SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 3, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Tom, Oing, Moulton, JJ.

6219-
6220 Index 651334/16

Publications International, Ltd.,
Plaintiff-Respondent,

-against-

Phoenix International Publications, Inc.,
Defendant-Appellant,

Jiangsu Phoenix Education Publishing
Co. Ltd.,
Defendant.

- - - - -

Phoenix International Publications, Inc.,
Defendant/Counterclaim-Plaintiff-Appellant,

-against-

Publications International, Ltd.,
Plaintiff/Counterclaim-Defendant-Respondent,

JRS Distribution Co., et al.,
Additional Counterclaim-Defendants-Respondents.

_____

Sidley Austin LLP, New York (John M. Skakun, III of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellant.

McDermott Will & Emery LLP, New York (Michael R. Huttenlocher of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.),

entered February 2, 2017, which, to the extent appealed from as limited by the briefs, granted counterclaim-defendant and additional counterclaim-defendants' motion to dismiss the second amended counterclaims alleging "manipulated returns" and seeking indemnification for unpaid Mexican taxes, unanimously affirmed, without costs. Order, same court (Barry R. Ostrager, J.), entered September 25, 2017, which granted counterclaim-defendant and additional counterclaim-defendants' motion to dismiss the third amended counterclaims insofar as they seek specific performance on the Mexican taxes claim, unanimously affirmed, without costs.

Even accepting the allegations as true and affording counterclaim plaintiff (Phoenix) every possible favorable inference, we find that the "manipulated returns" counterclaim, which alleges that the drop in merchandise returns was the result of a scheme on the part of counterclaim-defendant Publications International, Ltd. (PIL) to avoid its obligations under section 4.9 of the asset purchase agreement, is conclusory and lacking in factual specificity (*see Godfrey v Spano*, 13 NY3d 358, 373 [2009]).

The counterclaim seeking indemnification in connection with the allegedly unpaid Mexican taxes is not ripe, since the alleged

underlying tax liability has not been established (*see AM Gen. Holdings LLC v Renco Group, Inc.*, 2013 WL 5863010, *8-9, 2013 Del Ch LEXIS 266, *29-31 [Del Ch, Oct. 31, 2013]).

As to the third amended counterclaim seeking specific performance, Phoenix offered no reason that it could not have sought this relief in the second amended counterclaim. In any event, we find that this counterclaim was an attempt to circumvent the law of the case, since the counterclaim seeking identical monetary relief relating to Mexican taxes had been dismissed in the February 2, 2017 order.

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

ENTERED: MAY 3, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6452 The People of the State of New York, Ind. 4039/14
Respondent,

-against-

Jaime McKeown,
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 (Hope Korenstein of counsel), for respondent.

_____

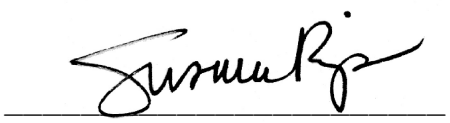
Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered January 27, 2016, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to time served and five years' probation, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. We note that the victim's testimony was corroborated by neutral witnesses. The evidence supports conclusions that defendant hit the victim on the head with a frying pan, and that the blow

caused substantial pain (*see People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]), as well as a concussion resulting in an impairment of her physical condition.

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

ENTERED: MAY 3, 2018



CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6453 Mora J. Moore, etc., et al., Index 300062/13
Plaintiffs-Appellants,

-against-

Trinity Baptist Church,
Defendant-Respondent.

_____

Law Office of Joel M. Gluck, New York (Joel M. Gluck of counsel), for appellants.

Molod Spitz & Desantis, P.C., New York (Marcy Sonneborn of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr. J.), entered on or about May 31, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant church established entitlement to judgment as a matter of law in this action where plaintiffs allege that the decedent was injured when he was knocked out of his wheelchair while sitting in defendant's vestibule. Defendant submitted evidence showing that it did not breach any duty of care to the decedent (*see Gilson v Metropolitan Opera*, 5 NY3d 574, 577 [2005]). The church was not on notice of any dangerous crowding condition and no prior incidents similar to the one claimed here had ever occurred. Furthermore, plaintiffs failed to identify

any overcrowding condition. Rather, decedent testified that he was surrounded by two or three choir members who had come to greet him, when a crowd of people, which may have not even exceeded five people, entered the area. Even assuming that an usher had offered to take decedent to his pew, in the absence of prior notice of a dangerous condition, it was not foreseeable that temporarily leaving decedent in the middle of the vestibule would have placed him in danger (*see Di Ponzio v Riordan*, 89 NY2d 578 [1997]; *Marrero v City of New York*, 102 AD3d 409 [1st Dept 2013]).

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

ENTERED: MAY 3, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6454 In re Cynthia B.C.,
Petitioner-Appellant,

-against-

Peter J.C.,
Respondent-Respondent.

_____

Hegge & Confusione, LLC, New York (Michael Confusione of counsel), for appellant.

_____

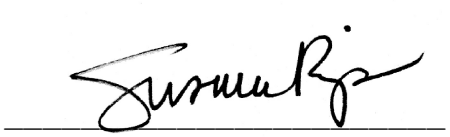
Appeal from order, Family Court, New York County (Clark V. Richardson, J.), entered on or about May 16, 2016, which denied on procedural grounds petitioner's objection to a Support Magistrate's order, unanimously dismissed, without costs, as taken from a nonappealable paper.

Petitioner's objection, which was denied by the court on the ground that she did not file proof of service of a copy of the objection on respondent father, is not reviewable on appeal (*see* Family Ct Act § 439[e]; *Matter of Dallas C. v Katrina J.*, 121 AD3d 456 [1st Dept 2014]). Petitioner acknowledges that she did not file an affidavit of service showing that she served her objection on respondent or respondent's counsel. This failure to file proof of service of her objection "is a failure to fulfill a

condition precedent to filing timely written objections to the Support Magistrate's order, and consequently, a waiver of [the] right to appellate review" (*Matter of Naomi S. v Steven E.*, 147 AD3d 568, 568 [1st Dept 2017]; *see Dallas C.* at 456).

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

ENTERED: MAY 3, 2018



CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6455 Kashaun Henry, Index 305645/14
Plaintiff-Respondent,

-against-

Xucia Carr,
Defendant-Appellant.

_____

Richard T. Lau & Associates, Jericho (Kathleen E. Fioretti of counsel), for appellant.

The Law Offices of Jeffrey L. Goodman, P.C., Brooklyn (Richard C. Bell of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about July 24, 2017, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing plaintiff's claims that he sustained serious injuries to his cervical spine and lumbar spine within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion as to the cervical spine claim, and otherwise affirmed, without costs.

Defendant established that plaintiff did not sustain a serious injury involving significant or permanent consequential limitations of use of his cervical spine or lumbar spine through the affirmed report of her expert orthopedist, who found normal ranges of motion and no objective evidence of traumatic injury in

the subject body parts, and opined that any injury to these body parts had resolved (*see Reyes v Se Park*, 127 AD3d 459, 460 [1st Dept 2015]; *Rickert v Diaz*, 112 AD3d 451 [1st Dept 2013]). Defendant also submitted post-accident treatment records that indicated that plaintiff did not have limited range of motion. However, defendant's expert did not raise any issue as to causation, since he acknowledged that the accident caused the resolved cervical and lumbar spine injuries (*see Moreira v Mahabir*, 158 AD3d 518 [1st Dept 2018]; *Santos v New York City Tr. Auth.*, 99 AD3d 550 [1st Dept 2012]).

In opposition, plaintiff raised an issue of fact as to his claimed lumbar spine injury through the affirmed report of his orthopedic surgeon, who examined plaintiff on several occasions, both shortly after the accident and more recently, and observed significant limitations in range of motion, as well as positive results on objective tests for lumbar injury (*see Moreira v Mahabir*, 158 AD3d at 518-519; *Encarnacion v Castillo*, 146 AD3d 600, 601 [1st Dept 2017]). In addition, plaintiff's radiologist averred that his MRI revealed conditions of the lumbar spine discs. The orthopedist's post-accident findings of limitations in range of motion conflict with the medical records submitted by defendant, raising an issue of fact, particularly since symptoms

may vary in severity over time (*see Perl v Meher*, 18 NY3d 208, 218 [2011]). Although plaintiff was not required to address causation, his orthopedist did address the fact that plaintiff had suffered a prior lumbar spine injury, noted that plaintiff had fully recovered from that injury before the subject accident, and opined that plaintiff's current conditions were causally related to the accident (*see id.* at 219).

As to the claimed cervical spine injury, however, plaintiff failed to submit evidence sufficient to raise an issue of fact as to whether any sprain or strain caused by the accident involved significant or permanent consequential limitations in use. His physician did not examine the cervical spine at any time, and plaintiff effectively abandoned his claim of cervical spine injury by failing to address it in his opposition to defendant's motion (*see Bray v Rosas*, 29 AD3d 422 [1st Dept 2006]). Nevertheless, should plaintiff establish a serious injury of the

lumbar spine at trial, he will be entitled to recover for other injuries causally related to the accident (*see Osborne v Diaz*, 104 AD3d 486, 487 [1st Dept 2013]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

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

ENTERED: MAY 3, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6456 Mitchell Greenwood, Index 150080/14
Plaintiff-Respondent,

-against-

Whitney Museum of American Art,
et al.,
Defendants-Appellants.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Jonathan P. Shaub of counsel), for appellants.

Sacks and Sacks LLP, New York (Scott N. Singer of counsel), for respondent.

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered September 7, 2017, which granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law §§ 240(1), 241(6), and 241-a claims, unanimously modified, on the law, to deny the motion as to the Labor Law §§ 241(6) and 241-a claims, and to dismiss the unpleaded Labor Law § 241-a claim, and otherwise affirmed, without costs.

Plaintiff sustained injuries during construction of a building when a piece of scrap metal fell on him. The piece of metal was being used by his co-worker, who was welding steel about 30 feet above on a lift, as a "dunnage" to secure a "fire blanket" to prevent sparks from igniting objects in surrounding

areas. At the time, plaintiff was "fire watching," which required him to remove flammable objects and suppress any fires started by errant sparks.

The court correctly granted plaintiff partial summary judgment on his Labor Law § 240(1) claim inasmuch as the record establishes that plaintiff's injury was the proximate result of the failure to take adequate steps to secure the piece of scrap metal from falling from the height at which it was being used.

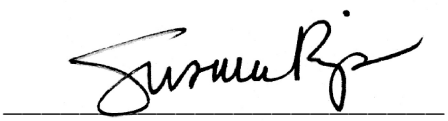
Plaintiff's Labor Law § 214-a claim was raised for the first time in his supplemental bill of particulars, served only three days before he filed his summary judgment motion, and was not alleged in the complaint. We therefore dismiss the section 241-a claim (*Paterra v Arc Dev. LLC*, 136 AD3d 474 [1st Dept 2016]), without prejudice to plaintiff's moving, if so advised, to amend the complaint to add such a claim.

Triable issues of fact preclude partial summary judgment on the Labor Law § 241(6) claim. The claim is predicated on 12 NYCRR § 23-2.5(a)(1), which requires placement of planks in shafts "not more than two stories or 30 feet, whichever is less, above the level where persons are working." Questions of fact exist as to whether the piece of steel fell from "more than two stories or 30 feet," and whether the placement of planks would be

antithetical to plaintiff's work by, for example, obstructing his view, or increasing the risk of fires caused by sparks (*see McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1094-1095 [2d Dept 2012]; *Boyle v 42nd St. Dev. Project, Inc.*, 38 AD3d 404 [1st Dept 2007]).

