SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 3, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Acosta, Moskowitz, Freedman, Abdus-Salaam, JJ.

8374 US Oncology, Inc., Index 650461/11
Plaintiff-Appellant,

-against-

Wilmington Trust FSB,
Defendant-Respondent.

_____

Sullivan & Cromwell LLP, New York (Robert J. Giuffra, Jr., of counsel), for appellant.

Stroock & Stroock & Lavan LLP, New York (Daniel A. Ross of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered February 23, 2012, which, in this action seeking, inter alia, a declaratory judgment, denied plaintiff's motion for summary judgment, without prejudice to renew upon completion of discovery, unanimously affirmed, without costs.

This action concerns the disputed meaning of the contractual phrase "the remaining term of the Securities" as it applies to the formula for calculating the premium that plaintiff bond

issuer owes the bondholders for redeeming the instruments before August 15, 2013. As applicable here, the formula provides that plaintiff will pay, in addition to the principal amount of the bonds, (1) the present value of the much smaller premium that plaintiff would have owed if it had called the bonds on August 15, 2013 *plus* (2) the net present value of the interest payments that the bondholders would have received through August 15, 2013, using a discount rate equal to the "Treasury Rate" plus .5%. "Treasury Rate" is defined as the interest rate of a "Comparable Treasury Issue," which in turn is defined as a United States Treasury note "having a maturity comparable to the remaining term of the Securities."

Seeking summary judgment on its declaratory action, plaintiff argues that "the remaining term of the Securities" unambiguously refers to a term ending on the bonds' maturity date of August 15, 2017. In opposition, defendant contends that the phrase, when read in the context of the early redemption provisions, could be construed to mean a term ending on August 15, 2013.

The motion court properly found that the disputed contract language is ambiguous and denied plaintiff's summary judgment motion, with leave to renew after discovery. It is well

established that "[w]hether a contract is ambiguous is a question of law" (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]; *see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). A contract is ambiguous when "on its face [it] is reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). The agreement must be read as a whole "to ensure that excessive emphasis is not placed upon particular words or phrases" (*South Rd. Assoc., LLC* at 277; *see Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003]).

Contrary to plaintiff's contention, the disputed phrase does not unambiguously refer to a term ending on the date that the notes would have matured if they had never been called, namely, August 15, 2017. The phrase can also plausibly be construed as

referring to a term ending on August 15, 2013, which date is used throughout the formula to calculate the premium for an earlier redemption.

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.,

8726 The People of the State of New York, Respondent,

-against-

Maria M., Defendant-Appellant.

Ind. 1563/10

Steven Banks, The Legal Aid Society, New York (Michelle Fox of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered February 23, 2012, convicting defendant, upon her plea of guilty, of assault in the second degree, and sentencing her to a term of three years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of adjudicating defendant a youthful offender, reducing the sentence to a term of one year, and otherwise affirmed.

Upon examination of the record, we conclude that it does not establish that defendant knowingly, voluntarily, and intelligently waived her right to appeal (*see People v Bradshaw*, 18 NY3d 257, 265 [2011]). We are not advancing new precedent. Based upon facts unique to this case, we find that the record does not establish that the defendant understood that the waiver

of right to appeal is "separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]). The trial court's perfunctory colloquy failed to explain the waiver of the right to appeal, and did not clarify that defendant did not automatically forfeit this right, which is separate and distinct from trial rights. Given defendant's lack of comprehension, the perfunctory colloquy, and the language of the written waiver, the record does not reflect a knowing, voluntary, and intelligent waiver of the right to appeal. Thus, we reach defendant's claim of an excessive sentence.

In light of defendant's age, the mitigating facts of the case, and her lack of any juvenile or prior criminal record, we find that the sentence imposed was excessive to the extent indicated (*see People v Kwame S.*, 95 AD3d 664 [1st Dept 2012]).

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8924 The People of the State of New York, Ind. 5076/07
Respondent,

-against-

Ronald Sudol,
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 (Susan Gliner of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (John Cataldo, J., at jury trial and CPL 330.30 motion to set aside the verdict; Thomas Farber, J. at sentencing), rendered February 14, 2012, convicting defendant, after a jury trial, of gang assault in the second degree and assault in the third degree, and sentencing him to concurrent terms of 3½ years and 1 year, respectively, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the gang assault conviction, dismissing that count of the indictment, and remanding for resentencing on the remaining conviction, and otherwise affirmed.

On the prior appeal by the People in this case (89 AD3d 499 [1st Dept 2011]), this Court determined that the evidence was

insufficient to establish that the victim suffered serious physical injury, but we were unable to provide defendant with any remedy given the procedural posture. In view of our prior decision, we review defendant's unpreserved claim in the interest of justice and agree with defendant that the evidence was legally insufficient to support his gang assault conviction.

We find no basis for ordering a new trial regarding the third-degree assault charge. Defendant's claim of improper cross-examination is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits for the reasons stated on the prior appeal (89 AD3d at 501).

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8926-
8926A In re Susan S.,
Petitioner-Appellant,

-against-

Jacqueline S.,
Respondent-Respondent.

- - - - -

Jacqueline S.,
Petitioner-Respondent,

-against-

Susan S.,
Respondent-Appellant.

_____

George E. Reed, Jr., White Plains, for appellant.

Richard L. Herzfeld P.C., New York (Richard L. Herzfeld of counsel), for respondent.

_____

Orders, Family Court, New York County (George L. Jurow, J.H.O.), entered on or about July 14, 2011, which, after a fact-finding hearing in proceedings brought pursuant to article 8 of the Family Court Act, granted Jacqueline S.'s petition for a two-year order of protection against Susan S., and dismissed Susan S.'s cross petition for an order of protection against Jacqueline S., unanimously affirmed, without costs.

