SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 13, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

9995 Ernest Thomas, et al., Index 104828/10
Plaintiffs-Appellants,

-against-

Goldman Sachs Headquarters, LLC, et al.,
Defendants-Respondents.

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

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Ellyn B. Wilder of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 31, 2012, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim, modified, on the law, to deny the motion to the extent the Labor Law § 241(6) claim is based on Industrial Code (12 NYCRR) § 23-1.7(e)(1), and otherwise affirmed, without costs.

The motion court erred when it dismissed plaintiff's Labor Law § 241(6) claim to the extent it is based on Industrial Code (12 NYCRR) § 23-1.7(e)(1), which states that "[a]ll passageways shall be kept free from . . . conditions which could cause tripping." While plaintiff's testimony suggests that he tripped on overlapping Masonite placed five or six feet away from a doorway, his testimony also establishes that his foot then slid into a gap in the floor approximately 8 to 10 inches wide and 12 to 18 inches deep directly in front of the doorway. He then fell into a glass wall. Further, a field supervisor testified that plywood should have been used to cover the gap on the floor since Masonite was not strong enough to provide adequate support. Given that the gap in the floor was directly in front of the doorway, plaintiff raised an issue of fact as to whether the proximate cause of his injury was a tripping hazard within a passageway (*see Jara v New York Racing Assn., Inc.*, 85 AD3d 1121 [2d Dept 2011]; *Kerins v Vassar Coll.*, 293 AD2d 514 [2d Dept 2002]).

Plaintiff's Labor Law § 241(6) claim based on Industrial Code (12 NYCRR) § 23-1.7(e)(2) was properly dismissed as inapplicable. Section 23-1.7(e)(2) states, "The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials." Regardless of whether plaintiff was using Masonite for his work when the accident occurred, the protective covering had been purposefully installed on the floor as an integral part of the renovation project. As such, it cannot be construed as accumulated debris or scattered materials (*see Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592 [1st Dept 2013]; *Rajkumar v Budd Contr. Corp.*, 77 AD3d 595 [1st Dept 2010]).

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

FRIEDMAN, J.P. (concurring)

I respectfully disagree with the majority to the extent it finds an issue as to whether plaintiff's mishap occurred within the doorway to the outside terrace. Nonetheless, I concur in the modification of the order appealed from to reinstate the claim under Labor Law § 241(6) insofar as it is based on 12 NYCRR 23-1.7(e)(1) on the ground that defendants failed to carry their burden of affirmatively establishing a prima facie case that plaintiff, when he tripped, was not walking within a passageway within the purview of the latter provision. While I believe, to reiterate, that the record establishes that plaintiff did not trip within the aforementioned doorway, the configuration of the space within which the accident did occur cannot be determined as a matter of law from plaintiff's deposition testimony or from any other evidence in the existing record. Accordingly, defendants were not entitled to summary judgment dismissing the Labor Law § 241(6) claim insofar as it is based on 12 NYCRR 23-1.7(e)(1).

I agree that defendants are entitled to summary judgment dismissing the claim under Labor Law § 241(6) insofar as it is based on 12 NYCRR 23-1.7(e)(2).

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

ENTERED: AUGUST 13, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10155 In re Ben Friedman, Index 113309/11
Petitioner-Appellant,

-against-

The Board of Education of the
City School District of the
City of New York, et al.,
Respondents-Respondents.

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Offices of Richard E. Casagrande, New York (Maria-Elena Gonzalez of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered April 6, 2012, which denied the petition to annul petitioner teacher's unsatisfactory rating for the 2007-2008 school year, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the petition granted, and the unsatisfactory rating annulled.

Respondents' determination to sustain the unsatisfactory performance evaluation was not rationally based on administrative findings that petitioner engaged in corporal punishment of students during the 2007-2008 school year (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231

[1974]). There was no longer any documentation substantiating an instance of corporal punishment in petitioner's personnel file after the parties stipulated to the removal of two disciplinary letters from the file.

It is undisputed that Part 2(I) of DOE's Human Resources Handbook "Rating Pedagogical Staff Members" provides (1) that a teacher's evaluation must be supported by documentation in his/her personnel file; (2) that documentation removed from a file through grievance procedures is inadmissible in performance reviews; and (3) that documentation not addressed directly to a teacher is inadmissible in performance reviews, unless it is attached to and part of another document appropriately placed in the teacher's file. Moreover, materials placed in a teacher's personnel file must include a signature and date line for the teacher, evidencing that she has read the material and understands that it will be placed in the file, as well as a signature and date line for a witness; unsigned documents are inadmissible in evaluation reviews.