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

ENTERED: MAY 3, 2018



CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6457 MPEG LA, L.L.C., Index 162716/15
Plaintiff-Appellant,

-against-

Toshiba America Information Systems, Inc.,
Defendant,

Toshiba Corp.,
Defendant-Respondent.

_____

Windels Marx Lane & Mittendorf, LLP, New York (John D. Holden of counsel), for appellant.

Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Atlanta, GA (Benjamin R. Schlesinger of the bar of the State of Georgia, admitted pro hac vice, of counsel), Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, DC (Doris Johnson Hines of the bar of the District of Columbia, admitted pro hac vice, of counsel), and Gibbons P.C., New York (William P. Deni Jr. of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 1, 2017, which granted defendant Toshiba Corp.'s motion for summary judgment dismissing the breach of contract cause of action against it, unanimously affirmed, with costs.

The claim that Toshiba under-reported and underpaid royalties under the parties' license agreement was correctly dismissed because plaintiff failed to comply with the agreement's

audit provision, a condition precedent to suit (*see e.g. Rio Algom v Sammi Steel Co.*, 168 AD2d 250 [1st Dept 1990], *lv denied* 78 NY2d 853 [1991]).

Plaintiff's contention that Toshiba did not comply with a certification requirement contained in the license agreement is unpreserved and, in any event, unavailing. Plaintiff seeks not to compel certification but to recover for under-reporting and underpayment of royalties, and that claim, as indicated, is premature absent an audit.

Plaintiff's argument that the parties' actions and informal understandings of the mechanics of the audit procedures demonstrate that it would have been futile to pursue an audit relies on parol evidence and therefore is foreclosed by the license agreement's general merger clause (*see Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 599-600 [1997]). Plaintiff's contention that its informal efforts to commence an audit complied with the license agreement's notification procedures is without merit. It is undisputed that plaintiff did

not comply with the clear notice provisions set forth in the agreement.

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

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

ENTERED: MAY 3, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6458 Houston Casualty Company, Index 651981/14
Plaintiff-Respondent-Appellant, 595609/14

-against-

Cavan Corporation of NY,
Defendant-Appellant-Respondent,

New Puck, LLC, et al.,
Defendants.

- - - - -

Cavan Corporation of NY,
Third-Party Plaintiff-Appellant-Respondent,

-against-

The Ducey Agency, Inc.,
Third-Party Defendant-Respondent-Respondent.

_____

Wilkofsky, Friedman, Karel & Cummins, New York (Mark L. Friedman of counsel), for appellant-respondent.

DLA Piper LLP (US), New York (Aidan M. McCormack of counsel), for respondent-appellant.

Keidel, Weldon & Cunningham, LLP, White Plains (Howard S. Kronberg of counsel), for respondent-respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovitts, J.), entered October 18, 2016, which, to the extent it granted insurance broker the Ducey Agency's (Ducey) cross motion to dismiss the first and second causes of action of the third-party complaint, for negligence and breach of contract, and denied the Cavan Corporation of NY's (Cavan) motion to amend those causes of

action, and to add a fourth cause of action for negligent misrepresentation, unanimously reversed, on the law, with costs, the cross motion to dismiss denied, and the proposed amendments to the first and second causes of action, and the addition of a fourth cause of action for negligent misrepresentation, granted. Appeal from the aforementioned order, to the extent it granted Cavan's motion to amend its first counterclaim against plaintiff Houston Casualty Company (Houston) for illusory coverage and its nineteenth affirmative defense for untimely delivery and to add a second counterclaim for negligence, a twenty-first affirmative defense and fifth counterclaim for waiver, and a sixth counterclaim for bad faith against Houston, unanimously dismissed, as academic.

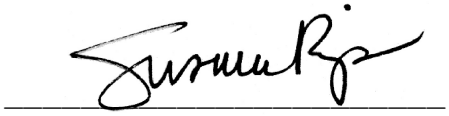
Ducey's cross motion to dismiss the third-party complaint should be denied, and Cavan's motion to amend the first and second causes of action for negligence and breach of contract, respectively, and to add a fourth cause of action for negligent misrepresentation should be granted, as "[u]nder New York law, a party who has engaged a person to act as an insurance broker to procure adequate insurance is entitled to recover damages from the broker [under a breach of contract theory] if the policy obtained does not cover a loss for which the broker contracted to

provide insurance, and the insurance company refuses to cover the loss" (*Bruckmann, Rosser, Sherrill & Co. v Marsh USA Inc.*, 65 AD3d 865, 866 [1st Dept 2009]). Moreover, "[a]n insurance agent or broker can be held liable in negligence if he or she fails to exercise due care in an insurance brokerage transaction. Thus, a plaintiff may seek to hold a defendant broker liable under a theory of either negligence or breach of contract" (*id.*). Here, the proposed amended third-party complaint alleges a breach independent of the contract, that Ducey failed to inform Cavan of the definitions and terms of the Houston policy and its potential effect on coverage (*see Baseball Off. Of Commr. v Marsh & McLennan*, 295 AD2d 73, 82 [1st Dept 2002]). In exceptional circumstances a cause of action for negligent misrepresentation exists where there is a special relationship between the customer and the insurance broker and the customer reasonably relies upon the broker's representations (*see Murphy v Kuhn*, 90 NY2d 266, 270 [1997]). Here, Cavan alleged that it met annually with its broker, in the course of their 20-year relationship, to discuss its insurance needs, and that it relied on the broker's advice (*see Dae Assocs., LLC v AXA Art Ins. Corp.*, 158 AD3d 493, 494 [1st Dept 2018]).

Houston's appeal is dismissed as academic in light of this Court's recent decision in a related matter concerning this litigation (158 AD3d 536 [1st Dept Feb. 20, 2018]).

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

ENTERED: MAY 3, 2018



CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6460 Joel Marco, Index 23185/13E
Plaintiff,

-against-

Tower 111, LLC,
Defendant-Respondent.

- - - - -

Tower 111, LLC,
Third-Party Plaintiff-Respondent,

-against-

Golf and Body NYC, LLC,
Third-Party Defendant,

W & W GLASS, LLC, doing business as
W & W Glass, LLC,
Third-Party Defendant-Appellant.

_____

Law Office of James J. Toomey, New York (Michael J. Kozoriz of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Carla Varriale of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered December 19, 2016, which, to the extent appealed from, denied the cross motion of third-party defendant W & W Glass, Inc. (W & W) for summary judgment dismissing the third-party complaint as against it, unanimously reversed, on the law, without costs, and the cross motion granted.

Plaintiff alleges that he was injured when he tripped and

fell over an industrial-sized electrical cord in defendant/third-party plaintiff Tower 111, Inc.'s (Tower) building. After plaintiff brought the main action against Tower, Tower commenced a third-party action against W & W. Tower averred that W & W, which had been engaged in a window-replacement job at the building months before plaintiff's accident, had left behind at the building, upon ceasing its work, its electrically-operated scaffold and related equipment, allegedly including the cord on which plaintiff later tripped.

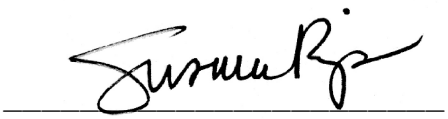
Even assuming that plaintiff tripped on the cord that W & W had been using and that the cord was W & W's property (rather than Tower's property), the record establishes that no basis exists for holding W & W liable to Tower for common-law indemnification or contribution based on this accident. Tower admits that, when it directed W & W to cease its work at the building months before plaintiff's accident, it requested that W & W leave behind its scaffold and related equipment to avoid having to obtain a new permit to resume the work. W & W complied with this request, and, during the months of W & W's absence immediately preceding plaintiff's mishap, Tower repeatedly used and moved the cord for its own purposes, thereby severing any causal nexus between W & W's exercise of control over the cord

and plaintiff's injury months later. Since W & W did not exercise control over the cord — the instrumentality of the harm — at any time relevant to the causation of the accident, it cannot be held liable for plaintiff's injury (*see Piazza v Regis Care Ctr., LLC*, 47 AD3d 551, 554 [1st Dept 2008]; *Gerdowsky v Crain's New York Business*, 188 AD2d 92 [1st Dept 1993]). Further, to the extent W & W may have entrusted the cord to Tower, any such entrustment would not have rendered W & W vicariously liable for Tower's subsequent negligence in dealing with the cord in the furtherance of Tower's own business (*cf.* Vehicle & Traffic Law § 388).

Inasmuch as Tower, on appeal, does not contest that the remaining causes of action asserted against W & W in the third-party complaint (for contractual indemnification and breach of contract to procure insurance) should have been dismissed, we reverse to grant W & W's cross motion in its entirety.

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

ENTERED: MAY 3, 2018



CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6461 Arthur E. Rondeau, Index 654181/15
Plaintiff-Appellant,

-against-

Marc Berman, et al.,
Defendants-Respondents.

_____

Arthur E. Rondeau III, appellant pro se.

Mintz & Gold LLP, New York (Steven G. Mintz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about January 13, 2017, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The court properly dismissed plaintiff's breach of contract claim, asserting that defendant Berman had agreed to publish an article about plaintiff, for lack of definiteness (*see Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]). Plaintiff's promissory estoppel claim, based on similar facts, also fails to state a cause of action (*see New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 [1st Dept 2004]). Furthermore,

plaintiff's wholly speculative theories of damages warranted dismissal of his claims (*see Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]), and there exists no basis to impose vicarious liability on the remaining defendants.

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

ENTERED: MAY 3, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6462 The People of the State of New York, Ind. 4643/99
Respondent,

-against-

Paul Smith,
Defendant-Appellant.

_____

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

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

_____

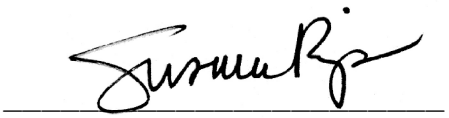
Order, Supreme Court, New York County (Renee A. White, J.), entered on or about May 6, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Each of the court's point assessments at issue was supported by clear and convincing evidence. The court correctly assessed points for use of a dangerous instrument and multiple victims based on grand jury testimony (*see People v Sincerbeaux*, 27 NY3d 683, 687 [2016]) establishing that defendant cut one victim with a knife or other edged weapon, and that he attempted to rape a second victim. The court properly assessed points for a history of drug and alcohol abuse, based upon defendant's admission to probation officials. Any period of prolonged abstinence was

accounted for by his incarceration (*see People v Watson*, 112 AD3d 501, 503 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]). Defendant's challenge to points contained in the risk assessment instrument but not assessed by the court is academic.

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

ENTERED: MAY 3, 2018



CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6463 In re Dondre R.J.H.,
Petitioner-Appellant,

-against-

Rashida S., et al.,
Respondents-Respondents.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), and Loeb & Loeb LLP, New York (C. Linna Chen of counsel), attorneys for the children.

_____

Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about October 19, 2016, which dismissed the custody petition, unanimously affirmed, without costs.

In reviewing custody issues, deference is to be accorded to the determination rendered by the fact-finder, unless it lacks a sound and substantial basis in the record (*Yolanda R. v Eugene I.G.*, 38 AD3d 288, 289 [1st Dept 2007]). We find that the order on appeal has a sound and substantial basis in the record, and neither petitioner nor the attorney for the child (AFC) presents grounds to reverse.