The determination that Susan had committed the family offenses of harassment in the second degree and attempted assault

in the third degree is supported by a fair preponderance of the evidence (*see* Family Court Act §§ 812 [1]; 832). Susan, however, did not establish, by a fair preponderance of the evidence, that Jacqueline had committed acts warranting an order of protection. The court's credibility determinations are supported by the record, and there is no basis to disturb them (*see Matter of Lisa S. v William V.*, 95 AD3d 666 [1st Dept 2012]).

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

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8927 Inessa Cafarella, et al., Index 350300/10
Plaintiffs-Respondents,

-against-

2180 Realty Corp.,
Defendant-Appellant,

Igor Edelman, etc.,
Defendant,

J.L.F. Home Improvement, Inc.,
Defendant-Respondent.

Lester Schwab Katz & Dwyer LLP, New York (Howard R. Cohen of counsel), for appellant.

Michael A. Ruiz, P.C., Bronx (Steven J. Mines of counsel), for Cafarella respondents.

Armienti, DeBellis, Guglielmo & Rhoden LLP, New York (Harriet Wong of counsel), for J.L.F. Home Improvement, Inc., respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered May 21, 2012, which denied defendant 2180 Realty Corp.'s motion for summary judgment dismissing the claims asserted against it or, alternatively, for common-law indemnification against defendant J.L.F. Home Improvement, Inc., unanimously affirmed, without costs.

Plaintiff Inessa Cafarella alleges that, while carrying the infant plaintiff, she tripped and fell over a brown or tan

colored cement bag, about 7 inches high and 16 inches wide, which was covered in gray dust, while entering the lobby of her apartment building. Plaintiff testified that this bag was being used to prop open the vestibule door and was placed on the floor, which was comprised of brown, gray and tan tiles, directly in front of the door.

Given plaintiff's description of the cement bag and its location, 2180 Realty Corp. failed to make a prima facie showing that the alleged condition was "open and obvious" and not inherently dangerous (*see Lawson v Riverbay Corp.*, 64 AD3d 445 [1st Dept 2009]; *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71-72 [1st Dept 2004]).

In the absence of any cross claim for indemnification, no grounds exist upon which to grant 2180 Realty Corp. that relief (*see Hughey v RHM-88, LLC*, 77 AD3d 520, 523 [1st Dept 2010]).

We have considered 2180 Realty Corp.'s remaining arguments and find them unavailing.

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8928 In re Jaekas N.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency.

Elisa Barnes, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about May 8, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of sexual misconduct and sexual abuse in the second degree, and placed him on enhanced supervision probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding 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 court's credibility determinations, including its assessment of the victim's delay in reporting the offenses.

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8929 80 Varick Street Group, L.P., Index 108635/09
Plaintiff-Respondent,

-against-

Donald MacPherson,
Defendant-Appellant.

_____

Jeffrey S. Ween & Associates, New York (Jeffrey S. Ween of counsel), for appellant.

Belkin Burden Wenig & Goldman LLP, New York (Magda L. Cruz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered May 7, 2012, which, inter alia, granted plaintiff's cross motion for summary judgment on its cause of action for ejectment, unanimously affirmed, without costs.

Defendant's mezzanine was a breach of a substantial obligation of his tenancy that was not waivable in light of both its illegality (*see e.g. 2 W. 32nd St. Corp. v Levine*, 199 Misc 1020, 1021 [App Term, 1st Dept 1951]) and the specific non-waiver clause in the lease which provided that acceptance of rent does not waive a violation.

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

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8930 The People of the State of New York, Ind. 1902/10
Respondent,

-against-

Ian Wallen,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed 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 (Richard D. Carruthers, J.), rendered on or about June 15, 2011,

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

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

ENTERED: JANUARY 3, 2013

CLERK

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

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8931-
8932 Index 650478/10

Concord Capital Mgt., LLC, et al.,
Plaintiffs-Appellants,

-against-

Bank of America., N.A., etc., et al.,
Defendants-Respondents,

Ira L. Brody,
Defendant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Jed I. Bergman of counsel), for appellants.

Schoeman, Updike & Kaufman, New York (Randall G. Sommer of counsel), for Bank of America, N.A., respondent.

Quinn Emanuel Urquhart & Sullivan LLP, New York (Kevin S. Reed of counsel), for Fifth Third Bank, respondent.

Appeal from order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 5, 2011, which granted defendants-respondents' motions to dismiss the complaint, deemed appeal from judgment, same court and Justice, entered February 10, 2012, and, so considered, said judgment unanimously affirmed, with costs.

"The doctrine of in pari delicto mandates that the courts will not intercede to resolve a dispute between two wrongdoers" (*Kirschner v KPMG LLP*, 15 NY3d 446, 464 [2010]). "The justice of

the in pari delicto rule is most obvious where a willful wrongdoer is suing someone who is alleged to be merely negligent" (*id.*), such as defendant Bank of America, N.A. It is true that defendant Fifth Third Bank is alleged to have acted willfully; however, in pari delicto "also applies where both parties acted willfully" (*id.*).

The IAS court properly declined to apply the adverse interest exception to the in pari delicto rule. Although the complaint alleges that plaintiffs' former executives looted plaintiffs, it also alleges that the corrupt executives' scheme brought millions of dollars into plaintiffs' coffers and allowed plaintiffs to survive for a few years. "So long as the corporate wrongdoer's fraudulent conduct enables the business to survive – to attract investors and customers and raise funds for corporate purposes –" the adverse interest exception does not apply (*id.* at 468).