Here, there were two disciplinary letters addressing separate instances of corporal punishment. One of the requirements of the letter is to have an Office of Special Investigation (OSI) report attached in order to confirm legitimacy of the incident. The January 28, 2007 letter, which addressed a November 9, 2007 incident, did not have as an attachment the OSI report concluding that the allegation of corporal punishment on November 9, 2007 was substantiated. Moreover, the OSI report for this incident was not signed and dated by the teacher. The second disciplinary letter, dated May 21, 2009, attached the OSI report, which concluded that the November 29, 2007 incident was substantiated. However, both letters were removed from petitioner's file by stipulation, and the OSI report for the first incident, standing alone, was inadmissible. Thus, there remained no documentation in the record to support the unsatisfactory finding (*see Appeal of Naomi Dowrie* [46 Ed Dept Rep 273, Decision No. 15,506, Dec. 22, 2006], in which the Commissioner of the New York State Department of Education upheld the petitioner's appeal from an unsatisfactory rating on the ground that respondents had failed to follow their own procedures and had considered material that had been removed from her file through the grievance process, i.e., "materials not properly placed in [the] teacher's personal [*sic*] file"; *Mangone v Klein,* 2007 NY Slip Op 32475[u] [Sup Ct NY County 2007] [relying on *Dowrie* and denying DOE's motion to dismiss petition to set aside unsatisfactory rating upon finding that the petitioner's had nothing in her file other than a disciplinary letter that had been ordered to be removed following arbitration related to the allegations against him]).

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

ENTERED: AUGUST 13, 2013

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CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10220 Sea Trade Maritime Corporation, Index 653407/11
Plaintiff-Respondent,

-against-

Stylianos Coutsodontis,
Defendant-Appellant.

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Poles Tublin Stratakis & Gonzalez, LLP, New York (Scott R. Johnston of counsel), for appellant.

Cardillo & Corbett, New York (James P. Rau of counsel), for respondent.

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Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered May 2, 2012, awarding plaintiff the principal sum of $704,066.41, plus interest, costs and disbursements, and bringing up for review an order, same court and Justice, entered March 12, 2012, which granted plaintiff's motion for summary judgment in lieu of complaint and denied defendant's cross motion for summary judgment dismissing the action or, in the alternative, for a stay, unanimously reversed, on the law, without costs, the judgment vacated, plaintiff's motion for summary judgment denied, and plaintiff is directed to file a complaint within 30 days of entry of this order.

Plaintiff's motion brought pursuant to CPLR 3213 to enforce a Spanish court's award of damages as against defendant who improperly commenced a proceeding to arrest plaintiff's ship in

Spain should not have been granted.

A motion for summary judgment in lieu of a complaint (CPLR 3213) is based on an "instrument for the payment of money only or upon any judgment." The statute allows a plaintiff an expedited procedure for entry of a judgment by filing and service of a summons and a set of motion papers that contain sufficient evidentiary detail for the plaintiff to establish entitlement to summary judgment (*see* David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3213:8).

CPLR 5302 provides that New York will recognize foreign decrees that are "final, conclusive and enforceable where rendered even though an appeal therefrom is pending." Here, the parties' Spanish law experts disagree as to whether the document here, denominated a "ruling" ("auto" in Spanish), is enforceable as a judgment. Both agree that no enforcement proceeding has been commenced in Spain. Defendant's legal expert asserts that under articles 538 and 811 of the relevant Spanish law, plaintiff must petition the Spanish court upon notice, to "convert" the ruling into a judgment, at which point it becomes enforceable. Plaintiff's legal expert asserts that because defendant allegedly has no assets in Spain, no enforcement proceeding in Spain is necessary and that in Spanish law, there are different types of court decisions depending on the nature of the proceeding, and this "auto" under section 456.2 of the Civil Proceedings Act (LEC), is an "auto definitivo," that is, a ruling that can be immediately enforced as a judgment.

When deciding a motion for summary judgment, the court's function is issue finding rather than issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence is construed in the light most favorable to the one moved against (*Bielat v Montrose*, 272 AD2d 251 [1st Dept 2000]). It was error for the motion court, faced with a document entitled an "auto" and a battle of the Spanish law experts on how to treat such a ruling, to find as a matter of law that the affidavit of plaintiff's expert was more persuasive and credible than that of defendant's expert without affording defendant the opportunity to test at a hearing or trial the expert's credentials, experience, demeanor, and interest or bias, if any, through cross-examination. The conflicting evidence as to whether the ruling is final, conclusive and enforceable in Spain precludes plaintiff from obtaining an accelerated judgment pursuant to CPLR 3213. Accordingly, the court should have denied plaintiff's motion.

Although not essential to our determination that summary judgment should not have been granted to plaintiff, we have considered defendant's alternative argument regarding the sufficiency of plaintiff's moving papers. The papers did not include a copy of the actual "instrument for the payment of money" and instead contained what appears to be an uncertified English translation of the Spanish court's ruling. The motion court granted plaintiff an adjournment to supplement its papers, and plaintiff submitted a certified copy of the Spanish-language document, a certified English translation that corrected the name of the document, originally called a "brief," to "ruling," and an affidavit by a Spanish legal expert discussing the law.