We disagree that the order resulted from the court's erroneous over-emphasis on petitioner's financial status. Instead, we view the order as the outgrowth of the court's

reasonable appraisal of petitioner's testimony about his stage of life. Petitioner, who, at the time of the hearing, was about to turn 21 years old, testified that he held a part-time job and was in the process of deciding whether to try to go back to school or, instead, try to get a second job, and the court reasonably construed his testimony as proof that he was not in a position to assume custody of his sibling Dallas[1]. His near-total financial dependence on his mother only buttressed that conclusion (*cf. Matter of Stent v Schwartz*, 133 AD3d 1302 [4th Dept 2015], *lv denied* 27 NY3d 902 [2016]). Moreover, the court was also appropriately concerned whether petitioner was equipped to assume sole responsibility for his sister's medical care, given testimony about her special needs.

Further, and whether or not the requisite "extraordinary circumstances" to allow an award of custody to a non-parent exist here, petitioner and AFC do not further show, as petitioner must (*see Matter of Suarez v Williams*, 26 NY3d 440 [2015]; *Matter of Bennett v Jeffreys*, 40 NY2d 543 [1976]), why a change in custody is necessary to advance or protect Dallas's best interests (*see Matter of Lawrence C. v Anthea P.*, 79 AD3d 577 [1st Dept 2010]),

[1]The other sister of whom petitioner has sought custody has turned 18, and the appeal as to her is now moot.

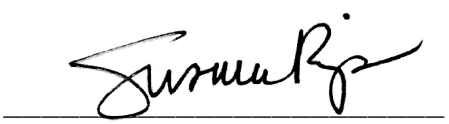
the consideration that must guide any custody determination (*Eschbach v Eschbach*, 56 NY2d 167 [1982]).

Petitioner is already involved, at least to a point, in his sister's education and medical care. To the extent her mother may occasionally attend parent-teacher conferences and take her to medical appointments, petitioner's counsel stated this was not because petitioner has been barred from doing so, but because he did not "feel" he had the right to assume greater responsibility in these realms. Yet neither petitioner nor AFC cite any instances where petitioner sought to be involved with, or make a decision about Dallas's education or medical care but, due to his legal status, was thwarted from so doing. Nor do either of them cite any issues that have arisen as a result of the mother's involvement in Dallas's education and medical care.

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

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

ENTERED: MAY 3, 2018



CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6464 The People of the State of New York, Ind. 4446/13
Respondent,

-against-

Derrick Jack,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Andrea Yacka-Bible of counsel), for appellant.

_____

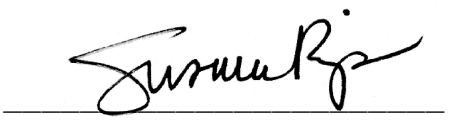
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J. at plea; Ronald Zweibel, J. at sentencing), rendered March 26, 2014,

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

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

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

ENTERED: MAY 3, 2018



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

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6465 Marilyn Silverman, Index 25560/14E
Plaintiff-Respondent,

-against-

Brady L.L.C., et al.,
Defendants-Appellants.

_____

Cozen O'Connor, New York (Kristin Keehan of counsel), for appellants.

The Edelsteins, Faegenburg & Brown, LLP, New York (Glenn K. Faegenburg of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Donna Mills, J.), entered March 20, 2017, upon a jury verdict, in favor of plaintiff and against defendants, unanimously affirmed, without costs.

Plaintiff commenced this action to recover for personal injuries she sustained when the doorknob on the door to her apartment came off the door as she pulled on it, causing her to lose her balance and fall.

The jury's verdict was supported by valid lines of reasoning and permissible inferences from the evidence at trial and was not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). Plaintiff's testimony that she complained on multiple occasions to both the building

superintendent and the porter who tightened the screws in her doorknob at least three times presented an issue of fact and credibility for the jury as to whether defendants had notice of the recurring loose doorknob (*see Santana v Kardash Realty Corp.*, 158 AD3d 595 [1st Dept 2018]; *Rios v 1146 Ogden LLC*, 136 AD3d 606 [1st Dept 2016]). Actual notice of the recurring loose doorknob provides constructive notice of each recurrence (*see Talavera v New York City Tr. Auth.*, 41 AD3d 135, 136 [1st Dept 2007]; *Simoni v 2095 Cruger Assoc.*, 285 AD2d 431, 432 [1st Dept 2001]).

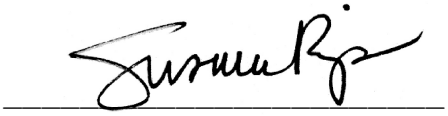
Testimony about the post-accident inspection of the doorknob, which defendants failed to preserve, was relevant to the condition of the doorknob at the time of the accident (*see Francklin v New York El. Co., Inc.*, 38 AD3d 329 [1st Dept 2007]; *Vaccariello v Meineke Car Care Ctr., Inc.*, 136 AD3d 890, 892-893 [2d Dept 2016]). In context, any error in permitting testimony

about the concomitant repair was harmless.

We have considered defendant's other claims and find them to be unavailing.

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

ENTERED: MAY 3, 2018



CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6466 Roger S. Roth, Index 159191/15
Plaintiff-Respondent,

-against-

Benjamin Ostrer, et al.,
Defendants-Appellants.

_____

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman of counsel), for appellants.

Sher Tremonte LLP, New York (Justin M. Sher of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered May 2, 2016, which, to the extent appealed from, denied defendants' motion pursuant to CPLR 3211(a)(1) and 3211(a)(7) to dismiss the causes of action for legal malpractice, breach of fiduciary duty, and breach of contract, unanimously modified, on the law, to dismiss the cause of action for breach of fiduciary duty and breach of contract, and otherwise affirmed, without costs.

Plaintiff alleges that defendants committed legal malpractice by withdrawing, without first consulting with him, his appeal from a November 2012 order of Supreme Court, Orange County (Lawrence H. Ecker, J.), that dismissed his article 78 petition to annul his summary termination from the Newburgh

Police Department, without a pretermination hearing pursuant to Civil Service Law § 75 or Town Law § 155.

Defendants failed to demonstrate as a matter of law that their withdrawal of the appeal was not negligence but a reasonable strategic decision (*see Rodriguez v Lipsig, Shapey, Manus & Moverman, P.C.*, 81 AD3d 551 [1st Dept 2011]). The withdrawal resulted in plaintiff's forgoing a pretermination hearing, which would have entitled him to procedural safeguards and allowed for disciplinary measures less severe than termination. By contrast, the reinstatement hearing to which the Town of Newburgh consented upon vacatur of plaintiff's conviction and his plea to harassment in the second degree, a violation (Penal Law § 240.26), and at which defendants represented plaintiff, was limited to whether, in the Town's discretion, plaintiff should be reinstated to his position (*see* Civil Service Law § 75; Town Law § 155; Public Officers Law § 30[1][e]).

The allegations in the complaint establish that but for defendants' conduct in withdrawing the appeal from Justice Ecker's ruling, and in sending a different lawyer than the one promised to represent him at the reinstatement hearing, he would not have incurred damages (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *see Weil, Gotshal &*

Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 271-272 [1st Dept 2004]). Plaintiff showed that he would have prevailed on the appeal had it not been withdrawn, because Justice Ecker erred in concluding that plaintiff's conviction of assault in the third degree, based on criminal negligence (Penal Law §§ 15.05[4]; 120.00[3]), a misdemeanor, constituted a violation of his oath of office, i.e., arose from "knowing or intentional conduct indicative of a lack of moral integrity," and warranted termination without a hearing pursuant to Public Officers Law § 30(1)(e) (*Matter of Duffy v Ward*, 81 NY2d 127, 135 [1993]). Justice Ecker reasoned that third-degree assault was a violation of plaintiff's oath of office merely because criminal negligence requires more than ordinary civil negligence, and that therefore it "did not negate a finding that [plaintiff] engaged in 'knowing or intentional' conduct within the meaning of [Public Officers Law § 30(1)(e)]" (*Matter of Application Roth v Town of Newburgh*, Sup Ct, Orange County, Nov. 16, 2012, Ecker, J., index No. 3014/2012). In addition, the elements of criminally negligent assault in the third degree do not necessarily warrant a finding of lack of moral integrity (*see Duffy*, 81 NY2d at 135).

In arguing to the contrary, defendants at times rely on the underlying facts of the offense, contrary to *Duffy* (81 NY2d at

134 ["misdemeanor conviction for conduct outside the line of duty will be 'a crime involving a violation of (the) oath of office' under Public Officers Law § 30[1][e] only if the violation is apparent from the Penal Law's definition of the crime"]).

Had plaintiff prevailed on appeal, he would have obtained a pretermination hearing, which, as indicated, in contrast to the reinstatement hearing he received, would have allowed him to argue for disciplinary measures other than termination. Plaintiff thus sufficiently alleged that defendants caused him actual ascertainable damages of lost salary and other benefits (*see Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002], *lv denied* 98 NY2d 606 [2002]).

Defendants' contention that the complaint should be dismissed as against Hoovler pursuant to Business Corporation Law § 1505(a) is unavailing at this stage. Hoovler's affidavit, in which he denies performing or supervising legal service on plaintiff's behalf, does not address time records that suggest otherwise.

The claims for breach of contract and breach of fiduciary duty should have been dismissed as duplicative of the legal malpractice claim, in terms of both the misconduct alleged and damages sought.

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

ENTERED: MAY 3, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6467 The People of the State of New York, Ind. 1104/13
Respondent,

-against-

Richard Lorenzo,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Waleska Suero Garcia of counsel), for respondent.

_____

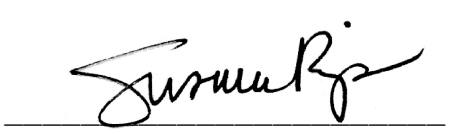
Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about August 24, 2016, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently 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.

Defendant's low score on the Static-99R test had only limited probative value (*see People v Rodriguez*, 145 AD3d 489, 490 [1st Dept 2016] *lv denied* 28 NY3d 916 [2017]).

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

ENTERED: MAY 3, 2018



CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6468N In re City of New York, et al., Index 450615/16
Petitioners-Respondents,

-against-

District Council 37, et al.,
Respondents-Appellants.

_____

Robin Roach, New York (Michael Isaac of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered January 17, 2017, which granted the petition to vacate an arbitration award, denied the grievance, and dismissed the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

An arbitrator exceeds his or her powers when the "award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 90 [2010] [internal quotation marks omitted]). A provision in a contract that the arbitrator may not alter or modify a contract does not limit the arbitrator's power to resolve the dispute by interpreting the contract based on his

or her findings as to the parties' intent (*see Twiss Assoc. v Imptex Intl. Corp*, 189 AD2d 672, 673 [1st Dept 1993], *lv denied* 81 NY2d 710 [1993]). However, an award should be vacated where it is not derived from the contract, but from the deliberate and intentional consideration of matters outside the contract (*see Matter of City of New York v Davis,* 146 AD2d 480, 483 [1st Dept 1989]).

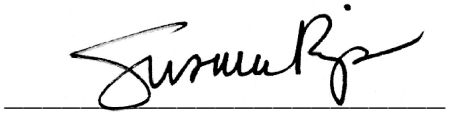
Here, the record shows that the arbitration award added to or modified the collective bargaining agreement, which was expressly prohibited in the agreement (*id; see Matter of Port Auth. Police Benevolent Assn. [Port Auth. of N.Y. & N.J.]*, 235 AD2d 359 [1st Dept 1997]). The arbitrator's decision rewrote the contract for the parties by expanding the number of workers entitled to the assignment differential, when the contract expressly limited the differential to workers at a specific

facility.

