondent New York State Division of Housing and Community Renewal's (DHCR) cross motion to dismiss the petition to annul DHCR's determination, dated July 31, 2014, which upheld the denial of petitioner's claim to succession rights to his deceased mother's apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination that the subject apartment was not petitioner's primary residence for at least two years prior to the death of his mother in November 2010 has a rational basis

(*see e.g. Matter of Martino v Southbridge Towers, Inc.*, 68 AD3d 412 [1st Dept 2009]). The record shows petitioner was not named on the income affidavits during the relevant time period and, other than an affidavit from a friend of petitioner's mother, who said that the apartment was petitioner's primary residence, petitioner failed to submit any other documentary evidence showing that the apartment was his primary residence (*see Matter of Renda v New York State Div. of Hous. & Community Renewal*, 22 AD3d 382 [1st Dept 2005]; *see also* 9 RCNY 1727-8.2[a][2]; *compare Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649 [2013]). Furthermore, "persons seeking succession may only have one primary residence" (9 NYCRR 1727-8.2[a][2][ii]), and here, petitioner does not dispute that he frequently traveled to his home in California to take care of a family business, while also taking care of his mother in New York.

We have considered petitioner's remaining contentions, including that respondent Southbridge Towers should be estopped from contesting him succession, and find them unavailing.

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

ENTERED: NOVEMBER 17, 2016

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2223 Loren McLean, et al., Index 151890/13
Plaintiffs-Appellants,

-against-

Tishman Construction Corporation,
et al.,
Defendants-Respondents.

_____

Kelner and Kelner, New York (Gail S. Kelner of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered December 18, 2015, which denied plaintiffs' motion for summary judgment on the issue of liability on the Labor Law § 240(1) claim and granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant plaintiffs' motion and deny defendants' motion as to the § 240(1) claim, and otherwise affirmed, without costs.

The injured plaintiff testified that a metal beam, while being placed on a flatbed truck, fell off the blades of a forklift, slamming plaintiff's foot and causing him to fall off the truck. This unrefuted testimony established prima facie that "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a

physically significant elevation differential" and therefore that liability exists under Labor Law § 240(1) (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). The cases that defendants rely on are inapposite, since they involve not objects falling on or toward workers on flatbeds but workers falling from flatbeds, implicating only the adequacy of safety devices for falling workers, which is not at issue here (*see Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 903 [2008]; *Toefer v Long Is. R.R.*, 4 NY3d 399, 408 [2005]; *Brown v New York-Presbyt. Healthcare Sys., Inc.*, 123 AD3d 612 [1st Dept 2014]).

Nor was plaintiff the sole proximate cause of his injuries since the injuries "were caused at least in part by the lack of safety devices to check the beam's descent as well as the manner in which [his coworker] lowered the beam" (*Bonaerge v Leighton House Condominium*, 134 AD3d 648, 649-650 [1st Dept 2015]; *see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

The motion court properly deemed the Labor Law § 241(6) claims predicated on Industrial Code (12 NYCRR) §§ 23-1.16, 23-2.3, 23-6.1 and 23-8.1 abandoned, since plaintiff failed to specify any particular subsection(s) and subdivision(s) of these provisions (*see Pantelis v Skanska*, 2012 NY Slip Op 33000[U], *16-17 [Sup Ct, NY County 2012]). The remaining provisions on

which plaintiff relies, 12 NYCRR 23-1.5(a) and (c)(1) and (2), are insufficient as predicates for Labor Law § 241(6) liability, since they set forth general rather than specific standards of conduct (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207 [1st Dept 2002]; *Williams v White Haven Mem. Park*, 227 AD2d 923 [4th Dept 1996]).

Defendants established prima facie that they did not have the authority and control over the injury-producing work necessary to support the Labor Law § 200 and common-law negligence claims (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). While defendant Tishman, in its capacity as construction manager, had general supervisory and coordinating responsibilities, it did not have the requisite level of direct supervision and control over the injury-producing activity (*see Geonie v OD & P NY Ltd.*, 50 AD3d 444 [1st Dept 2008]; *Scott v American Museum of Natural History*, 3 AD3d 442, 443 [1st Dept 2004]). Nor is Tishman's authority to control safety at the work site and stop work if it observed a dangerous condition sufficient to support the Labor Law § 200 and common-law negligence claims as against it (*see Conforti v Bovis Lend Lease*

LMB, Inc., 37 AD3d 235, 236 [1st Dept 2007]).