There is no absolute rule that on a CPLR 3213 motion, a plaintiff cannot supplement its papers in response to a defendant's arguments, so as to establish its entitlement to summary judgment in lieu of complaint. "Nothing that is curable by the mere addition of papers should result in a denial of the motion, unless it is a denial with leave to renew on proper papers" (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3213:8). "Mere omissions from the affidavits" that can be rectified by filing and serving additional affidavits should be cured by a continuance or adjournment in order for the additional affidavits to be served and filed (*id.*). Thus, in *Shaw v Krebs* (85 AD2d 913 [4th Dept 1981]), CPLR 3213 relief was denied because the certified copy of the clerk's minutes was not a substitute for a certified copy of the judgment. However, in *European Am. Bank & Trust Co. v*

Schirripa (108 AD2d 684 [1st Dept 1985]), the failure to attach copies of underlying promissory notes to an unconditional guarantee was not fatal, where the instrument and an affidavit of nonpayment were submitted. In *Matapos Tech. Ltd. v Compania Andina de Comercio Ltda* (68 AD3d 672 [1st Dept 2009]), where the defendant "had made an issue of" missing endorsements to the subject notes, the motion court properly allowed the plaintiff to submit a supplemental affidavit containing the endorsements that had been inadvertently omitted from the initial moving papers.

Here, defendant had an opportunity to address the merits of the later-submitted documents, in the form of a reply in the cross motion, and therefore plaintiff's failure initially to include all the documents did not result in prejudice to defendant and require denial of the motion (*see Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 382 [1st Dept 2006]).

Defendant never argued below that public policy precludes recognition of the award; accordingly, the argument is waived (*see CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81, 101 [1st Dept 2002], *affd* 100 NY2d 215 [2003], *cert denied* 540 US 948 [2003]). In any event, the argument is unavailing, as the cause of action on which the damages award is based is not "repugnant to the public policy of this state" (CPLR 5304[b][4]).

Upon denial of a plaintiff's motion for summary judgment in lieu of complaint "the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise" (CPLR 3213). Here, given that the initial motion papers were supplemented as discussed above, it is appropriate to direct plaintiff to file a formal complaint.

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

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

ENTERED: AUGUST 13, 2013

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CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

10332 Amalgamated Bank, Index 603573/09
Plaintiff-Appellant,

-against-

Helmsley-Spear, Inc.,
Defendant,

Schneider & Schneider, Inc., et al.,
Intervenors-Defendants-Respondents.

Emmet, Marvin & Martin, LLP, New York (Tyler J. Kandel of counsel), for appellant.

Herrick, Feinstein LLP, New York (William R. Fried of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 7, 2012, which granted the motion of intervenor defendants to intervene and to vacate a default judgment against defendant in the principal amount of $2,363,542.66, unanimously reversed, on the law, without costs, the motion denied, and the judgment reinstated.

Intervenor defendant Schneider & Schneider, Inc. (Schneider Corporation) was engaged in the business of, among other things, providing real estate appraisal services; intervenor defendant Lynn C. Schneider was an officer and director of Schneider Corporation and the president of defendant Helmsley-Spear, Inc. (Helmsley). Schneider held 99 percent of the total shares in

Helmsley, and in October 2007, she sold those shares to non-party HSI Holdings, LLC (HSI).

In 2009, plaintiff commenced this action against defendants Helmsley and James G. McCauley, a Helmsley employee, for an appraisal that McCauley had allegedly performed negligently. After receiving the summons and complaint, Helmsley's counsel told plaintiff's counsel that Helmsley had transferred its assets to HSI, thus likely rendering any judgment unenforceable. Although it received an extension of time to answer or respond to the complaint, Helmsley never answered or otherwise appeared in the action. For his part, McCauley settled with plaintiff, and the court eventually dismissed the action against him with prejudice.

On March 30, 2011, the Clerk entered a default judgment of $2,289,600 against Helmsley. Plaintiff sought to enforce the judgment by collecting the proceeds that Lynn Schneider had received from her 2007 sale of shares to HSI on the ground that the sale was a fraudulent transfer of Helmsley's assets. To accomplish the enforcement, in March 2012, plaintiff commenced *Amalgamated Bank v Schneider & Schneider, Inc.*, Index No. 650776/2012 (the supplemental proceeding), asserting claims under

CPLR 5225(b) and Debtor and Creditor Law §§ 273, 276, 276-a, and 278.

Schneider Corporation and Lynn Schneider (together, intervenors) then moved to intervene on Helmsley's behalf in this action and vacate the default judgment. On the motion, intervenors argued that Schneider Corporation was not involved in the offending appraisal or in Helmsley's decision to default. Thus, intervenors concluded, it would be inequitable to hold them accountable for alleged wrongdoing that had not been adjudicated on the merits and in which they played no part.