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

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

ENTERED: MAY 3, 2018



CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6469N In re Part 60 RMBS Put-Back Litigation Index 777000/15
- - - - - 153945/13
Natixis Real Estate Capital Trust 2007-HE2, etc., 595610/15
Plaintiff/Counterclaim Defendant-Respondent,

-against-

Natixis Real Estate Capital, Inc.,
Defendant/Counterclaim Plaintiff-Appellant.
- - - - -
Natixis Real Estate Holdings LLC, etc.,
Third-Party Plaintiff-Appellant,

-against-

Wells Fargo Bank, N.A.,
Third-Party Defendant-Respondent.

_____

Davis & Gilbert LLP, New York (James R. Serritella of counsel), for appellant.

Selendy & Gay, New York (Andrew Dunlap of counsel), for Natixis Real Estate Capital Trust 2007-HE2, respondent.

Jones Day, New York (Michael O. Thayer of counsel), for Wells Fargo Bank, N.A., respondent.

_____

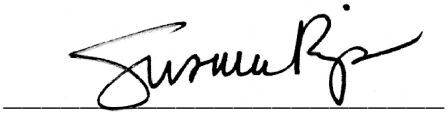
Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on September 28, 2017, which denied defendant/counterclaim plaintiff/third-party plaintiff Natixis Real Estate Capital, Inc.'s challenge to a special master's order holding that the subject documents are protected by the common interest privilege, unanimously affirmed, with costs.

In this residential mortgage-backed securities put-back action, the securities administrator, Wells Fargo Bank, N.A., separate securities administrator, Computershare Trust Company, National Association, and the nonparty certificateholders, shared the common legal interest of pursuing the mortgage put-back claims. Due to the "no-action" clause in the applicable pooling and servicing agreement, the allegedly injured certificateholders may not directly pursue their claims, and must rely on the securities administrator and separate securities administrator to litigate on behalf of the trust. Within this limited context, we find that the standard articulated in *Ambac Assur. Corp. v Countrywide Home Loans, Inc.* (27 NY3d 616, 628 [2016]) concerning the application of the common interest privilege, is met (*see ACE Sec. Corp. v DB Structured Prods., Inc.*, 55 Misc3d 544, 561-563 [Sup Ct, NY County 2016]).

Moreover, the documents were exchanged at a time when the parties shared their common interest of pursuing the put-back claims, and were made in furtherance of that common interest.

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

ENTERED: MAY 3, 2018



CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Kapnick, Kern, JJ.

6470N Josh Taylor, Index 153770/16
Plaintiff-Respondent,

-against-

Montreign Operating Company, LLC,
et al.,
Defendants-Appellants.

_____

Hodgson Russ LLP, Buffalo (Ryan J. Lucinski of counsel), for appellants.

Sacks and Sacks, New York (Scott N. Singer of counsel), for respondent.

_____

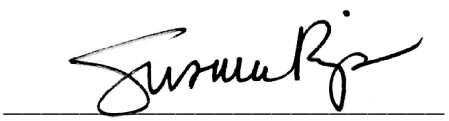
Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered July 21, 2017, which denied defendants' motion to change venue from New York County to Sullivan County, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, and the motion granted.

The motion court exercised its discretion in an improvident manner in light of defendants' demonstration that the convenience of material nonparty witnesses would be better served by the change (*see Kennedy v C.F. Galleria at White Plains*, 2 AD3d 222, 223 [1st Dept 2003]; *cf. Cardona v Aggressive Heating*, 180 AD2d 572 [1st Dept 1992]). Defendants submitted the affidavits of four first responders and plaintiff's coworker, all of whom

averred that they would testify as witnesses but would be inconvenienced by traveling to New York County. The accident occurred in Sullivan County, and other than one defendant's registered principal place of business, and one of plaintiff's physicians maintaining an office in the county, this matter has no contact with New York County (*see Lawrence v Volvo Cars of N. Am.*, 224 AD2d 329 [1st Dept 1996]). Plaintiff's argument that the affidavits submitted by defendants were not sufficiently detailed is unpersuasive, and plaintiff offers nothing to rebut defendants' assertions that his coworker, the first responders, and the sheriff who investigated the accident were material witnesses, as they averred in their affidavits (*see Kennedy* at 223; *see also Austin v DaimlerChrysler Corp.*, 294 AD2d 182 [1st Dept 2002]). Furthermore, plaintiff's assertion that he has alleged violations of the Labor Law, and thus liability may be resolved prior to trial, is not relevant (*see Risoli v Long Is. Light. Co.*, 138 AD2d 316, 319 [1st Dept 1988]).

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

ENTERED: MAY 3, 2018



CLERK

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6611 & M-1651 & M-1756
Barrie Shackman, et al.,
Plaintiffs-Respondents,

-against-

400 East 85th Street Realty Corp.,
Defendant-Appellant.

Index 160778/14

Gartner + Bloom, P.C., New York (William M. Brophy of counsel), for appellant.

Lambert & Shackman, PLLC, New York (Thomas C. Lambert of counsel), for respondents.

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered April 4, 2017, which, insofar as appealed from, granted plaintiffs' motion for partial summary judgment on the negligence, private nuisance, rent abatement, and constructive eviction causes of action, unanimously modified, on the law, to deny the motion as to the nuisance cause of action, and otherwise affirmed, without costs.

With respect to the negligence cause of action, the undisputed evidence demonstrates that defendant was aware of deficiencies in the building's HVAC system that rendered the system prone to causing floods of the type that damaged plaintiffs' apartment and that it failed to perform any of the maintenance and repair work that its own expert engineer agreed

would have prevented the floods, namely, snaking or flushing out the HVAC piping. The court providently exercised its discretion in finding plaintiffs' expert architect competent, based on his training and experience, to opine on the maintenance of an HVAC system located in the walls of the building (*see Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 398-399 [1941]; *Edgewater Apts. v Flynn*, 216 AD2d 53, 54 [1st Dept 1995]; *see also Rapp B. Props., LLC v RLI Ins. Co.*, 65 AD3d 923, 925 [1st Dept 2009], *lv denied* 13 NY3d 714 [2009]). The court also properly considered the unsigned transcripts of the deposition testimony of defendant's building superintendent and property manager since defendant failed to return signed copies of the transcripts to plaintiffs within 60 days (CPLR 3116[a]) and does not challenge the accuracy of the transcripts (*see Gomez v Shop-Rite of New Greenway*, 110 AD3d 483, 484 [1st Dept 2013]).

The decretal paragraph of the order notwithstanding, it is apparent from the discussion of the private nuisance cause of action that the motion court found, correctly, that plaintiffs failed to establish their prima facie case because they did not show a recurrence of the leaking during the three-year statutory limitations period (*see Domen v Holding Co. v Aranovich*, 1 NY3d 117, 124 [2003]; *Duane Reade v Reva Holding Corp.*, 30 AD3d 229,

237 [1st Dept 2006]). Thus, we modify the order to reflect the court's determination that plaintiffs are not entitled to summary judgment on the nuisance cause of action.

Plaintiffs established their entitlement to summary judgment on the rent abatement cause of action, under both Real Property Law § 235-b and their proprietary lease, by their undisputed submissions showing that the floods caused by defendant's negligence "materially affect[ed]" their health and safety and deprived them of the use of a significant portion of their apartment (*see Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 327-328 [1979], *cert denied* 444 US 992 [1979]; *Witherbee Ct. Assoc. v Greene*, 7 AD3d 699, 700-701 [2d Dept 2004]).

Similarly, plaintiffs are entitled to summary judgment on the constructive eviction cause of action because they demonstrated that the leak "'substantially and materially deprived [them] of the beneficial use and enjoyment of the [entire] premises'" (*Pacific Coast Silks, LLC v 247 Realty, LLC*, 76 AD3d 167, 172 [1st Dept 2010], quoting *Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]; *see Bostany v Trump Org. LLC*, 88 AD3d 553, 554 [1st Dept 2011]). Defendant argues that plaintiffs are not entitled to summary judgment on this cause of action because it is duplicative of the rent

abatement cause of action and may only be asserted as a defense (*see Elkman v Southgate Owners Corp.*, 233 AD2d 104 [1st Dept 1996]). This argument, having been made for the first time in reply on appeal, is unpreserved for our review (*see Wolkstein v Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000]).

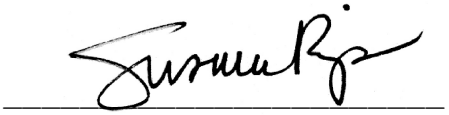
Plaintiffs, who did not appeal from the parts of the order that denied their motion, request that we search the record and grant them full relief as to, inter alia, damages, attorneys' fees, and punitive damages (*see* CPLR 3212[b]; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106 [1984]). Their arguments in support of this request are without merit.

M-1651 & M-1756 - *Barrie Shackman v 400 East 85th Street Realty Corp.*

Motion for stay of trial denied as academic, and motion to file a sur-reply denied.

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

ENTERED: MAY 3, 2018



CLERK

Friedman, J.P., Andrias, Kapnick, Kahn, JJ.

3025 Turner Construction Company, et al., Index 653917/13
Plaintiffs-Appellants,

-against-

Endurance American Specialty
Insurance Company, et al.,
Defendants-Respondents.

_____

Saxe Doernberger & Vita, P.C., New York (Richard W. Brown of counsel), for appellants.

Litchfield Cavo LLP, New York (Vincent J. Velardo of counsel), for Endurance American Specialty Insurance Company, respondent.

Carroll McNulty & Kull LLC, New York (Denise Marra DePekary of counsel), for Everest National Insurance Company, respondent.

_____

Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered May 14, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for partial summary judgment, and granted defendant Endurance American Specialty Insurance Company's (Endurance) cross motion for summary judgment declaring that it had no obligation to defend or indemnify plaintiffs in an underlying personal injury action, unanimously affirmed, without costs.

The Dormitory Authority of the State of New York (DASNY), the owner of the project, retained plaintiff Skidmore Owings & Merrill, LLP to provide architectural services. Skidmore entered

into a contract with plaintiff Turner Construction Company for construction management services. DASNY also entered into a contract with KJC Waterproofing, Inc. for the performance of all the roofing and exterior waterproofing work. KJC subcontracted the installation of the garden roofing to Plant Fantasies, the underlying plaintiff's employer, by a written purchase order.

Pursuant to the DASNY-KJC contract, KJC procured insurance coverage from Endurance along with an excess liability policy from defendant Everest National Insurance Company. Turner and Skidmore commenced this coverage action against Endurance and Everest, seeking a declaration that, inter alia, Endurance was obligated to defend and indemnify them as additional insureds under the Endurance policy.

The Endurance policy includes the following additional insured endorsement:

> "ADDITIONAL INSURED BY CONTRACT, AGREEMENT OR PERMIT
>
> "WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization with whom you agreed, because of a written contract or written agreement or permit to provide insurance such as is afforded under this policy, but only with respect to your operations, 'your work' or facilities owned or used by you."

As we have previously decided in *Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.* (143 AD3d 146 [1st

Dept 2016], affirmed by the Court of Appeals on March 27, 2018 (_ NY3d_, 2018 NY Slip Op 02117 [2018]), this language, which interprets the phrase "because of a written contract" in conjunction with the preceding phrase "with whom you [the named insured] agreed," is susceptible to only one meaning: that to obtain additional insured status, plaintiffs, Turner and Skidmore, were required to have a direct contract with Endurance's named insured, KJC. Because neither Turner nor Skidmore had such an agreement with KJC, they do not qualify for coverage under the language of the additional insured endorsement and Endurance was not obligated to defend or indemnify them in the underlying action.