In light of the foregoing, we need not reach defendants-respondents' alternative arguments for dismissal.

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8933 The People of the State of New York, Ind. 1054/09
Respondent,

-against-

Nathan Perry,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Kirkland & Ellis LLP, New York (Jordan N. Malz of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, Bronx County (Colleen D. Duffy, J.), rendered August 20, 2010, as amended March 19, 2012, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of four years, held in abeyance, and the People directed to make the arresting officer's unredacted memo book available to this Court for its in camera review.

The record supports the inference that some of the material redacted from the arresting officer's memo book, which was turned over to the defense, constituted *Rosario* material (*People v*

Rosario, 9 NY2d 286 [1961], *cert denied* 368 US 866 [1961]; *see also* CPL 240.45) and was not otherwise protected from disclosure. Defendant is therefore entitled to an in camera review of the unredacted memo book to determine whether any of the deleted portions of the officer's notes constituted *Rosario* material and, if so, whether their nondisclosure caused defendant any prejudice (*cf*. *People v Smith*, 33 AD3d 462, 464 [1st Dept 2006], *lv denied* 8 NY3d 849 [2007]).

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Saxe, Richter, Abdus-Salaam, JJ.

8934 Luz Rodriguez, Index 300689/09
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Schwartzapfel Lawyers, P.C., New York (Alexander J. Wulwick of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered May 25, 2012, which, in this personal injury action arising from a slip-and-fall on a wet substance in a stairwell in defendant's building, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant made a prima facie showing of its entitlement to judgment as a matter of law with evidence that it neither created nor had actual or constructive notice of the allegedly hazardous condition (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). The caretaker who cleaned the building on the day before the early-morning accident testified that she inspected the subject stairs twice every morning and once every afternoon,

and promptly mopped any urine or other spills she found during her inspections. This testimony was corroborated by her supervisor's testimony and the janitorial schedule (*see Love v New York City Hous. Auth.*, 82 AD3d 588 [1st Dept 2011]). Plaintiff's opposition failed to raise a triable issue of fact. The evidence plaintiff submitted fails to demonstrate a recurring dangerous condition routinely left unremedied by defendant, as opposed to a mere general awareness of such a condition, for which defendant is not liable (*see Raposo v New York City Hous. Auth.*, 94 AD3d 533, 534 [1st Dept 2012]). Defendant is not "required to patrol its staircases 24 hours a day" (*Love*, 82 AD3d at 588).

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8937 German American Capital Corporation, Index 651140/10
Plaintiff-Respondent,

-against-

Oxley Development Company, LLC, et al.,
Defendants-Appellants.

_____

Nesenoff & Miltenberg LLP, New York (Kimberly C. Lau of counsel), for appellants.

Seyfarth Shaw LLP, New York (Eddy Salcedo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 16, 2011, which granted plaintiff lender's motion for summary judgment in lieu of complaint and directed the Clerk to enter judgment in favor of plaintiff as against defendants borrower and guarantors, jointly and severally, in the amount of $37,000,000 plus interest at 11% from July 1, 2009 through July 31, 2009, and thereafter at a rate of 16%, plus an exit fee of $185,000, unanimously affirmed, with costs.

Plaintiff established its entitlement to judgment as a matter of law in this action to recover on a promissory note executed by borrower Oxley Development Company, Inc. (Oxley) (*see* CPLR 3213). Plaintiff submitted evidence, including the note,

the loan agreement and guaranty, and an affidavit of plaintiff's principal who attested to Oxley's failure to make payment on the loan at its maturity date (*see Boland v Indah Kiat Fin. [IV] Mauritius*, 291 AD2d 342 [1st Dept 2002]; *see also SCP [Bermuda] v Bermudatel Ltd.*, 242 AD2d 429 [1st Dept 1997]; *Apple Bank for Sav. v Mehta*, 202 AD2d 339 [1st Dept 1994]).

Defendants' argument that Oxley's performance under the note and loan agreement was frustrated by plaintiff's failure to make timely reimbursement of certain marketing expenses it submitted in accordance with the loan agreement's reimbursement provisions raises a defense that lies outside the making of the note and the obligations thereunder (*see Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968] ["(w)hile defenses advanced might raise issues outside the note, that does not change its character as one for the payment of money only"], *affd* 29 NY2d 617 [1971]). Such a defense, which rests upon an apparent claim of breach of a loan agreement provision regulating the availability of certain loan proceeds for marketing purposes, is separate from Oxley's unequivocal and unconditional obligation to repay the monies it was loaned. To the extent that the breach

of contract defense may amount to a viable claim, it may be asserted in a separate action (*see SCP [Bermuda]*, 242 AD2d at 430; *Maslin v Stockman*, 265 AD2d 533 [2d Dept 1999]).

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8938 Jeffrey Marrero, Index 105101/07
Plaintiff-Appellant, 591144/07
590522/09
Jessie Marrero, 59104/09
Plaintiff,

-against-

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

Sony Music Entertainment, Inc.,
Defendant.

- - - - -

The City of New York, et al.,
Third Party Plaintiffs-Respondents,

-against-

USI Services Inc., et al.,
Third Party Defendants-Respondents.

- - - - -

Strike Force Protective Services, Inc., et al.,
Fourth Party Plaintiff-Respondents,

-against-

Concert Service Specialist Inc.,
Fourth Party Defendant-Respondent.