The IAS court should have denied intervention. As we have held, "[T]he potentially binding nature of the judgment on the proposed intervenor is the most heavily weighted factor in determining whether to permit intervention" (*Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 202 [1st Dept 2010], citing *Vantage Petroleum, Bay Isle Oil Co. v Board of Assessment Review of Town of Babylon*, 61 NY2d 695, 698 [1984]; *see also Matter of Tyrone G. v Fifi N.*, 189 AD2d 8, 17 [1st Dept 1993]).

Here, however, intervenors cannot intervene by arguing that the default judgment has a res judicata effect on the supplemental proceeding and adversely affects their rights in that proceeding. The default judgment has no res judicata effect on intervenors because a default is not a determination on the merits as is necessary to invoke that doctrine (*see People v Evans*, 94 NY2d 499, 502 [2000] ["claim preclusion . . . contemplates that the parties had a 'full and fair' opportunity to litigate the initial determination"]; *see also Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 413 [1st Dept 2011] [it is "the [long]-standing policy of the Courts to favor adjudication of the merits over default dismissals"]). Likewise, intervenors were not parties to the default action (*see Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999] ["Under res judicata, or claim preclusion, a valid final judgment bars future actions *between the same parties* on the same cause of action"] [emphasis added]).

Further, plaintiffs did not obtain the default judgment through fraud or through any other wrongdoing (*see Smith v Daca Taxi*, 222 AD2d 209 [1st Dept 1995]; *Rowan v Rowan*, 202 AD2d 281, 282 [1st Dept 1994]; *cf. Oppenheimer v Westcott*, 47 NY2d 595 [1979]). Rather, as the record makes clear, the default judgment resulted from Helmsley's decision not to answer the complaint or otherwise appear in the action because it apparently believed itself to be judgment-proof and that plaintiff would be unable to satisfy the judgment against it. Accordingly, intervenors cannot show that Helmsley had a reasonable excuse for the default (*see*

Brown v Suggs, 38 AD3d 329, 330 [1st Dept 2007] [deliberate default is not excusable]). Although intervenors might well have decided to choose a different course for the litigation, the decision to default was Helmsley's to make, and Helmsley's choice does not confer on intervenors the right to defend the action based on their status as former owners. Intervenors' right to act for defendant ended with the 2007 sale – an event that occurred four years before the clerk entered the default judgment against Helmsley.

Nor can proposed intervenors show that they, as intervenors, have a meritorious defense. On the contrary, the only defenses that intervenors have proposed actually belonged to Helmsley and McCauley; intervenors raise no defenses of their own interests. Of course, intervenors may raise whatever defenses they want to raise in the supplemental proceeding – the action that was actually commenced against them.

Oppenheimer (47 NY2d 595), upon which the motion court placed much reliance, does not support intervenors' position. As the motion court noted, the *Oppenheimer* Court stated that intervenors had an interest in setting aside the default judgment (*id.* at 602). The *Oppenheimer* Court did not, however, set aside the default judgment on that basis alone; the court merely allowed intervenors to intervene on that basis. But the

Oppenheimer Court also found that plaintiff had obtained the default judgment through fraud or wrongdoing, and indeed, the fraud or wrongdoing was the reason for the vacatur (*id.* at 599, 603-604 ["we hold that the default judgment . . . must be vacated, for the record is clear that [plaintiff] was guilty of misconduct, if not fraud . . . . The withholding of [] information from the court was [] clearly misconduct, if not fraud, warranting vacatur of the judgment"]). By contrast, as stated above, no wrongful acts precipitated the default judgment in this case.

Likewise, *Yuppie Puppy Pet Prods., Inc.* (77 AD3d 197) does not support intervenors' argument. The plaintiff in *Yuppie Puppy* sued when defendant failed to honor a lease (*id.* at 199-200). The defendant defaulted in the litigation; the court issued a judgment in the plaintiff's favor, allowing it to continue to occupy the property until the defendant could pay certain monies owed under the lease (*id.* at 199). In the interim, the defendant had defaulted on its mortgage, resulting in the proposed intervenor's commencement of a foreclosure action (*id.*).

There, unlike here, the proposed intervenors' rights were intertwined with a default judgment that allowed the plaintiff to alienate property that was collateral for proposed intervenors' loan to the defaulting defendant (*id.*). There were simply no circumstances under which the proposed intervenor would not be affected by the default judgment. Thus, this court permitted intervention under CPLR 1012(a)(3), because the action involved property rights and the proposed intervenor would be affected adversely by the judgment (*Yuppie Puppy*, 77 AD3d at 200-201). Equally important was our finding that intervention was appropriate because plaintiff had "aggressively used the judgment in an effort to preclude [the proposed intervenor] from obtaining any relief in its separate, pending, foreclosure action" (*id.* at 202). Neither situation exists here.