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

ENTERED: MAY 3, 2018

CLERK

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6365N James C. Roddy, Jr., Index 35007/07
Plaintiff-Appellant,

-against-

Katherine Roddy,
Defendant-Respondent.

_____

Elayne Kesselman, New York, for appellant.

Pryor Cashman LLP, New York (Donald Lockhart Schuck of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered August 31, 2007, which, to the extent appealed from as limited by the briefs, granted defendant's motion to reject the recommendation of the special referee that plaintiff not be required to reimburse her for counsel fees, and directed that plaintiff pay a portion of defendant's counsel fees, unanimously reversed, on the law, without costs, and the motion denied.

The Domestic Relations Law permits the court to direct a party to pay counsel fees "to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties" (Domestic Relations Law § 238; *see also* Domestic Relations Law § 237[b]). These provisions are

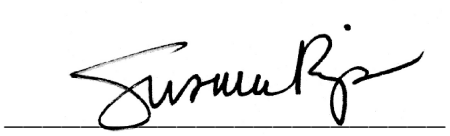
intended "to ensure a just resolution of the issues by creating a more level playing field with respect to the parties' respective abilities to pay counsel. . . [and] permit[] consideration of many factors, but focus[] primarily upon the paramount factor of financial need" (*Silverman v Silverman*, 304 AD2d 41, 48 [1st Dept 2003]; *Wells v Serman*, 92 AD3d 555, 555 [1st Dept 2012] [an award of counsel fees under these provisions "cannot be made merely to punish a party" for its litigation conduct]). Where a party's inappropriate litigation conduct has adversely affected the other party but both are able to pay their own counsel fees, the appropriate remedy may be a sanction (22 NYCRR 130-1.1), not an award of attorneys' fees (*Silverman v Silverman*, 304 AD2d at 48-49).

The court awarded legal fees to defendant based upon its consideration of the merits of plaintiff's positions in the parties' custody litigation. In particular, the court noted that plaintiff had failed to respond to or comply with requests by the Administration for Children's Services during an investigation prior to its commencement of a proceeding under article 10 of the Family Court Act that was eventually consolidated with the parties' custody proceedings and ultimately dismissed. However, the court also adopted the special referee's findings that

neither party was the "monied spouse," that each was capable of paying his or her own counsel fees, and that both parties are genuinely concerned for and "deeply care about their children." Under these circumstances, the award of counsel fees under the Domestic Relations Law was improper (*Wells v Serman*, 92 AD3d 555).

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

ENTERED: MAY 3, 2018



CLERK

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6428 Hereford Insurance Company, Index 156073/16
Plaintiff-Appellant,

-against-

Lida's Medical Supply, Inc., et al.,
Defendants-Respondents,

Hayek Chiropractic, P.C., et al.,
Defendants.

_____

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

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 24, 2017, which denied plaintiff's motion for summary judgment declaring that it has no obligation to pay the no-fault medical provider claims of defendants Lida's Medical Supply, Inc. and American Kinetics Lab, Inc. with respect to the July 9, 2015 motor vehicle accident, unanimously reversed, on the law, without costs, the motion granted, and it is so declared.

Plaintiff's first cause of action is for a declaratory judgment that it did not owe a duty to pay no-fault claims because the underlying claimants failed to appear for independent medical examinations (IMEs). While plaintiff's notice of motion did not specify that it was solely moving for summary judgment on its first cause of action, its attorney's affirmation shows that

they were limiting the relief sought to this claim.

When an individual submits a personal injury claim for motor vehicle no-fault benefits, the insurance company may request that the individual submit to an IME, and if the individual fails to appear for that IME, it "constitutes a breach of a condition precedent vitiating coverage" (*Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 470 [1st Dept 2016]; *see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]; 11 NYCRR 65-1.1). Here, plaintiff established its entitlement to judgment as a matter of law by submitting the letters sent to each claimant notifying them about the date, time, and location of the initially scheduled IME and a second scheduled IME and affidavits of service for these letters. Plaintiff also submitted affidavits from each medical professional assigned to conduct the scheduled IME, with each stating that the medical professional was in his or her office at the date and time of the scheduled IME, the respective claimant failed to appear, the appointment was kept open until the end of the day, and at the end of the day, the medical professional filled out the affidavit acknowledging the nonappearance.

Because Hereford sent the notices scheduling the IMEs prior

to the receipt of each of the claims, the notification requirements for verification requests under 11 NYCRR 65-3.5 and 65-3.6 do not apply (*see Mapfre* at 469). Furthermore, plaintiff was not required "to demonstrate that the claims were timely disclaimed since the failure to attend medical exams was an absolute coverage defense" (*American Tr. Ins. Co. v Lucas*, 111 AD3d 423, 424-25 [1st Dept 2013]]).

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

ENTERED: MAY 3, 2018

CLERK

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6431 Paz Kaspi, Index 113180/11
Plaintiff-Appellant,

-against-

Michael Wainstein,
Defendant-Respondent.

_____

Tuttle Yick LLP, New York (Gregory Tuttle of counsel), for appellant.

_____

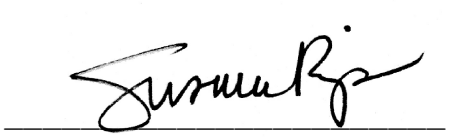
Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 13, 2017, which denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

The court properly denied plaintiff summary judgment where issues of fact exist as to whether the sum plaintiff seeks to recover is, in whole or in part, a finder's/broker's fee and whether plaintiff was a licensed real estate broker or real estate salesperson at the time he provided the purported services, as required by Real Property Law § 442-d. That defendant conceded at his deposition that he considered the letter agreement to be a stipulation of settlement is irrelevant. As this Court stated in its decision on plaintiff's prior appeal, in which he made the same argument regarding the enforceability of this agreement: "It is plaintiff who may not bring or

maintain this action if the money sought or any portion thereof is for a finder's or broker's fee and he did not have a broker's or salesman's license" (*Kaspi v Wainstein*, 116 AD3d 412, 412 [1st Dept 2014]).

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

ENTERED: MAY 3, 2018



CLERK

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6432- Ind. 2309/15
6432A The People of the State of New York, 3012/16
Respondent,

-against-

Charles Smith,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin of counsel), for respondent.

_____

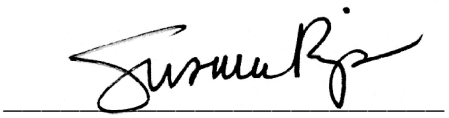
An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Albert Lorenzo, J.), rendered November 15, 2016,

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

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

ENTERED: MAY 3, 2018



CLERK

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

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6433 Roberto Santiago, Index 115909/10
Plaintiff,

-against-

44 Lexington Associates, LLC,
et al.,
Defendants-Appellants,

Tractel, Inc.,
Defendant-Respondent.

_____

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac of counsel), for appellants.

Nicoletti Gonson Spinner, LLP, New York (Ben Gonson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered October 17, 2016, which, insofar as appealed from as limited by the briefs, granted the motion of defendant Tractel, Inc. for summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims as against it, unanimously affirmed, without costs.

Plaintiff was injured when he slipped on debris while performing work in connection with the design, fabrication, and installation of a window washing system that had been subcontracted to Tractel as part of the construction of a building. Since the debris removal giving rise to plaintiff's

injury was not within the scope of authority or work delegated to Tractel, it may not be liable to plaintiff under Labor Law §§ 240(1) or 241(6) as a statutory agent of the general contractor, defendant Jeffrey M. Brown Associates, Inc. (Brown) (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011]).

Pursuant to its contract with defendant owner 44 Lexington Associates, LLC (owner), Brown was responsible for maintaining the premises free of debris. Brown and the owner point to nothing in Tractel's subcontract delegating such responsibility to it (*compare Tuccillo v Bovis Lend Lease, Inc.*, 101 AD3d 625, 628 [1st Dept 2012]; *Nascimento* at 193-194; *Everitt v Nozkowski*, 285 AD2d 442 [2d Dept 2001]), and the record shows that Brown had laborers present on the day of plaintiff's accident performing debris removal.

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

ENTERED: MAY 3, 2018

CLERK

Richter, J.P., Gesmer, Singh, Moulton, JJ.

6434 Moon 170 Mercer, Index 155605/12
Plaintiff-Respondent,

-against-

Zachary Vella,
Defendant-Appellant.

_____

Steven Landy & Associates PLLC, New York (David A. Wolf of counsel), for appellant.

Cordova & Schartzman, LLP, Garden City (Jonathan B. Schartzman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered February 7, 2017, which denied defendant's motion to vacate a judgment, entered January 23, 2017, against him, in the amount of $1,178,518.62, unanimously affirmed, with costs. The order of this Court, entered November 21, 2017, which stayed enforcement of the aforementioned Supreme Court order pending a determination of this appeal, is vacated.

In this action to enforce a personal guaranty of rent payments pursuant to a commercial lease, plaintiff was previously granted summary judgment on the issue of defendant's liability, and the matter was remanded for discovery and a trial on damages (*Moon 170 Mercer, Inc. v Vella*, 122 AD3d 544 [1st Dept 2014]). After discovery, plaintiff moved for summary judgment on the

amount of damages, and defendant moved for summary judgment limiting his damages to unpaid rent that accrued while the tenant, Mephisto Management LLC (Mephisto), occupied the premises (*see Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 537 [1st Dept 2017], *lv denied* 29 NY3d 919 [2017]). Defendant also cross-moved for sanctions, arguing that plaintiff withheld that after evicting Mephisto, it had re-leased the premises to two companies, and withheld the related leases in discovery (*id.* at 538). The Supreme Court denied the motions and cross motion (*id.* at 537). On appeal, in our decision dated January 12, 2017, we modified the Supreme Court's order to grant plaintiff summary judgment on its damages award, and directed entry of judgment in plaintiff's favor in the amount of approximately $1.1 million, with interest (*id.* at 537).

In rejecting defendant's arguments seeking sanctions, which were based on plaintiff's withholding that it had leased the premises to two companies, namely Indiefork Hospitality LLC (Indiefork) and Sneakerboy, we noted that Michael Shah, plaintiff's principal, had explained that "plaintiff's efforts to lease the premises to those companies had failed. There is no evidence that plaintiff hid any profits from those leases or otherwise failed to credit any amounts due towards the damages it

seeks from defendant" (*id.* at 538).

Plaintiff explained in his prior motion papers to this Court, which were resubmitted with its opposition papers to the instant motion to vacate the judgment, that plaintiff at one point had sought to open a restaurant and bar in the space, and thus applied for a liquor license, which requires proof that the applicant is entitled to occupy the location covered by the prospective license. Plaintiff then submitted a lease with Indiefork to the State Liquor Authority; however, after realizing the restaurant was not feasible, the deal fell through, and Indiefork never occupied the premises. This Court, citing plaintiff's explanation that efforts to re-lease the premises had fallen through, thus rejected defendant's claim that plaintiff had re-let the premises and failed to credit rental income resulting from any tenancy by Indiefork under the Indiefork lease.

The motion court correctly denied the motion to vacate the judgment based on newly-discovered evidence because it is based on that very same Indiefork lease that was the subject of the prior summary judgment and sanctions motions, and thus, does not constitute newly-discovered evidence (*Prote Contr. Co. v Board of Educ. of City of N.Y.*, 230 AD2d 32, 39 [1st Dept 1997]).