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

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

ENTERED: NOVEMBER 17, 2016

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2224 Aaron Elkin, Index 105411/08
Plaintiff-Appellant,

-against-

Andrea Labis,
Defendant-Respondent.

_____

Aaron Elkin, appellant pro se.

Char & Herzberg LLP, New York (Edward M. Char of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered August 25, 2014, which granted defendant mother's motion for a permanent injunction against plaintiff father to the extent of prohibiting him from directly contacting the subject child's pediatrician and her medical practice, ordered the father to request medical records or information about the child from the doctor and her practice by contacting the mother in writing, via fax or email, and within two days of receiving such request, directed the mother to forward same to the doctor and her practice requesting that the information be sent directly to the father, and limited such requests to up to six times per calendar year, excluding requests for information concerning emergency hospitalizations of the child, unanimously affirmed, without costs.

To the extent the father remains constrained from directly contacting the child's physician and medical practice, any decision by this Court would have an impact or immediate consequence on the parties' respective rights (*see Matter of Johnson v Pataki*, 91 NY2d 214, 222 [1997]). Accordingly, the appeal is not moot.

In any event, the mother's contention was corroborated by the physician's assertions that the father had called her office "incessantly . . . before visits and after visits" and would constantly be annoying to the front desk, "to the point that [they] were dreading his phone calls." Moreover, the father did not dispute that he made such multiple requests for information, and admitted that he was motivated to obtain the child's medical records to support his pending habeas corpus motion (*see generally Association of Contr. Plumbers of City of N.Y. v Contracting Plumbers Assn. of Brooklyn & Queens, Inc.*, 302 NY 495, 498 [1951]; *Bellew v New York, Westchester & Conn. Traction Co.*, 47 App Div 447 [2d Dept 1900]). Further, the mother established that the child would suffer harm if she were deprived of continuity of treatment by her pediatrician, who had treated her since infancy and with whom she had a strong rapport and level of comfort (*compare e.g. Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596 [1st Dept 2011]; *see generally Association of Contr.*

Plumbers, 302 NY at 498). Contrary to the father's argument, the court did not virtually terminate his parental rights by denying him the right to obtain information from the child's medical providers, nor change the custody agreement such that an evidentiary hearing was warranted. Nor did the injunction have far-reaching consequences, as it was expressly limited to this particular physician and her practice.

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

ENTERED: NOVEMBER 17, 2016

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2225- Ind. 5412/12
2226 The People of the State of New York,
Respondent,

-against-

David L. Jamison,
Defendant-Appellant.

_____

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

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

_____

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Jill Konviser, J.), rendered July 21, 2015 and January 14, 2014,

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: NOVEMBER 17, 2016

CLERK

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

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2227- Index 653123/13
2228- 652986/13
2229 Phoenix Light SF Limited, et al.,
Plaintiffs-Appellants,

-against-

Credit Suisse AG, et al.,
Defendants-Respondents.

- - - - -

Phoenix Light SF Limited, et al.,
Plaintiffs-Appellants,

-against-

Morgan Stanley, et al.,
Defendants-Respondents.

_____

Robbins Geller Rudman & Dowd LLP, San Diego, CA (Nathan R. Lindell of the bar of the State of California, admitted pro hac vice, of counsel), for appellants.

Cravath, Swaine & Moore LLP, New York (Richard W. Clary of counsel), for Credit Suisse AG, Credit Suisse Securities (USA) LLC, DLJ Mortgage Capital, Inc., Credit Suisse First Boston Mortgage Securities Corp. and Asset Backed Securities Corp., respondents.

Davis Polk & Wardwell LLP, New York (James P. Rouhandeh of counsel), for Morgan Stanley, Morgan Stanley & Co. LLC, Morgan Stanley Mortgage Capital Holdings LLC, Morgan Stanley ABS Capital I, Inc., Morgan Stanley Capital I, Inc., Saxon Capital, Inc., Saxon Funding Management LLC and Saxon Asset Securities Company, respondents.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered May 6, 2015, in index No. 653123/13, to the extent appealed from as limited by the briefs, dismissing the common-law

fraud, fraudulent inducement, and aiding and abetting fraud claims, unanimously reversed, on the law, with costs, and those claims reinstated. Appeal from order, same court and Justice, entered on or about April 23, 2015, to the extent it granted defendants' CPLR 3211(a)(7) motion to dismiss the aforesaid claims, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court and Justice, entered on or about April 23, 2015, in index No. 652986/13, which, to the extent appealed from as limited by the briefs, granted defendants' CPLR 3211(a)(7) motion to dismiss the common-law fraud, fraudulent inducement, and aiding and abetting fraud claims, unanimously reversed, on the law, with costs, and the motion denied.