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

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

ENTERED: AUGUST 13, 2013

CLERK

Friedman, J.P., Sweeny, Moskowitz, Feinman, JJ.

9471 Syncora Guarantee Inc., formerly known as XL Capital Assurance Inc., Plaintiff-Respondent, Index 651566/11

-against-

J.P. Morgan Securities LLC, formerly known as Bear, Stearns & Co. Inc., Defendant-Appellant.

____

Sullivan & Cromwell LLP, New York (Robert A. Sacks of counsel), for appellant.

Patterson Belknap Webb & Tyler LLP, New York (Philip R. Forlenza of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered May 4, 2012, reversed, on the law, without costs, and defendant's motion for summary judgment granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Opinion by Moskowitz, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny, Jr.
Karla Moskowitz
Paul Feinman, JJ.

9471
Index 651566/11

____x

Syncora Guarantee Inc.,
formerly known as XL Capital
Assurance Inc.,
Plaintiff-Respondent,

-against-

J.P. Morgan Securities LLC,
formerly known as Bear,
Stearns & Co. Inc.,
Defendant-Appellant.

____x

Defendant appeals from the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered May 4, 2012, which denied defendant's motion for summary judgment dismissing the complaint as barred by the principles of res judicata or for dismissal under CPLR 3211(a)(4) on the grounds that there is another action pending.

Sullivan & Cromwell LLP, New York (Robert A. Sacks, Sharon L. Nelles and Darrell S. Cafasso of counsel), and Greenberg Traurig, LLP, New York (Richard A. Edlin, Eric N. Whitney and Anastasia A. Andelova of counsel), for appellant.

Patterson Belknap Webb & Tyler LLP, New York (Philip R. Forlenza, Harry Sandick, Matthew J. Shepherd, Lia M. Brooks and Anthony C. DeCinque of counsel), for respondent.

MOSKOWITZ, J.

This matter arises out of the collapse of the residential housing market following the global financial crisis of 2007 and 2008. Plaintiff Syncora Guarantee Inc. (Syncora), formerly known as XL Capital Assurance, Inc., is a monoline insurance company that provides insurance for structured finance transactions, including residential mortgage backed securities (RMBS). In March 2007, Syncora agreed to insure an RMBS transaction known as the GreenPoint Mortgage Funding Trust 2007-HE1 (the transaction).[1] In exchange for monthly premiums, Syncora guaranteed principal and interest payments in the event the underlying mortgage loans failed to perform. EMC Mortgage Corporation (EMC)[2] served as sponsor of the transaction, while Bear, Stearns & Co. Inc. (Bear Stearns) served as manager and underwriter.[3] The transaction was backed by nearly 10,000 home

[1] RMBS are securitization trusts that hold mortgage loans. Investors in the securities receive a return from the loans' principal and interest payments. The transaction is also a securitization trust.

[2] In March 2011, EMC Mortgage Corporation became EMC Mortgage LLC.

[3] At the time of the transaction, EMC and Bear Stearns were wholly-owned subsidiaries of The Bear Stearns Companies, Inc. In May 2008, JPMorgan Chase & Co. acquired The Bear Stearns Companies, Inc., including its subsidiaries EMC and Bear Stearns. The JPMorgan-owned entity then merged into Bear Stearns and later became known as defendant J.P. Morgan Securities LLC (JP Morgan).

equity lines of credit (HELOCs). EMC purchased the HELOCs from GreenPoint Mortgage, Inc. (GreenPoint) and sold them into a trust. In turn, the trust issued securities to investors.

To satisfy its agreement to insure the transaction, Syncora issued an insurance and indemnity agreement to EMC (the I&I Agreement) under which Syncora agreed to issue a financial guaranty policy (the policy). The I&I Agreement contains a series of EMC's broad warranties as a condition to, and as consideration for, Syncora's issuance of the policy. Those warranties refer to, among other things, the quality of the loan collateral as well as EMC's and GreenPoint's underwriting, due diligence and quality control policies. The I&I Agreement also contains a provision requiring EMC to promptly disclose each loan that failed to conform to EMC's warranties, and to either cure, repurchase, or provide adequate substitutes for each loan (the repurchase provision).

After the transaction closed in March 2007, the underlying mortgage loans began defaulting, following the collapse of the residential housing market. The defaults required Syncora to take write offs and pay claims under the policy.

When the transaction began to underperform, Syncora hired a

Thus, EMC and JP Morgan are sister affiliates.

third-party consultant to review a large subset of the loan pool. The review allegedly revealed that more than 85 percent of a randomly selected sample of loans had failed to conform to EMC's contractual warranties – for example, by violating EMC's own underwriting guidelines and mortgage-lending practices. According to Syncora, the most prevalent of the breaches involved either Bear Stearns's misrepresentations about the borrowers' ability and willingness to pay or GreenPoint's failure to adhere to its own underwriting guidelines when originating the loans. Syncora alleges that it has so far invoked its rights under the repurchase provision for 1,315 breaching loans, but that EMC has refused to repurchase all but 32 of the loans. Further, Syncora alleges, it has so far paid out over $320 million in unreimbursed insurance claims.