Moreover, we necessarily resolved the merits of Vella's arguments in the prior appeal (146 AD3d 537), so his arguments are barred by the doctrine of law of the case (*Carmona v Mathisson*, 92 AD3d 492, 492-493 [1st Dept 2012]; *Grossman v Meller*, 213 AD2d 221, 224 [1st Dept 1995]; *see also Grullon v City of New York*, 297 AD2d 261, 265-266 [1st Dept 2002]).

To the extent that defendant argues that terms and conditions since discovered in the paper lease warrant vacatur of the judgment and denial of Moon's summary judgment motion for a damages award, the terms he cites would not have warranted denial of summary judgment, were not material to the court's decision, and thus do not constitute newly-discovered evidence (*Prote Contr. Co.*, 230 AD2d 32, 39).

As the motion was properly denied and judgment has been entered, to the extent this Court, by order dated November 21, 2017, stayed enforcement of the Supreme Court's order denying the

motion to vacate the judgment pending a determination of the instant appeal, on the condition that defendant maintain a bond or undertaking in the amount of the judgment plus continuing interest, that stay is now vacated.

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

ENTERED: MAY 3, 2018

CLERK

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6436 Ayub Ahmed, Index 103377/10
Plaintiff-Respondent,

-against-

Macy's Inc.,
Defendant-Appellant,

Thyssenkrupp Corporation,
Defendant.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Paul M. Tarr of counsel), for appellant.

H. Bruce Fischer, P.C., Tappan (Eduard Tamma of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D.S. Wright, J.), entered August 29, 2016, which denied the motion of defendant Macy's Inc. for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Macy's established its entitlement to judgment as a matter of law in this action where plaintiff alleges that he was injured when he slipped and fell on an escalator in Macy's department store. Macy's submitted, inter alia, deposition testimony of two of its employees, as well as the records of maintenance and

inspections of the escalator by defendant Thyssenkrupp Corp. and the New York City Department of Buildings. Such evidence showed that the escalator was regularly maintained and inspected during the years prior to plaintiff's accident, and there were never any reports of accidents or other problems with the escalator (*see Parris v Port of N.Y. Auth.*, 47 AD3d 460 [1st Dept 2008]; *Gjonaj v Otis El. Co.*, 38 AD3d 384 [1st Dept 2007]).

In opposition, plaintiff failed to raise a triable of fact. Plaintiff's wife's hearsay statement that the stairs were wet does not indicate that they were wet long enough for Macy's to have notice of the condition. Similarly, plaintiff's testimony that the rubber handrail pulled up when he grasped at it as he slipped, does not raise an issue of fact that any such defect existed long enough for Macy's to have notice, particularly since there were no prior complaints and in light of the evidence of regular maintenance and City inspections showing no problems (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837

[1986]; *Curiale v Sharrotts Woods, Inc.*, 9 AD3d 473, 474-475 [2d Dept 2004]). Furthermore, the opinion of plaintiff's expert engineer that the wooden escalator treads were more slippery than industry safety standards permit does not raise an issue of fact.

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

ENTERED: MAY 3, 2018

CLERK

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6437 The People of the State of New York, Respondent, Ind. 1541/12

-against-

Alonzo Johnson, Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Andrew J. Zapata of counsel), for respondent.

_____

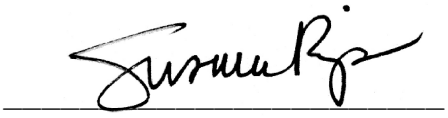
Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered April 20, 2015, convicting defendant, after a jury trial, of murder in the second degree, manslaughter in the first degree, three counts of robbery in the first degree, two counts of robbery in the second degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 22 years to life, unanimously reversed, on the law, and the matter remanded for a new trial.

On a codefendant's appeal (*People v Whitefield*, 153 AD3d 1177 [2017], *lv denied* 30 NY3d 1110 [2018]), we determined that the court should have granted a for-cause challenge to a prospective juror. We find no reason to reach a different result with regard to this defendant, who joined in the challenge.

Since we are ordering a new trial, we find it unnecessary to reach defendant's remaining arguments.

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

ENTERED: MAY 3, 2018



CLERK

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6439 Marie D., etc., Index 350174/10
Plaintiff-Appellant,

-against-

Roman Catholic Church of the
Sacred Heart,
Defendant-Respondent.
- - - - -
[And a Third-Party Action]

_____

Meagher & Meagher, P.C., White Plains (Merryl Weiner of counsel), for appellant.

Conway, Farrell, Curtin & Kelly, P.C., New York (Jonathan T. Uejio of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about March 13, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff slipped and fell on a staircase located on the grounds of premises owned by defendant church and leased to plaintiff's employer, third-party defendant. Defendant demonstrated that, at the time of plaintiff's accident, it was an out-of-possession landowner with no contractual obligation to make repairs. The lease also allowed defendant to use a designated space for morning services, but defendant demonstrated

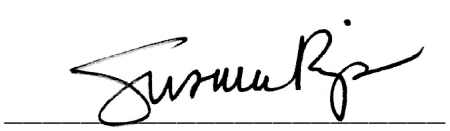
that it had ceased using the space at least two years before the accident and had no key or code access to the premises (*see Sapp v S.J.C. 308 Lenox Ave. Family L.P.*, 150 AD3d 525, 527 [1st Dept 2017]).

As an out-of-possession landlord with a reserved right to enter to make repairs, even if defendant had constructive notice of a defective condition on the staircase, it could only be found liable if the defect that caused plaintiff's accident was "a significant structural or design defect that was contrary to a specific statutory safety provision" (*Devlin v Blaggards III Rest. Corp.*, 80 AD3d 497, 497-498 [1st Dept 2011], *lv denied* 16 NY3d 713 [2011]; *see Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [1st Dept 2010]). While plaintiff alleged that the absence of a center railing on the staircase violated the 1938 Building Code, defendant submitted evidence establishing that the building and staircase were built between 1916 and 1917, so that the 1938

Code does not apply. The other alleged defects in the staircase do not constitute significant structural defects (*see e.g. Podel v Glimmer Five, LLC*, 117 AD3d 579 [1st Dept 2014], *lv denied* 24 NY3d 903 [2014]).

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

ENTERED: MAY 3, 2018



CLERK

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6440 Athanasios Tsiomos, Index 26326/04
Plaintiff,

-against-

Judy A. Szak,
Defendant-Appellant,

Skanska USA Civil Northeast, Inc.,
doing business as Slattery Skanska,
Inc., et al.,
Defendants-Respondents,

Perini Corporation,
Defendant.

- - - - -

[And a Third-Party Action]

_____

Burke, Conway & Dillon, White Plains (Martin Galvin of counsel), for appellant.

London Fischer LLP, New York (James Walsh of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about May 25, 2017, which granted defendants-respondents Skanska USA Civil Northeast, Inc. d/b/a Slattery Skanska, Inc. and Slattery Associates, Inc.'s motion for summary judgment dismissing the complaint, and purported to dismiss all cross claims, against them, unanimously affirmed, without costs. Plaintiff's appeal from the above order unanimously dismissed, without costs, as abandoned.

On October 15, 2004, at about 11:30 p.m., plaintiff's right knee was injured when, while driving on the northbound service road of the Brooklyn Queens Expressway (BQE), defendant-appellant Judy A. Szak rear-ended his vehicle at its intersection with 30th Avenue in Queens. Defendants-respondents Skanska USA Civil Northeast, Inc. d/b/a Slattery Skanska, Inc. and Slattery Associates, Inc. (Skanska) contracted with nonparty the New York State Department of Transportation to act as the general contractor for a reconstruction project being performed to the BQE and subcontracted with third-party defendant Welsbach Electric Corp. to install temporary traffic lights at the subject intersection before the accident.

Skanska met its initial burden by submitting plaintiff's and Szak's deposition testimony, which establish that Szak rear-ended plaintiff's vehicle while in motion and that the intersection's traffic light was functioning and visible when the accident happened. Szak does not dispute that she struck plaintiff's vehicle in the rear or that she is required to provide a nonnegligent explanation for the accident (*see Warren v Donovan*, 254 AD2d 201, 201 [1st Dept 1998]).

Szak's assertion that there is a triable issue of fact as to whether Skanska placed the temporary traffic light in a direction

contrary to what was called for in the DOT contract is unavailing, because her testimony establishes that she saw the traffic light facing in the right direction after the accident. Her claim that Skanska proximately caused the accident by placing the traffic light underneath the overpass and to the left of the intersection fails to raise a triable issue of fact, because her testimony that she did not see plaintiff's moving vehicle in front of her until impact despite having an unobstructed view of the roadway establishes that the sole proximate cause of the accident was her failure to maintain a safe driving speed and distance (*see Rodriguez v City of New York*, 259 AD2d 280 [1st Dept 1999]).

We dismiss plaintiff's appeal as abandoned, since it was never perfected (*see McCabe v 148-57 Equities Co.*, 305 AD2d 231, 232 [1st Dept 2003]).

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

ENTERED: MAY 3, 2018

CLERK

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6441 The People of the State of New York, Ind. 4657N/15
Respondent,

-against-

Juan Ortero,
Defendant-Appellant.

_____

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

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

_____

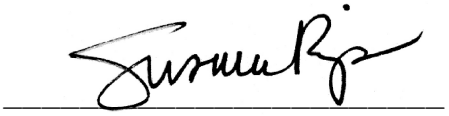
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Neil Ross, J.), rendered October 5, 2016,

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.

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

ENTERED: MAY 3, 2018



CLERK

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

Richter, J.P., Gesmer, Singh, Moulton, JJ.

6442-
6442A Index 650459/16

L.A. Grika, derivatively and on behalf of nominal defendant McGraw Hill Financial, Inc.,
Plaintiff-Appellant,

-against-

Harold McGraw III, et al.,
Defendants-Respondents,

McGraw Hill Financial, Inc.,
Nominal Defendant-Respondent.

_____

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Mark C. Rifkin of counsel), for appellant.

Cahill Gorden & Reindel LLP, New York (Brian T. Markley of counsel), for Harold McGraw III, Douglas L. Peterson, Deven Sharma, Andrea Bryan, Kathleen A. Corbet, Barbara Duka, Thomas Gillis, Vickie A. Tillman, Joanne Rose, David Tesher and Patrice Jordan, respondents.

Davis Polk & Wardwell LLP, New York (Charles S. Duggan of counsel), for McGraw Hill Financial, Inc., respondent.

_____

Orders, Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 29, 2016, which granted defendants' motions to dismiss the amended complaint as against them, unanimously affirmed, with costs.

Plaintiff, a shareholder in McGraw Hill Financial, Inc., the nominal defendant, alleges that the individual defendants, members of the board, caused McGraw Hill to sustain damages by

permitting it to issue, through subsidiary Standard & Poor's Rating Services (S&P's), inaccurate credit ratings with respect to collateral debt obligations (CDOs), residential mortgage-backed securities (MBS), and commercial mortgage-backed securities.