The allegations that with respect to their purchase of residential mortgaged-back securities plaintiffs relied on misrepresentations and omissions made by defendants in the offering documents are sufficient to state the justifiable reliance element of the fraud claims; plaintiffs are not required to allege that they requested from defendants the actual loan files or due diligence reports or that they obtained representations and warranties made directly by defendants about the quality of the loans, as opposed to those made to defendants by other parties with direct access to the relevant information

(*see IKB Intl. S.A. v Morgan Stanley*, 142 AD3d 447, 449-450 [1st Dept 2016]; *Basis Yield Alpha Fund Master v Morgan Stanley*, 136 AD3d 136, 142-143 [1st Dept 2015]; *CIFG Assur. N. Am., Inc. v Goldman, Sachs & Co.*, 106 AD3d 437 [1st Dept 2013]). We find that the remaining elements of the fraud claims are also sufficiently alleged (*see IKB Intl.*, 142 AD3d 447; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 294-296 [1st Dept 2011]).

We see no basis for reassignment to a different justice.

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

ENTERED: NOVEMBER 17, 2016

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2230 Jose Rosario doing business as Inwood Photo, Plaintiff-Respondent, Index 103969/09 590166/10

-against-

Ceci Restaurant, Inc., Defendant-Appellant,

Master Fire Prevention Systems, Inc., et al., Defendants.

- - - - -

[And a Third-Party Action]

_____

Law Office of Steven G. Fauth, LLC, New York (Scott S. Levinson of counsel), for appellant.

Law Office of Mitchell J. Winn, New York (Mitchell J. Winn of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered May 22, 2015, which, to the extent appealed from, denied the motion of defendant Ceci Restaurant, Inc. (Ceci) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Ceci established its prima facie entitlement to summary judgment by submitting evidence showing that it did not create or have actual or constructive notice of the condition that caused the fire that started in its restaurant and spread to plaintiff's business located in an adjacent building (*see generally Gordon v*

American Museum of Natural History, 67 NY2d 836 [1986]).

In opposition, plaintiff submitted, inter alia, the testimony of an employee of defendant Aster Fire Prevention Services, Inc., an affiliate of defendant Master Fire Prevention Systems, Inc., which was hired by Ceci to clean the restaurant's exhaust system. The employee stated that the cleaning of the ducts was not done in strict accordance with the New York City Fire Code. Plaintiff also submitted the testimony and report of a Fire Marshal who indicated that the fire ignited in the ductwork of Ceci. Based on the foregoing, triable issues of fact exist as to whether Master Fire was negligent in performing its work on Ceci's behalf (*see e.g. Hosmer v Kubricky Constr. Corp.*, 88 AD3d 1234 [3d Dept 2011], *lv dismissed* 19 NY3d 839 [2012]).

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

ENTERED: NOVEMBER 17, 2016

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2231-
2232 The People of the State of New York, Ind. 1444N/12
996/13
Respondent,

-against-

Bryan Otero,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered August 1, 2013, as amended October 3, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree; and judgment, same court and Justice, rendered August 1, 2013, as amended October 28, 2013, convicting defendant, upon a plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to an aggregate term of six years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence for the sale

conviction to a term of four years, with two years' postrelease supervision, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: NOVEMBER 17, 2016

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2234 Masako Iwata, Index 152771/13
Plaintiff-Appellant,

-against-

Manhattan and Bronx Surface
Transit Operating Authority,
et al.,
Defendants-Respondents.

Law Office of Jeffrey I. Schwimmer, New York (Jeffrey I. Schwimmer of counsel), for appellant.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered on or about July 13, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendants failed to establish prima facie that the emergency doctrine is applicable to the facts of this case, i.e., that plaintiff's injuries resulted from defendant bus driver's reaction to "a sudden and unforeseen emergency not of [his] own making" (*Caristo v Sanzone*, 96 NY2d 172, 175 [2001]). They submitted the driver's testimony that a taxicab cut him off and made a right turn in front of him as he was slowing down and pulling into the Second Avenue bus stop. However, defendants' submissions include the driver's testimony that he made two stops

for traffic between Third and Second Avenues and plaintiff passenger's testimony that she fell to the floor of the bus when the bus came to a "violent short stop" between Third and Second Avenues, before it stopped at the Second Avenue bus stop. Thus, defendants failed to establish that the emergency created by the taxicab absolved them from negligence with respect to the stop that caused plaintiff's fall. To the extent plaintiff's testimony conflicts with the driver's testimony concerning the stops made by the bus, the conflict presents issues of fact that preclude summary judgment.