In March 2009, Syncora filed a breach of contract action against EMC in federal court.[4] In that action, captioned *Syncora Guarantee Inc. v EMC Mortgage Corp.*, No. 09-Civ-3106 (SD NY) [Crotty, J.] (the federal action), Syncora asserted causes of action for, among other things, breach of the repurchase

[4] Diversity jurisdiction enabled Syncora to bring the action in federal court, because it is a New York corporation with its principal place of business in New York while EMC is a Delaware corporation with its principal place of business in Texas. Also relevant is that defendant JP Morgan is a Delaware corporation with its principal place of business in New York.

provision and material breach of the I&I Agreement. When Syncora commenced the federal action, a financial guarantor, Ambac Assurance Corp (Ambac), was already litigating similar contract claims against EMC (*Ambac Assurance Corp. v EMC Mortgage Corp.*, No. 08-Civ-9464 [SD NY] [Berman, J.]) (the *Ambac* Action). The same counsel represents both Ambac and Syncora in their litigations against EMC, Bear Stearns, and JP Morgan.

In November 2010, Syncora moved to amend its federal complaint, asserting that discovery had revealed the scope of the intentional misrepresentations Bear Stearns had made before the transaction. In support of its motion, Syncora stated that discovery had uncovered a "fraudulent scheme developed and executed by [Bear Stearns] and its affiliate EMC" and that EMC was "acting under the control of [Bear Stearns]" when it purchased the HELOCs, sold them into the trust, and contracted with Syncora to provide the policy that protected investors. Syncora also claimed to have discovered that EMC was initially prepared to honor its repurchase obligations under the I&I Agreement but that JP Morgan abruptly reversed those decisions in the summer of 2008, shortly after it acquired Bear Stearns.

According to Syncora, once it had a sufficient factual basis to satisfy the heightened pleading standard for fraud, it informed the court that it intended to amend its complaint, and moved to add fraudulent inducement and securities fraud claims against both Bear Stearns and EMC and a tortious interference claim against Bear Stearns. Similarly, in the *Ambac* Action, Ambac moved to amend its complaint to add the same claims.

Judge Richard M. Berman ruled first in the *Ambac* Action, finding that Ambac had a good faith basis to amend its complaint to add a fraudulent inducement claim against Bear Stearns and EMC. The court ruled, however, that Ambac's federal securities claims were futile for lack of standing, and that absent the federal claims, the court did not have subject matter jurisdiction over non-diverse Bear Stearns because Ambac is a Wisconsin corporation with its principal place of business in New York. Thus, the court granted Ambac's motion to add the fraudulent inducement claims against Bear Stearns and EMC but then immediately dismissed the case for lack of jurisdiction. Ambac refiled its action in state court, where it is currently pending (*Ambac Assurance Corp. v EMC Mortgage Corp.*, No. 650421/2011 [NY Sup Ct]).

In March 2011, Judge Paul Crotty denied Syncora's motion to amend the complaint as untimely under the Federal Rules of Civil Procedure. The court ruled that Syncora had failed to demonstrate the good cause necessary to permit its late amendment or justify its delay of over a year in doing so. The court noted that the “intricacies of the fraud” were not necessary to bring the claim and that Syncora was on notice of Bear Stearns’s alleged fraud “long before documents were produced.” Thus, the court concluded, in filing the initial complaint, “Syncora made a conscious choice not to move Bear Stearns as a party defendant because to do so would prevent diversity jurisdiction.” The court also found that the proposed securities claims were futile for lack of standing because Syncora was “neither a buyer nor a seller of the securities at issue.” Finally, the court noted that, had it allowed Syncora to add its fraud claims against non-diverse Bear Stearns, the “most prudent” course would have been to dismiss the case for loss of diversity jurisdiction.

Syncora then filed this state action, asserting the same claims that Judge Crotty had rejected as untimely in the federal action. Specifically, the amended complaint asserts fraudulent inducement and tortious interference claims against JP Morgan, the former Bear Stearns. As in its federal pleadings, Syncora alleges that Bear Stearns and EMC acted “in concert” to induce its participation in the transaction. For example, the amended complaint alleges that Bear Stearns “oversaw every link in the mortgage-loan-securitization chain” through its “well-engineered network of affiliates.” The complaint further alleges that Bear Stearns executives “controlled the volume of loans to acquire from GreenPoint" and "made decisions and representations regarding the due diligence, quality control, and repurchase protocols" related to the transaction.