The doctrine of collateral estoppel bars this action as against McGraw Hill (*see Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015]).[1] In March 2010, the United States District Court for the Southern District of New York dismissed a derivative action commenced by McGraw Hill shareholder Teamsters Allied Benefit Funds (Teamsters Funds) against McGraw Hill and certain of its officers and directors, which alleged, as the instant complaint alleges, that McGraw Hill was harmed as a result of S&P's inflated ratings of MBS and CDOs (*Teamsters Allied Benefit Funds v McGraw*, 2010 WL 882883, 2010 US Dist LEXIS 23052 [SD NY, Mar. 11, 2010]). The district court found that the Teamsters Funds' demand letter did not fairly and adequately apprise the directors of the violations of federal securities law alleged in the

[1] Because "there is no discernable difference between federal and New York law concerning ... collateral estoppel" (*Marvel Characters, Inc. v Simon*, 310 F3d 280, 286 [2d Cir 2002]), we will apply New York law (*compare id.* at 288-289 *with Conason*, 25 NY3d at 17).

complaint (2010 WL 882883 at *4-6, 2010 US Dist LEXIS 23052 at *11-18, citing Business Corporation Law § 626[c]) and that, in any event, the Teamsters Funds did not allege facts demonstrating that the board's rejection of their demand was not made in good faith by disinterested directors (2010 WL 882883 at *6-8, 2010 US Dist LEXIS 23052 at *18-23, citing *Auerbach v Bennett*, 47 NY2d 619, 630-631 [1979]). The court declined to exercise supplemental jurisdiction over the state law claims (2010 WL 882883 at *11, 2010 US Dist LEXIS 23052 at *34-35).

The underlying allegations of wrongdoing and the reasons for the board's refusal to pursue them are materially identical in the Teamsters Funds' action and the instant action (*see Conason*, 25 NY3d at 17). It is of no moment that the causes of action differ, because the issues are identical (*see Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). The issue decided by the district court with respect to the federal claims - i.e., whether the Teamsters Funds alleged facts demonstrating that the board's rejection of its demand was not made in good faith by disinterested directors - would have applied equally to the state law claims had the district court exercised jurisdiction over them. Thus, the issue whether the board properly exercised its business judgment in refusing to consider allegations of officer

and director wrongdoing related to the rating of CDOs and MBS is barred by the doctrine of collateral estoppel because it was actually litigated and decided in the Teamsters Funds' action (*see Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18, 23 [1st Dept 2014]; *Conason*, 25 NY3d at 17).

The Teamsters Funds, as derivative plaintiff, had a full and fair opportunity to litigate the issue of the propriety of the board's demand refusal in the federal action (*see Conason*, 25 NY3d at 17). The fact that the instant derivative action was brought by a different shareholder is of no consequence, because the claims "belong to and are brought on behalf of the corporation, rather than on behalf of [the shareholders] themselves" (*Levin v Kozlowski*, 13 Misc 3d 1236[A], 2006 NY Slip Op 52142[U], *9 [Sup Ct, NY County, Nov. 14, 2006], *affd* 45 AD3d 387 [1st Dept 2007]; *see also Auerbach v Bennett*, 47 NY2d at 631).

Finally, the issue litigated in the Teamsters Funds' action was necessary to support a valid and final judgment on the merits (*see Conason*, 25 NY3d at 17). Accordingly, plaintiff is collaterally estopped to litigate the board's demand refusal with respect to the 2004-2007 allegations of wrongdoing. With respect to the 2010-2014 allegations, plaintiff neither made a proper

demand on the board nor pleaded demand futility, as required under Business Corporation Law § 626(c).

The claims against the individual defendants that are based on the 2004-2007 allegations are time-barred, under the six-year or three-year statute of limitations (*see* CPLR 213[7]; 214[4]).

The complaint fails to state causes of action against the director and officer defendants for breach of fiduciary duty (*see Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]; CPLR 3016[b]) and aiding and abetting breach of fiduciary duty (*see Yuko Ito v Suzuki*, 57 AD3d 205, 208 [1st Dept 2008]). Nor does it state a cause of action against the employee defendants for breach of the duty of loyalty, since it does not allege that these defendants acted directly against their employers' interests (*see Veritas Capital Mgt., L.L.C. v Campbell*, 82 AD3d 529, 530 [1st Dept 2011], *lv dismissed* 17 NY3d 778 [2011]).

The complaint fails to state a cause of action for unjust enrichment, since it does not allege that it would be against equity and good conscience to allow defendants McGraw, Douglas Peterson, and Deven Sharma to retain the compensation they received (*see Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]).

The contribution and indemnification claims fall with the underlying claims.

Amendment of the complaint could not remedy the above-discussed flaws.

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

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

ENTERED: MAY 3, 2018

CLERK

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6444 The People of the State of New York, Ind. 3154/15
Respondent,

-against-

Harold Montgomery,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer 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 (Neil Ross, J.), rendered March 14, 2016,

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.

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

ENTERED: MAY 3, 2018

CLERK

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

Richter, J.P., Gesmer, Singh, Moulton, JJ.

6445 Dmitry Markov, Index 650033/14
Plaintiff-Appellant,

-against-

Stack's LLC (Delaware),
Defendant-Respondent.

_____

Law Offices of Sanford F. Young, P.C., New York (Sanford F. Young of counsel), for appellant.

Bruce N. Lederman, New York, for respondent.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered January 12, 2017, which granted defendant's motion to dismiss the amended complaint on the ground that the action was not commenced within the applicable statute of limitations, unanimously affirmed, without costs.

The motion court properly dismissed the complaint on the ground that it was served after the statutory limitations period had expired. Plaintiff's claims arose on January 14, 2008. The original complaint in this action, which was filed on January 6, 2014 (just days before the six-year statute of limitations expired), did not name Stack's LLC as a defendant, nor did it name defendant Stack's LLC (Delaware). The amended complaint, which for the first time named Stack's LLC (Delaware) as a

defendant, was not filed until January 24, 2014 – more than a week after the statute had run. Plaintiff cannot properly rely on CPLR 1024 as a shield from the statute of limitations. Even assuming that the appellation "John Doe" referred to a corporation rather than a natural person, the complaint's description of the John Doe defendant was not described in such a way as to fairly apprise Stack's LLC (Delaware) that it was an intended defendant (*see Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 29–30 [2d Dept 2009]; *see Tucker v Lorieo*, 291 AD2d 261, 262 [1st Dept 2002]). Thus, the inadequate description rendered the action jurisdictionally defective (*Thas v Dayrich Trading, Inc.*, 78 AD3d 1163, 1165 [2d Dept 2010]).

Plaintiff's remaining arguments are not preserved for appeal. Were we to consider those arguments, we would find them unavailing.

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

ENTERED: MAY 3, 2018

CLERK

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6446- Index 23394/14
6447-
6448 Pedro Bautista,
Plaintiff-Respondent-Appellant/Respondent,

-against-

Archdiocese of New York, etc., et al.,
Defendants-Appellants-Respondents.

- - - - -

Archdiocese of New York, etc., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Hughes & Hughes Contracting Corp., et al.,
Third-Party Defendants.

_____

Leahey & Johnson, P.C., New York (Peter James Johnson Jr. of counsel), for appellants-respondents/appellants.

Ras Associates, PLLC, Purchase (Luis F. Ras of counsel), for respondent-appellant/respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered June 15, 2017, which denied plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim and defendants' cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant defendants' motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly. Order, same court and Justice, entered August 12, 2016, which denied defendants' motion

for a default judgment against third-party defendant Richard Monagh d/b/a Harbor Roofing, unanimously reversed, on the law, without costs, and the motion granted. Appeal from order, same court and Justice, entered June 10, 2016, which granted plaintiff's motion to sever the third-party action from the main action, unanimously dismissed, without costs, as academic.

Defendants made a prima facie showing that the accident in which plaintiff was injured falls within the exemption to Labor Law §§ 240(1) and Labor Law 241(6) for "owners of one and two-family dwellings who contract for but do not direct or control the work" (Labor Law § 240[1]; Labor Law § 241). Plaintiff was repairing a detached garage associated with a church rectory used for both residential and church purposes (*see Bartoo v Buell*, 87 NY2d 362 [1996]; *Muniz v Church of Our Lady of Mt. Carmel*, 238 AD2d 101 [1st Dept 1997], *lv denied* 90 NY2d 804 [1997]). Moreover, the certificate of occupancy indicates that the rectory constituted a dwelling and a private garage (*see Thompson v Geniesse*, 62 AD3d 541 [1st Dept 2009]). Defendants' failure to plead this affirmative defense in their answer does not mandate the denial of their motion, since plaintiff was not surprised by the defense and fully opposed the motion (*see* CPLR 3018[b]; *Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 2 AD3d

266 [1st Dept 2003], *lv denied* 2 NY3d 702 [2004]; *see also Florio v Fisher Dev.*, 309 AD2d 694, 696 [1st Dept 2003]).

Plaintiff failed to raise issues of fact as to the applicability of the homeowner exemption. His assertion that the garage was exclusively restricted to use by teachers at an elementary school owned by the church is unsupported by the record.

The Labor Law § 200 and common-law negligence claims should be dismissed because plaintiff's fall from scaffolding involved the means and methods of his work, which were supervised and controlled solely by his employer (*see Ciechorski v City of New York*, 154 AD3d 413, 414 [1st Dept 2017]; *Alvarado v French Council LLC*, 149 AD3d 581 [1st Dept 2017]).

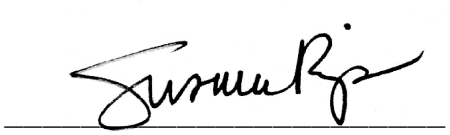
Defendants are entitled to a default judgment against third-party defendant Richard Monagh d/b/a Harbor Roofing, against whom they asserted contractual indemnification claims, since they established proper service and made a prima facie showing of

their entitlement to judgment (*see* CPLR 3215; *see also Ostroy v Six Sq. LLC*, 74 AD3d 693 [1st Dept 2010]).

In view of the foregoing, we need not reach the parties' remaining arguments.

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

ENTERED: MAY 3, 2018



CLERK

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6449N Anatole Shagalov, et al., Index 655576/17
Plaintiffs-Respondents-Appellants,

-against-

Asher Edelman, et al.,
Defendants-Appellants-Respondents,

John Does 1-20,
Defendants.

_____

Hughes Hubbard & Reed LLP, New York (Daniel H. Weiner of counsel), for appellants-respondents.

Barton LLP, New York (Mathew E. Hoffman of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 21, 2017, which, inter alia, granted plaintiffs' motion for a preliminary injunction enjoining defendants from transporting, transferring, disposing, alienating, pledging, assigning, or otherwise encumbering or moving Keith Haring's "Untitled (March 5, 1984)" and Frank Stella's "Guifa E La Berretta Rossa" and "La Scienza della Fiacca," and denied the posting of an undertaking, unanimously modified, on the law, to remand the matter for the fixing of an adequate undertaking, and otherwise affirmed, without costs. Plaintiffs' cross appeal from the foregoing order unanimously withdrawn, before argument,

pursuant to the parties' stipulation filed April 9, 2018.

Plaintiffs demonstrated that the parties' arrangement may constitute a collateralized loan and that therefore they were entitled to notice concerning the disposition of the collateral under UCC article 9. Accordingly, plaintiffs met their burden of establishing a reasonable probability of success on the merits of their claim that defendants violated their UCC article 9 rights when they sold Haring's "Untitled (June 3, 1984)" and the Haring Tarp (*see Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 431 [1st Dept 2016]; *Four Times Sq. Assoc. v Cigna Invs.*, 306 AD2d 4, 5 [1st Dept 2003]). This is so even assuming that plaintiffs' failure to disclose nonparty Paul Kasmin Gallery's asserted 40% ownership interest in Stella's "La Scienza della Fiacca" at the time of the parties' April 2016 execution of the sale and lease agreements constituted an Event of Default as defined in those agreements.