[And a Third Third-Party Action]

_____

Budin, Reisman, Kupferberg & Bernstein LLP, New York (Gregory C. McMahon of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale LLP, New York (Steven H. Rosenfeld of counsel), for The City of New York, Delsener/Slater Enterprises Ltd., and Live Nation Worldwide, Inc., respondents.

Mandelbaum, Salsburg, Lazris & Discenza, PC, New York (Owen J. Lipnick of counsel), for Strike Force Protective Services, Inc., and USI Services Group Inc., respondents.

Pisciotti, Malsch & Buckley, P.C., White Plains (Ryan Lawrence Erdreich of counsel), for Concert Service Specialists, Inc., respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 18, 2011, which, insofar as appealed from, granted defendants City of New York, Delsner Enterprises Ltd., Delsner/Slater Enterprises, Ltd., and Live Nation, Inc.'s motion for summary judgment dismissing plaintiff Jeffrey Marrero's (plaintiff) first-party claim in its entirety, and dismissing, as moot, the third-party action and fourth-party action in their entireties, unanimously affirmed, without costs.

Supreme Court properly determined that respondents met their initial burden of showing that they provided adequate security measures at Ozzfest 2006, an outdoor concert held on Randall's Island (*see Rotz v City of New York*, 143 AD2d 301, 305 [1st Dept 1988]). Respondents submitted evidence showing that meetings were held with the NYPD to assess the security plans proposed, and that they ultimately provided 215 personnel to secure the concert, the attendance of which was about 10,000 to 12,000, and that such security would have been sufficient for a crowd of

30,000. Plaintiffs offered no evidence, expert or otherwise, to show that such security was inadequate (*see Villa v Paradise Theater Prods., Inc.*, 85 AD3d 402 [1st Dept 2011]; *Florman v City of New York*, 293 AD2d 120, 125-127 [1st Dept 2002]).

Contrary to plaintiff's contention, there is no evidence in the record to show that the unidentified person who shoved him was actually engaged in dangerous "moshing" or slam dancing; plaintiff himself testified that he was unsure whether his injury was due to an intentional push or someone simply bumping into him. In either case, however, that unidentified nonparty caused plaintiff's fall, and under the circumstances here, respondents cannot be held liable for such unforeseen conduct (*see Maheshwari v City of New York*, 2 NY3d 288, 294 [2004]; *Djurkovic v Three Goodfellows*, 1 AD3d 210 [1st Dept 2003], *lv denied* 2 NY3d 701 [2004]; *Stafford v 6 Crannel St.*, 304 AD2d 997, 998 [3d Dept 2003]).

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: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8939 The People of the State of New York, Ind. 2078/05
Respondent, 3812/05

-against-

Shahe Cross,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

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

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about September 20, 2010,

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

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

ENTERED: JANUARY 3, 2013

CLERK

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

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8940-
8941 Index 650223/11

Quadrant Management Inc.,
Plaintiff-Respondent,

-against-

John Hecker,
Defendant-Appellant,

Maxine Shriber, et al.,
Defendants.

_____

Wechsler & Cohen LLP, New York (Kim Lauren Michael of counsel), for appellant.

Jones Day, New York (Tracy V. Schaffer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 6, 2012, against defendant John Hecker, and order, same court and Justice, entered June 22, 2012, which sua sponte vacated the stay of entry and execution of judgment, unanimously affirmed, without costs.

Plaintiff established its prima facie case on the promissory note by submitting a copy of the executed note and an affidavit by its CFO stating that defendant failed to repay the note in accordance with its terms (*see Solomon v Langer*, 66 AD3d 508 [1st Dept 2009]). In opposition, defendant failed to raise an issue of fact as to a bona fide defense. In his affidavit he asserts

that the loan was an advance against deferred compensation and that plaintiff's president fraudulently induced him to sign the note by misrepresenting that the loan would be credited against his deferred compensation. However, these assertions are unsubstantiated and conclusory (*see Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004]; *Banner Indus. v Key B.H. Assoc.*, 170 AD2d 246 [1st Dept 1991]; *Kornfeld v NRX Tech.*, 93 AD2d 772, 773 [1st Dept 1983], *affd* 62 NY2d 686 [1984]).

The claims asserted by defendant in his separate action against plaintiff, its president, and its affiliates are not "inseparable" from plaintiff's right to payment on the note and therefore do not preclude summary judgment. To the extent those claims allege failure to pay promised deferred compensation, as indicated, defendant submitted only his self-serving affidavit stating that the loan was to be credited against the deferred compensation. The allegations underlying defendant's remaining claims are unrelated to the note and do not affect his obligations thereunder (*see Mitsubishi Trust & Banking Corp. v Housing Servs. Assoc.*, 227 AD2d 305 [1st Dept 1996]; *Vinciguerra v Northside Partnership*, 188 AD2d 861, 862-863 [3d Dept 1992]).

In view of the foregoing, we need not separately address defendant's appeal from the June 22, 2012 order.

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8942 The People of the State of New York, Ind. 1373/09
Respondent,

-against-

Michael Toliver,
Defendant-Appellant.

_____

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

Michael Toliver, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered September 13, 2010, convicting defendant, after a jury trial, of failure to verify registration information under the Sex Offender Registration Act (Correction Law art 6-C) (three counts) and failure to verify annual registration information under that Act, and sentencing him to an aggregate term of 2⅓ to 7 years, unanimously affirmed.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the challenges at issue were not pretextual. This determination, based primarily on the court's assessment of

the challenging attorney's credibility, is entitled to great deference (*see Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). The prosecutor explained that she had challenged the three panelists at issue based, respectively, on their unusual clothing, educational background, and employment. The prosecutor was not required to show that these rationales were related to the facts of the case, and we find no basis to disturb the court's findings (*see People v Hecker*, 15 NY3d 625, 656, 663-665 [2010]).