Further, as it alleged in its federal pleadings, Syncora alleges in the state complaint that to induce it to insure the transaction, Bear Stearns made extensive representations concerning, among other things, the quality of the underlying loans and Bear Stearns's internal policies and procedures for ensuring the quality of those loans. Syncora also asserts in the state complaint, as in the federal complaint, that it relied on the truth of Bear Stearns's representations when analyzing the risks associated with the transaction. Defendant moved for summary judgement dismissing the complaint as barred by res judicata or for dismissal under CPLR 3211(a)(4).

The motion court erred in denying defendant's motion for summary judgment because, in light of Judge Crotty's decision, this action is barred by the doctrine of res judicata. The doctrine dictates, "as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action" (*UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 473-474 [1st Dept 2011] [internal quotation marks omitted]).

Here, we find that the motion court erred in finding that no privity existed between JP Morgan and EMC. To be sure, the motion court applied a strict standard in evaluating the issue of privity, finding, among other things, that JP Morgan and EMC had no "preexisting substantive legal relationship" and therefore, that no privity existed between them. That rigid a test is not, however, appropriate in evaluating questions of privity. Indeed, courts of this State have found that the concept of privity "requires a flexible analysis of the facts and circumstances of the actual relationship between the party and nonparty in the prior litigation" (*Evergreen Bank v Dashnaw*, 246 AD2d 814, 816 [3d Dept 1998]; *see also D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990] [noting that privity "is an amorphous concept not easy of application"]). This conclusion holds particularly true in this action, as Syncora not only seeks the same relief in two actions from close corporate affiliates, but has made extensive allegations that the two defendants acted in concert in the same alleged scheme and should be treated as the same entity for the purpose of maintaining suit (*see Wilson v Limited Brands*, 2009 WL 1069165 at *3 n 4, 2009 US Dist LEXIS 37576 *9 n 4 [SD NY Apr. 17, 2009]).

Syncora contends that corporate affiliation, "absent more," is insufficient to establish privity. This statement, standing by itself, is true. But Syncora's pleadings suggest far more than mere corporate affiliation, given the extensive allegations, in multiple pleadings and filings in state and federal court, that Bear Stearns and EMC acted "in concert and as a single entity without regard to corporate formality" to perpetrate the alleged fraud. Thus, Syncora's own allegations support a finding of privity for res judicata purposes (*see UBS Sec. LLC v Highland Capital Mgt. L.P.*, 93 AD3d 489, 490 [1st Dept 2012] [finding no need to remand for a determination regarding whether defendants are in privity where complaint seeks to hold one defendant liable as the alter ego of another defendant]).

Syncora tries to downplay its own allegations by arguing that it does not "seek to hold Bear Stearns liable . . . as EMC's alter ego" and by pointing to JP Morgan's denial of these allegations as creating an issue of fact. However, Syncora cannot defeat the motion by contradicting the allegations in its own pleadings. On the contrary, it is Syncora's allegations, not Bear Stearns' responses to them, that control the outcome of this motion (*see Rojas v Roman Catholic Diocese of Rochester*, 783 F Supp 2d 381, 407 [WD NY 2010] ["[A] party cannot attempt to defeat a summary judgment motion by contradicting factual allegations in [its] complaint"], *affd* 660 F3d 98 [2d Cir 2011], *cert denied* __ US __, 132 S Ct 1744 [2012]; *Melwani v Jain*, 2004

WL 936814, at *8 n 10, 2004 US Dist LEXIS 7590 *27 n 10 [SD NY Apr. 29, 2004] [defendant's assertion that corporate affiliates are "separate entities" and "that the corporate boundaries between them should not be disregarded" does "not preclude a finding of privity between the two [parties] for res judicata purposes"]).

Syncora further contends that, even upon a finding of privity between JP Morgan and EMC, the "jurisdictional competency" exception to res judicata applies because it could not have litigated its claims against JP Morgan and Bear Stearns in the federal action, because of the federal court's lack of subject matter jurisdiction over non-diverse Bear Stearns and JP Morgan.

However, this exception does not apply. In *Humphrey v Tharaldson Enterprises, Inc.* (95 F3d 624 [7th Cir 1996]), the Seventh Circuit addressed this issue, finding:

> "[the] principles [of federal common law] require plaintiffs to assert their claims initially in the forum with the broadest possible jurisdiction . . . . If a plaintiff has a collection of claims that arise from one set of events and has an unconstrained choice between a forum of limited jurisdiction and a forum of broad jurisdiction, a decision to proceed in the more limited forum precludes [it] from bringing the unlitigated claims in a subsequent proceeding."