Given the unique nature of the art works at issue, and regardless of their art dealer status, plaintiffs established that they would be irreparably harmed absent the requested preliminary injunction (*see Danae Art Intl. v Stallone*, 163 AD2d 81 [1st Dept 1990]; *see also Christie's Inc. v Davis*, 247 F Supp 2d 414, 424 [SD NY 2002]). The balance of the equities weighs in

plaintiffs' favor. The record shows that, even while learning – directly from Kasmin – on August 9, 2017, that any issues with *La Scienza* would be resolved by August 25, 2017, defendants took active steps to market the works to third parties, without plaintiffs' knowledge and while purporting to afford plaintiffs a chance to exercise their repurchase option under the agreements.

Plaintiffs are required to post an undertaking (CPLR 6312[b]). We remand the matter to Supreme Court to fix the amount of the undertaking (*see Matter of Rockwood Pigments NA, Inc. v Elementis Chromium LP*, 124 AD3d 509 [1st Dept 2015]; *Honeywell Intl. v Freedman & Son*, 307 AD2d 518 [3d Dept 2003]).

We have considered defendants' remaining arguments, including that this case should be assigned to another justice, and find them unavailing.

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

ENTERED: MAY 3, 2018

CLERK

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6451 In re Benjamin Braxton, Index 100903/16
[M-1352] Petitioner,

-against-

Hon. Robert Reed, etc., et al.,
Respondents.

_____

Benjamin Braxton, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for respondents.

_____

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: MAY 3, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando Acosta, P.J.
Sallie Manzanet-Daniels
Peter Tom
Jeffrey K. Oing
Anil C. Singh, JJ.

6329
Index 651556/16

_____x

Nadkos, Inc.,
Plaintiff-Appellant,

-against-

Preferred Contractors Insurance
Company Risk Retention Group LLC,
Defendant-Respondent,

Chesakl Enterprises, Inc.,
Defendant.
_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Melissa A. Crane, J.), entered November 6, 2017, which granted defendant Preferred Contractors Insurance Company Risk Retention Group LLC's (PCIC) motion for summary judgment, denied plaintiff's cross motion for summary judgment, and declared that PCIC does not have a duty to defend or indemnify plaintiff in the underlying personal injury action.

Melito & Adolfsen P.C., New York (S. Dwight Stephens and Ignatius John Melito of counsel), for appellant.

Diane Bucci, New York, for respondent.

SINGH, J.

The issue on this appeal, and one of first impression for this Court, is whether a risk retention group's (RRG)[1] failure to comply with the provision of Insurance Law § 3420(d)(2), requiring a timely notice of disclaimer, constitutes an unfair claim settlement procedure, prohibition of which is permitted under the federal Liability Risk Retention Act of 1986 (LRRA) (15 USC § 3901, *et seq.*). We agree with Supreme Court that a foreign RRG, such as defendant Preferred Contractors Insurance Company Risk Retention Group LLC (PCIC), does not need to comply with Insurance Law § 3420(d)(2) because it is preempted by the LRRA.

This insurance coverage declaratory judgment action arises out of an accident that occurred on May 27, 2015 during a construction project in Brooklyn owned by 596 E19 Partners, LLC, which hired plaintiff Nadkos, Inc. as general contractor. Nadkos entered into a subcontract with defendant Chesakl Enterprises, Inc. to perform the structural steel work. Chesakl hired Mirkamel Vafaev as a subcontractor; he allegedly fell and was injured while performing work under his subcontract.

Pursuant to its subcontract with Nadkos, Chesakl obtained

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[1]A risk retention group is a liability insurance company created by organizations or persons engaged in similar businesses or activities and thereby exposed to the same types of liability. The insureds are the owners of the RRG (*see* 15 USC § 3901(a)(4)).

general liability insurance from PCIC, a RRG, naming 596 and Nadkos as additional insureds.

In July 2015, Vafaev commenced the underlying personal injury action in Kings County, against 596, Nadkos, Chesakl, and Oleksandr Nad, allegedly a principal of Nadkos, alleging negligence and violations of Labor Law §§ 200 and 241(6).

On August 25, 2015, Colony Insurance Company, the commercial general liability insurer of Nadkos, tendered the underlying lawsuit to Chesakl and PCIC for defense and indemnification. On September 1, 2015, PCIC denied coverage to Chesakl on the basis of several policy exclusions. On November 16, 2017, PCIC disclaimed coverage to Nadkos based on the same exclusions.

On November 17, 2015, Colony advised PCIC that it had not timely disclaimed as required by Insurance Law § 3420, and therefore PCIC had waived any coverage defenses as to Nadkos under its policy. Later that day, PCIC responded that it is a RRG organized under the laws of Montana, with a Montana choice of law provision in the policy that renders New York Insurance Law § 3420 inapplicable. PCIC further maintained that its policy is excess, with no duty to defend.

Nadkos commenced this action in Supreme Court, seeking a declaration that PCIC is obligated to defend and indemnify it, in addition to seeking reimbursement for incurred costs of defense

and any indemnity payments made. PCIC moved for summary judgment declaring that it is not obligated to defend or indemnify Nadkos. Nadkos cross-moved for summary judgment declaring that PCIC must defend and indemnify it. Supreme Court granted PCIC's motion for summary judgment, finding that the LRRA preempted New York Insurance Law § 3420(d)(2), and denied Nadkos' cross motion for summary judgment. Nadkos appeals.

The LRRA is not a comprehensive federal regulation of RRGs but, rather, is a "reticulated structure under which risk retention groups are subject to a tripartite scheme of concurrent federal and state regulation" (*Wadsworth v Allied Professionals Ins. Co.*, 748 F3d 100, 103 [2d Cir 2014]). As it relates to state regulation, the LRRA permits the *chartering state* to regulate the formation and operation of RRGs and preempts most ordinary forms of regulation by the nondomiciliary states (15 USC § 3902[a][1], [4]). Therefore, the LRRA "sharply limits the secondary regulatory authority of nondomiciliary states over risk retention groups to specified, if significant, spheres" (*Wadsworth*, 748 F3d at 104).

One of the "significant spheres" that the LRRA permits non-domiciliary states to regulate is compliance with unfair claim

settlement practices of that state (*see* 15 USC § 3902[a][1][A]).[2] New York Insurance Law § 5904(d), which closely mirrors the LRRA, expressly requires foreign RRGs to "comply with the unfair claims settlement practices provisions as set forth in [Insurance Law § 2601]."

Insurance Law § 2601 provides seven types of acts that, "if committed without just cause and performed with such frequency as to indicate a general business practice, shall constitute unfair claim settlement practices; one of these is (6) failing to promptly disclose coverage pursuant to [Insurance Law § 3420(d)]." It is undisputed that PCIC is a RRG formed and functioning under the LRRA and domiciled in Montana. Accordingly, section 5904(d) governs the imposition of regulations on PCIC's operations in New York.

Nadkos's contention that Insurance Law § 2601 includes a

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[2]Specifically, the LRRA states,
"Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would

"(1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group and any State may require such a group to

"(A) comply with the unfair claim settlement practices law of the State."

violation of Insurance Law § 3420(d)(2) as an unfair claim settlement practice and therefore is a permissible regulation of an RRG, is without merit. The clear language of Insurance Law § 2601 is unambiguous with respect to this issue. When engaging in statutory interpretation, "our primary consideration is to discern and give effect to the Legislature's intention" (*Desrosiers v Perry Ellis Menswear, LLC*, 30 NY3d 488, 494 [2017] [internal quotation marks omitted]). Accordingly, "[t]he statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning" (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]; *see also Izzo v Manhattan Med. Group*, 164 AD2d 13, 16 [1st Dept 1990], *lv dismissed* 77 NY2d 989 [1991] [stating the "well-known rule of statutory construction that every word in the statute is to be given meaning and effect"]).

Nadkos argues that Insurance Law § 2601 only refers to Insurance Law § 3420(d) in its entirety and does not delineate between sub-sections (d)(1) and (d)(2). However, the use of the word "disclose," if applied to both subdivisions (1) and (2) of section 3420(d), would render the term superfluous (*see Izzo*, 164 AD2d at 16). Specifically, subdivision (1) of section 3420(d) sets forth time requirements for an insurer to "confirm" liability limits and "advise" when sufficient identifying

information is lacking (i.e., disclose[3] information), while subdivision (2) sets forth time requirements for an insurer to "disclaim"[4] coverage (i.e., make a determination to deny coverage).

It is clear that the terms "disclose" and "disclaim" have distinct meanings and that the term "disclose" as used in section 2601(a) does not include the disclaimer of available coverages within Insurance Law § 3420(d)(2). This is further buttressed by the penalties imposed for a violation. Failure to disclose under section 3420(d)(1) may result in a civil penalty for the unfair claim settlement practice, while failure to disclaim results in coverage being extended beyond the scope and clear language of a policy (*see* Insurance Law § 2601[c]; *KeySpan Gas E. Corp. v Munich Reins. Am., Inc.*, 23 NY3d 583, 590 [2014]).

As Insurance Law § 3420(d)(2) is not within the scope of Insurance Law § 2601 and 5904, Supreme Court properly found that section 3420(d)(2) is preempted by the LRRA. It is clear from the legislative history of the LRRA that "Congress intended to

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[3]The plain meaning of "disclosure" is "to make (something) known or public; to show (something) after a period of inaccessibility or of being unknown; to reveal" (Black's Law Dictionary [10th ed 2014], disclose).

[4]"Disclaim" refers to a statement "usually formally, that one has no responsibility for, knowledge of, or involvement with (something)" (Black's Law Dictionary [10th ed 2014], disclaim).

exempt [risk retention groups] broadly from state law requirements that make it difficult for risk retention groups to form or to operate on a multi-state basis" (*Wadsworth*, 748 F3d at 107 [internal quotation marks omitted]). Accordingly, the LRRA is to be given a broad and expansive reading (*id.*).

Application of Insurance Law § 3420(d)(2) to PCIC or to any other RRG would directly or indirectly regulate these groups in violation of 15 USC § 3902(a)(1). Section 3420(d)(2) alters the rights and obligations of the carrier and insured under the policy by creating additional rights for the injured party, that is not contemplated by the LRRA and not required by all other states. Specifically,

> "the legislature enacted section 3420(d)(2) to aid injured parties by encouraging the expeditious resolution of liability claims. To effect this goal, the statute establishes an absolute rule that unduly delayed disclaimer of liability or denial of coverage violates the rights of the insured or the injured party. Compared to traditional common-law waiver and estoppel defenses, section 3420(d)(2) creates a heightened standard for disclaimer that depends merely on the passage of time rather than on the insurer's manifested intention to release a right as in waiver, or on prejudice to the insured as in estoppel"

(*KeySpan*, 23 NY3d at 590 [internal quotation marks, citations and brackets omitted]).

This heightened standard requirement in New York impairs an RRG's ability to operate on a nationwide basis "without being

compelled to tailor their policies to the specific requirements of every state in which they do business" (*Wadsworth*, 748 F3d at 108). As Congress has chosen to limit the power of nondomiciliary states to regulate RRGs, the LRRA clearly preempts Insurance Law § 3420(d)(2).

Accordingly, the order of the Supreme Court, New York County (Melissa A. Crane, J.), entered November 6, 2017, which granted defendant PCIC's motion for summary judgment, denied Nadkos, Inc.'s cross motion for summary judgment, and declared that PCIC does not have a duty to defend or indemnify Nadkos in the underlying personal injury action, should be affirmed, with costs.

All concur.

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered November 6, 2017, affirmed, with costs.

Opinion by Singh, J. All concur.

Acosta, P.J., Manzanet-Daniels, Tom, Oing, Singh, JJ.

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

ENTERED: MAY 3, 2018

CLERK