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

ENTERED: NOVEMBER 17, 2016

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2236 The People of the State of New York, Ind. 3213/13
Respondent,

-against-

Francisco Flores,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jared Wolkowitz 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 (Bruce Allen, J.), rendered June 18, 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: NOVEMBER 17, 2016

CLERK

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

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2239 The People of the State of New York, Ind. 3544/14
Respondent,

-against-

Luis Hernandez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Brian R. Pouliot 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 (Bruce Allen, J.), rendered July 28, 2015, as amended August 6, 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: NOVEMBER 17, 2016

CLERK

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

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2240 Michael Saab, Index 152673/12
Plaintiff-Appellant,

-against-

CVS Caremark Corporation, et al.,
Defendants-Respondents.

_____

Law Office of George T. Peters, Bronx (George T. Peters of counsel), for appellant.

McAndrew, Conboy & Prisco, LLP, Melville (Mary C. Azzaretto of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered August 5, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established prima facie that any defect in the sidewalk that allegedly caused plaintiff to trip and fall was insignificant and that there were no surrounding circumstances that magnified the dangers it posed (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77-78 [2015]). They submitted plaintiff's testimony that he could not describe the characteristics of the alleged defect or specify exactly where on the sidewalk he fell, and an affidavit by an expert who took photographs and measured the area and found no defect presenting an elevation differential of more than one quarter inch and no

space between sidewalk slabs greater than one half inch. Contrary to plaintiff's contention, the fact that the photographs were taken and the inspection performed almost two years after the accident is immaterial. Defendants submitted testimony that there had been no repairs to the sidewalk since the accident, and plaintiff does not argue that the photographs do not show the sidewalk in substantially the same condition as existed at the time of the accident.

In opposition, plaintiff failed to raise a triable issue of fact. He was unable to describe the defect, except to say that it was not wide and it was not deep, and he cites no surrounding circumstances that enhanced the danger. Nor did he offer any measurements of the alleged defects in the area of his fall in refutation of defendants' expert's measurements.

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

ENTERED: NOVEMBER 17, 2016

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2241N Wells Fargo Bank, N.A., Index 382162/09
Plaintiff-Respondent,

-against-

Mohammed Cisse,
Defendant-Appellant,

Bronx Supreme Court, et al.,
Defendants.

_____

Mohammed Cisse, appellant pro se.

Reed Smith LLP, New York (Andrew B. Messite of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered September 21, 2015, which denied defendant-appellant's motion to strike an affirmation submitted with plaintiff's motion for an order of reference, unanimously affirmed, without costs.

The court properly denied defendant's motion to strike, as he was in default at the time his motion was made and, regardless, the motion was purely academic and lacking in merit. The attorney affirmation defendant attacks was submitted with plaintiff's first motion for an order of reference, which the court had already denied at the time defendant made his motion to strike. Thus, any purported deficiency with the affirmation resulted in no prejudice to defendant and should not be reversed on this basis.

Regardless, defendant can point to no deficiency that would compel reversal of the court's order in any event. Defendant's argument that the affirmation should have been stricken because its author had no personal knowledge of the facts contained within it is unavailing (*Marine Midland Bank, N.A. v Embassy E.*, 160 AD2d 420, 421 [1st Dept 1990]). The affirmation was based on counsel's communications with a bank representative, who had personally reviewed plaintiff's books and records and confirmed the factual accuracy of the complaint's allegations, and who himself had submitted an affidavit in support of plaintiff's motion. There is no basis for reversing the court's order.

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: NOVEMBER 17, 2016

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2243 In re Reginald Robinson, Index 73/16
[M-4672] Petitioner,

-against-

Clerk of the Court, on behalf
of Bronx County Supreme Court,
Respondent.

_____

Reginald Robinson, petitioner pro se.

John W. McConnell, New York State Office of Court Administration, New York (Lee Alan Adlerstein of counsel), for respondent.

_____

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

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

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

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

ENTERED: NOVEMBER 17, 2016

CLERK