Defendant claims that the education-related explanation for one of the challenges was pretextual because, in a later round of jury selection after the *Batson* application had been denied, the prosecutor did not challenge another prospective juror with the same educational level. However, defendant did not make that claim at trial, and the prosecutor had no opportunity to explain the alleged disparity. We decline to review this unpreserved argument in the interest of justice. As an alternative holding, we find that the record does not support a claim of disparate treatment by the prosecutor of similarly situated panelists.

The court properly exercised its discretion in denying defendant's challenge for cause to a prospective juror, as she never said anything that would "cast serious doubt on [her] ability to render an impartial verdict" (*People v Arnold*, 96 NY2d

358, 363 [2001]). Viewed in context, any uncertainty she expressed related only to a purely hypothetical situation.

Defendant's pro se claims are without merit.

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8943 151 Mulberry Street Corp., etc., Index 651017/10
Plaintiff-Appellant,

-against-

Italian American Museum, et al.,
Defendants-Respondents.

Trolman, Glaser & Lichtman P.C., New York (Bruce N. Lederman of counsel), for appellant.

Cornicello Tendler & Baumel-Cornicello LLP, New York (David Tendler of counsel), and Solomon & Siris, P.C., Garden City (Stuart Siris of counsel), for Italian American Museum, Italian American Real Estate Holdings LLC, Joseph V. Scelsa, Ronald Mannino and Michael Ricatto, respondents.

Paul H. Appel, P.C., New York (Paul H. Appel of counsel), for Jerome G. Stabile, III Realty, L.L.C., respondent.

Order, Supreme Court, New York County (Barbara Kapnick, J.), entered September 15, 2011, which, to the extent appealed from, granted, in part, the motion of defendants Italian American Museum, Italian American Real Estate Holdings, Joseph V. Scelsa, Ronald Mannino, and Michael Ricatto (the Museum defendants) to dismiss the complaint, and which granted, in its entirety, the cross motion of defendant Jerome G. Stabile, III Realty L.L.C. f/k/a Stabile Brothers LLC (Stabile), to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff seeks to enforce a lease it alleges it entered

into with defendant Italian American Museum, and to preserve what it claims was a right to purchase the leased premises from the former owner, defendant Stabile. The lease contained two conditions precedent: approval by the Museum's mortgage bank and delivery of the lease (*see e.g. Broadway Corp. v Alexander's Inc*., 46 NY2d 506, 510-512 [1979]), neither of which occurred. Accordingly, the lease never came into existence.

Insofar as plaintiff claims the existence of an oral agreement pursuant to which it had the right to purchase the premises in the event the former owner elected to sell, any such agreement is barred by the Statute of Frauds (*see* General Obligations Law § 5-703). Plaintiff's argument that the agreement may be enforced under General Obligations Law § 5-703(4), based on its partial performance, was properly rejected by the motion court. Plaintiff's conduct in improving the premises is not "unequivocally referable" to the agreement (*see e.g. Richardson & Lucas Inc. v New York Athletic Club of the City of N.Y.*, 304 AD2d 462, 463 [1st Dept 2003]). Plaintiff's conduct is consistent with that of a restauranteur seeking to improve its business.

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

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8944 Kevin Edwards, Index 111684/07
Plaintiff-Respondent, 590137/09

-against-

BP/CG Center I, Inc., et al.,
Defendants-Respondents-Appellants,

Temco Services Industries, Inc.,
Defendant-Appellant-Respondent.

– – – – –

BP/CG Center I, Inc., et al.,
Third-Party Plaintiffs-Respondents.

-against-

Pro-Quest Security, Inc.,
Third Party Defendant-Respondent-Appellant.

_____

Lester Schwab Katz & Dwyer, New York (Steven B. Prystowsky of counsel), for Temco Service Industries, Inc., appellant-respondent.

Raven & Kolbe LLP, New York (Ryan E. Dempsey of counsel), for BP/CG Center I, Inc., BP/CG Center II, Inc., and Boston Properties Limited Partnerships, respondents-appellants/respondent.

Havkins, Rosenfeld, Ritzert & Varriale LLP, Mineola (Gail I. Ritzert of counsel), for Pro-Quest Security, Inc., respondent-appellant.

Law Offices of Douglas A. Emanuel, South Salem (Richard G. Monaco of counsel), for Kevin Edwards, respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered February 7, 2012, which, to the extent appealed from

as limited by the briefs, denied defendants' motions for summary judgment dismissing the complaint and all cross claims as against them, and denied third-party defendant Pro-Quest Security, Inc.'s motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to grant Pro-Quest's motion as to the third-party causes of action except for the cause of action for common-law indemnification of defendant/third-party plaintiff Temco Services Industries, Inc., and otherwise affirmed, without costs.

Contrary to the contention of defendants BP/CG Center I, Inc., BP/CG Center II, Inc., and Boston Properties Limited Partnership (collectively, Boston), the record demonstrates that the loading dock and ramp on which plaintiff slipped and fell were means of ingress and egress on premises open to the public. Thus, Boston had a nondelegable duty to maintain them in a reasonably safe condition, and can be held vicariously liable for any negligence on the part of Temco or Pro-Quest that caused them to be unsafe (*see LoGiudice v Silverstein Props., Inc.*, 48 AD3d 286 [1st Dept 2008]). The record presents issues of fact whether Temco failed to perform its maintenance contract with Boston, performed negligently, or negligently created the wet condition on the ramp (*see Tamhane v Citibank, N.A.*, 61 AD3d 571, 572-573

[1st Dept 2009]). Among the evidence is conflicting testimony as to whether it was a Temco or a Pro-Quest employee who was holding a hose.