(*id.* at 626, quoting *Waid v Merrill Area Public Schools*, 91 F3d 857 [7th Cir 1996], citing Restatement (Second) of Judgments,

§§ 24, 25, Comment *e*). The court continued that "[o]nly where a plaintiff has some claims that can only be brought in a limited forum may he 'proceed in the forum of limited and exclusive jurisdiction without losing the opportunity to later litigate the claims not within that forum's jurisdictional competency'" (*id. at 865,* quoting *Waid*, 91 F3d at 865, citing Restatement (Second) of Judgments, § 26, Comment *c*).

We find the Seventh Circuit's reasoning to be persuasive in this matter. Rather than choosing to file its initial action in state court, where there would be no jurisdictional impediment to adding Bear Stearns as a party, Syncora chose to bring state contract claims against EMC so it could proceed in a federal forum on the basis of diversity jurisdiction. Thus, as Judge Crotty aptly concluded in the federal action, Syncora made a "conscious choice" not to include Bear Stearns as a party defendant (*see Somerville House Mgmt., Ltd. v Arts & Entm't Television Network*, No. 92-Civ-4705, 1993 WL 138736 at *2-3, 1993 US Dist LEXIS 5534 *8-10 [SD NY Apr. 28, 1993]).

Likewise, Syncora chose to move for leave to amend its complaint in federal court, seeking to add federal securities law claims against Bear Stearns. Had the federal court allowed the new claims, those claims would have conferred federal jurisdiction over all of Syncora's claims against Bear Stearns.

Having made its own strategic decision, Syncora cannot now be heard to complain that it is being denied its day in court. On the contrary, because it chose to proceed initially in federal court, Syncora is bound by the effects of the path it charted (*see Falk v State Bar of Michigan*, 631 F Supp 1515, 1521 [WD Mich 1986] ["Plaintiff should not be allowed to hale defendant into a second court simply because the first court in which he chose to sue defendant could not consider all the various theories of recovery arising from his single cause of action"], *affd* 815 F2d 77 [6th Cir 1987]).

The motion court further erred in denying defendant's motion for dismissal of the action, based on CPLR 3211(a)(4), in favor of the earlier-filed federal action. Indeed, New York courts generally follow the so-called "first-in-time" rule, which provides "the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere" (*see White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 96 [1st Dept 1997], quoting *City Trade & Indus., Ltd. v New Cent. Jute Mills Co.*, 25 NY2d 49, 58 [1969], quoting *H. M. Hamilton & Co. v American Home Assur. Co.*, 21 AD2d 500, 506 [1st Dept 1964]).

Syncora argues that the absence of one common defendant across the two actions is inconsistent with application of the first-in-time rule (citing *Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211 [1st Dept 1990]). This argument is not persuasive. When considering whether to dismiss a later filed action, courts will determine whether there is a "sufficient identity" of parties (*White Light Prods.*, 231 AD2d at 93-94). Indeed, substantial, not complete, identity of parties is all that is required to invoke CPLR 3211(a)(4) (*id.* at 94). Thus, where, as here, a plaintiff seeks the same damages for the same alleged injuries relating to the same transaction from close corporate affiliates, a court may properly make a finding that parties have "substantially similar" identities for purposes of the first-in-time rule.

Syncora further argues that because the federal action consisted of breach of contract claims while this action consists of fraudulent inducement and tortious interference claims, the later filed case cannot be dismissed because the two cases do not address the same legal issues. This argument also lacks merit. To be sure, in the two actions, Syncora asserts different legal theories, but it seeks to recover for the same alleged harm based on the same underlying events. It is not necessary that the "precise legal theories presented in the first action also be presented in the second action" (*Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622, 622 [2d Dept 2009]; *see Schaller v Vacco*, 241 AD2d 663, 663 [3d Dept 1997] [dismissing action as duplicative "although the precise legal theories" presented in the case differed from those presented in the first filed action]). Rather, "[t]he critical element is that both suits arise out of the same subject matter or series of alleged wrongs" (*Cherico*, 67 AD3d at 622; *see also UBS Sec. LLC*, 86 AD3d at 474 [finding in a res judicata analysis that while the claim against defendant in the original action arose out of its alleged obligation to indemnify plaintiff for actions by plaintiff's affiliates, and claims against defendant in the second action arose out of its alleged manipulation of those affiliates, the two claims formed a single factual grouping, as both were related to the same business deal and raised the same issue]).

Here, both actions arise out of the same transaction, involve the same allegations concerning Bear Stearns's and EMC's concerted actions in the "mortgage-loan-securitization chain" and seek the same recovery for the same alleged injuries – that is, recovery of "claims payments made and to be made" under the policy. Thus, dismissal is also warranted under CPLR 3211(a)(4).

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered May 4, 2012, which denied defendant's motion for summary judgment dismissing the complaint as barred by the principles of res judicata or for dismissal under CPLR 3211(a)(4) on the ground that there is another action pending, should be reversed, on the law, without costs, and defendant's motion for summary judgment granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

All concur.

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

ENTERED: AUGUST 13, 2013

CLERK