In light of the issue of fact whether its employee created the dangerous condition resulting in plaintiff's injuries, Temco's common-law indemnification claim against Pro-Quest was correctly permitted to proceed. Temco's third-party contract claims should be dismissed because Temco has no contract with Pro-Quest.

Boston's third-party breach of contract claim against Pro-Quest should be dismissed because Pro-Quest demonstrated that it complied with its contractual obligations to Boston with respect to insurance (*see Inchaustegui v 666 Fifth Ave. Ltd. Partnership*, 96 NY2d 111 [2001]; *North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993]). Boston's common-law

indemnification claim against Pro-Quest should be dismissed based on the antisubrogation rule (*see North Star Reins.*, 82 NY2d at 294).

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8945 Daniel Robbins, et al., Index 115700/08
Plaintiffs,

-against-

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

- - - - -

Goldman Sachs Headquarters, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Zwicker Electric Co., Inc.,
Third-Party Defendant-Appellant.

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Milber Makris Plousadis & Seiden LLP, White Plains (Gregory Saracino of counsel), for appellant.

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 (Joan A. Madden, J.), entered September 15, 2011, which, to the extent appealed from as limited by the briefs, denied third-party defendant Zwicker Electric Co.'s motion for summary judgment, seeking dismissal of the third-party claims of defendants Goldman Sachs Headquarters, LLC and Tishman Construction Corp. for contractual indemnity, common law indemnity, and contribution, unanimously affirmed, without costs.

In this Labor Law case, questions of fact exist as to

whether insufficient lighting was a proximate cause of plaintiff's accident (*see Capuano v Tishman Constr. Corp.*, 98 AD3d 848 [1st Dept 2012]; *Murphy v Columbia Univ.*, 4 AD3d 200 [1st Dept 2004]). Zwicker Electric Co. (Zwicker) installed and maintained the temporary lighting in the area of plaintiff's accident, and both plaintiff and his foreman testified that it was very dark. While the sheet of metal that had been covering a large opening in the floor bore the words "danger" and "hole," neither worker observed the writing, allegedly because of inadequate lighting, and both were unaware that the metal was covering a hole until they moved it, causing plaintiff to fall into the hole.

The contract between defendants and Zwicker obligates Zwicker to indemnify defendants from claims "arising out of or resulting from the performance of Contractor's Work, or the Contractor's operations" or, inter alia, for claims caused by Zwicker's "willful or negligent act[s] or failures to act." The lighting provided by Zwicker was clearly a tool supplied for the other contractors to perform their work, and thus the accident arose out of Zwicker's work (*see Balbuena v New York Stock Exch.*,

Inc., 49 AD3d 374 [1st Dept 2008], *lv denied* 14 NY3d 709 [2010]). Moreover, the questions of fact concerning Zwicker's negligence would also trigger the indemnity provision.

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

ENTERED: JANUARY 3, 2013

CLERK

Gonzalez, P.J., Friedman, Saxe, Richter, Abdus-Salaam, JJ.

8946N H. Brian Walker, et al., Index 114718/10
Petitioners-Respondents,

-against-

Sandberg & Sikorski Corporation
Firestone, Inc., et al.,
Respondents-Appellants.

Hamburger Law Firm LLC, New York (Sharron E. Ash of counsel), for appellants.

H. Brian Walker, respondent pro se.

Leonard A. Walker, respondent pro se.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered May 27, 2011, which granted petitioners' motion for pre-action discovery to the extent of directing respondents to provide petitioners with information as to the identity of the source of an allegedly defamatory statement made to them, including the source's name, the dates that any such statements were made, and any other information that would assist in ascertaining the identity of the source, unanimously affirmed, without costs.

There is no reason to alter the court's discretionary determination (*see Bishop v Stevenson Commons Assoc., L.P.*, 74 AD3d 640, 641 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]).

The information at issue is material and necessary to petitioners' potentially viable claim for defamation, and would assist their efforts to identify prospective defendants (*see Christiano v Port Auth. of N.Y. & N.J.*, 1 AD3d 289 [1st Dept 2003]). That petitioners know the identity of the person who made an allegedly defamatory statement about one of the petitioners after the filing of the pre-action motion for discovery has no bearing on the court's determination.

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

ENTERED: JANUARY 3, 2013

CLERK

Sweeny, J.P., Saxe, Richter, Abdus-Salaam, Román, JJ.

8237 Lindsey Kupferman Nederlander, Index 350510/07
Plaintiff-Respondent,

-against-

Eric Nederlander,
Defendant-Appellant.

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Teitler & Teitler LLP, NY (John M. Teitler of counsel), for appellant.

Cohen Rabin Stine Schumann LLP, New York (Bonnie E. Rabin of counsel), for respondent.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered on or about April 17, 2012, which, to the extent appealed from, ordered defendant to pay 50% of the balances owed on the mortgages on the marital residence in the event that he is unable to refinance the mortgages or obtain extensions of the mortgage notes, unanimously affirmed, without costs.

Domestic Relations Law (DRL) § 234 empowers the court to "make such direction, between the parties, concerning the possession of property, as in the court's discretion justice requires having regard to the circumstances of the case and of the respective parties." Accordingly, pursuant to DRL § 234, the court can not only order that a party turn over marital property, but also that he or she refrain from transferring or disposing of

it (*Leibowits v Leibowits*, 93 AD2d 535, 537 [2d Dept 1983]). The power to issue preliminary injunctions affecting property in divorce actions stems from the recognition that while spouses have no legal or beneficial interest in marital property prior to a judgment of divorce, they nevertheless have an expectancy in that property (*see id.* at 540-545 [O'Connor, J. concurring]). Thus, in order to protect that expectancy pending equitable distribution, to maintain the status quo, and to prevent the dissipation of marital property, the court must be able to issue orders to ensure that such marital property is protected should it later become the subject of equitable distribution (*id.*; *Rosenshein v Rosenshein*, 211 AD2d 456, 456 [1st Dept 1995]; *Drazal v Drazal*, 122 AD2d 829, 831 [2nd Dept 1986]).

Here, contrary to defendant's assertion, the motion court's order, insofar as it ordered defendant to pay 50% of the balances owed on the mortgages on the marital residence in the event that he is unable to refinance the mortgages or obtain extensions of the mortgage notes, was a proper exercise of its discretion pursuant to DRL § 234. Specifically, the record indicates that the bank was planning to foreclose on the marital residence and that defendant - in failing to submit a requested application and financial information to the bank until after the instant motion

was made, months after the same was requested by the bank, and months after plaintiff submitted her information and application to the bank - was either by design or neglect contributing to the foreclosure. Thus, the motion court, to ensure that the marital home would not be lost to foreclosure, prior to trial and a final judgment of divorce, providently exercised its discretion in ordering defendant to cooperate in obtaining an extension of the loans and/or a refinancing of the loans (*see Weinstock v Weinstock*, 8 Misc3d 221 [Sup Ct, Nassau County 2005] [defendant directed to cooperate and execute the documents necessary to secure refinancing of the loan on the marital premises since the failure to do so would result in dissipation of the property]; *Lidsky v Lidsky*, 134 Misc 2d 511 [Sup Ct, Westchester County 1986]).

For the very same reasons, despite defendant's purported inability to pay half of the outstanding mortgages on the marital home, the motion court properly ordered that he do so if he was unsuccessful in refinancing or obtaining an extension. Contrary to defendant's assertion, the motion court did not err in implicitly concluding that defendant had the ability to pay half of the outstanding mortgages. While defendant, pointing to his modest earnings and substantial debt, claims that he lacks the

financial resources to comply with the court's order, his deposition testimony belies his assertion, evincing instead that he actually has access to seemingly unlimited financial resources, which can be, and were, justifiably imputed to defendant as income and/or assets.

At his deposition, defendant testified that while he only earned approximately $700 per week as an employee with his father's company, all of his bills, both personal and business, are, and have been paid by his father. Defendant further testified that all of his bills are mailed directly to his father's company where they are then reviewed by defendant's assistant. Thereafter, defendant's father wires funds to the company's account sufficient to cover defendant's expenses, defendant's assistant then draws company checks, and defendant then executes them. Thus, the record evinces significant distributions to defendant from his family business during the marriage and that defendant received support from his father extending several over years. While defendant characterized his father's aid as loans, totaling $4 million at the time of his deposition, and as per his statement of net worth, over $6.5 million in 2010, he nevertheless testified that he has not paid his father back. Based on the foregoing, clearly, the

substantial and ongoing financial aid provided to defendant by his father is either a gift, imputable as income (*Fabrikant v Fabrikant*, 62 AD3d 585, 586 [1st Dept 2009]; *Rostropovich v Guerrand-Hermes*, 18 AD3d 211, 211 [1st Dept 2005]; *Wildenstein v Wildenstein*, 251 AD2d 189, 190 [1st Dept 1998]; *Lapkin v Lapkin*, 208 AD2d 474, 474 [1st Dept 1994]) or a benefit provided to defendant by his father's company, also imputable as income (*Issacs v Issacs*, 246 AD2d 428, 428 [1st Dept 1998] [trial court properly imputed income to defendant husband insofar as he received numerous benefits from his company, namely cash outlays for personal expenses]).

Lastly, we find no merit to the defendant's contention that the motion court's order constitutes prejudgment equitable distribution of marital property. While it is true that in an action for divorce the court cannot distribute property by pendente lite order and prior to a final judgment of divorce (*Stewart v Stewart*, 118 AD2d 455, 456-457 [1st Dept 1986]), here, the motion court never made any determination as to the parties'

interests in the marital residence. Nor did the motion court order the equitable distribution of the marital property pendente lite.

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

ENTERED: JANUARY 3, 2013

CLERK

Friedman, J.P., Moskowitz, Freedman, Richter, Abdus-Salaam, JJ.

8329 In re Mike D.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Daniel A. Pollak of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 21, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a weapon in the fourth degree, and also committed the act of unlawful possession of a weapon by a person under 16, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Family Court providently exercised its discretion in adjudicating appellant a juvenile

delinquent and imposing probation, in view of the seriousness of the offense, appellant's chronic truancy, his prior gang affiliation and drug use, his mother's inadequate supervision and his failure to accept responsibility for his actions (*Matter of Akeem B.*, 81 AD3d 512 [1st Dept 2011]). We note that the adjudication is based on a finding that appellant, while wearing a ski mask and carrying a knife, was part of a group of four who surrounded another teenager.

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

ENTERED: JANUARY 3, 2013

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8920 Empire Erectors and Electrical Company, Inc., Plaintiff-Appellant, Index 310289/10

-against-

Unlimited Locations LLC, et al., Defendants-Respondents.

Lopresto & Barbieri, P.C., Astoria (Guy Barbieri of counsel), for appellant.

Angiuli & Gentile, LLP, Staten Island (Alan Karmazin of counsel), for respondents.

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered December 23, 2011, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to compel the depositions of defendants Justin Sallusto and Joseph Indelicato, unanimously reversed, on the law, with costs, the motion granted, and the matter remanded to Supreme Court for further proceedings.

Sallusto and Indelicato are being sued as guarantors of an agreement between plaintiff and defendant Unlimited Locations LLC. The court erred in denying plaintiff's motion on the basis of the automatic stay triggered by the bankruptcy petition filed by Unlimited only (*see* 11 USC § 362[a]). The automatic bankruptcy stay is generally not extended to non-debtor

guarantors (*see Milliken & Co. v Stewart*, 182 AD2d 385, 386 [1st Dept 1992], citing *Credit Alliance Corp. v Williams*, 851 F2d 119 [4th Cir 1988]). The automatic stay normally applies to non-debtors only when a claim against a non-debtor will have "an immediate adverse economic consequence for the debtor's estate" (*Queenie, Ltd. v Nygard Intl.,* 321 F3d 282, 287 [2d Cir 2003]). Sallusto and Indelicato have not made a showing that the continuation of this action against them would have such an effect on Unlimited's estate.

While the applicability of § 362(a) is limited, 11 USC § 105(a) vests bankruptcy courts with broad powers to "fashion such orders as are necessary to further the purposes of the substantive provisions of the Bankruptcy Code" (*United States v Sutton*, 786 F2d 1305, 1307 [5th Cir 1986]). Defendants assert that further litigation here would hamper Sallusto's efforts to assist in Unlimited's reorganization. On this score, we note that injunctions under § 105(a) have been granted by bankruptcy courts in circumstances where "the creditor's action would prevent the non-debtor from contributing funds to the reorganization, or would consume time and energy of the non-debtor that would otherwise be devoted to a reorganization

effort" (*see e.g. In re United Health Care Org.*, 210 BR 228, 232 [SD NY 1997], *appeal dismissed* 147 F3d 179 [2d Cir 1998]).

Accordingly, any relief should be sought in bankruptcy court.

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

ENTERED: JANUARY 3, 2013

CLERK

Sweeny, J.P., Saxe, Moskowitz, Renwick, Abdus-Salaam, JJ.

7360 The People of the State of New York, Ind. 717/09
Respondent,

-against-

Graham Reid,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Allen S. Axelrod of counsel), and Davis Polk & Wardwell LLP, New York (Marc J. Tobak of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered March 4, 2010, as amended March 18, 2010, affirmed.

Opinion by Saxe, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
David B. Saxe
Karla Moskowitz
Dianne T. Renwick
Sheila Abdus-Salaam, JJ.

7360
Ind. 717/09

_____x

The People of the State of New York,
Respondent,

-against-

Graham Reid,
Defendant-Appellant.
_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Arlene D. Goldberg, J.), rendered March 4, 2010, as amended March 18, 2010, convicting him, upon his plea of guilty, of criminal possession of a weapon in the third degree, and imposing sentence.

Steven Banks, The Legal Aid Society, New York (Allen S. Axelrod of counsel), and Davis Polk & Wardwell LLP, New York (Marc J. Tobak, Antonio J. Perez-Marquez and Heidi E. Reiner of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson and Richard Nahas of counsel), for respondent.

SAXE, J.

This appeal addresses whether suppression should have been granted where the police stopped defendant's car for a traffic infraction, and, based on what the arresting officer heard and observed, defendant was asked to exit the car and was patted down; he was placed under arrest only after a knife was found in his pocket. Because the arresting officer candidly admitted that he had not intended to arrest the driver before discovering the knife, defendant contends that the officer lacked the requisite predicate for the search and that therefore we must suppress the knife and other fruits of the search that followed. We disagree.

The arresting officer's factual testimony, which the court properly found to be credible, established that the necessary predicate existed for each step taken by the officer. Because, like the hearing court, we find that at the time of the patdown the officer actually had probable cause to arrest defendant for driving while intoxicated, the search was permissible and the fruits of the resulting full search were admissible. While we rely on the factual testimony of the arresting officer, we are not bound by his subjective assessment at the time regarding the nature and extent of his authority to act.

Police Officer Jacob Merino testified that in the early morning of February 15, 2009, he and a partner were patrolling in

an unmarked car when, at approximately 5:40 a.m., he observed defendant's car as it traveled west on 125th Street, crossing the double solid yellow lines into the oncoming traffic lane and swerving in and out of the lane without signaling. He continued to observe defendant's car for approximately 10 minutes before pulling it over after it made a right turn onto 12th Avenue without signaling.

After defendant pulled to the curb, officer Merino approached the driver's side of the car. He observed two plastic cups in the center console, and two passengers in the car, one in the front passenger seat, and one in the back seat. Defendant's eyes appeared to be watery, his clothing was disheveled, and Merino said that the car smelled of alcohol.

Merino asked defendant for his license and registration. While defendant was still in the car, Merino asked where he was coming from and where he was going, and defendant answered that he was driving his two passengers home. When Merino asked defendant whether he had been drinking, defendant answered that he had had a beer after getting off from work. When asked when that was, defendant said approximately 4:00 p.m., which reply seemed odd to Merino since that was approximately 13 hours earlier.

Merino then asked defendant to get out of the car. As

defendant complied with this direction, Merino asked him whether he had any weapons on him, "anything that he could hurt himself with or me." After defendant denied having any weapons, Merino patted him down. He felt a hard object in defendant's pocket, reached into the pocket and pulled out a switchblade knife. Merino acknowledged that he placed defendant under arrest at that time only because he found the switchblade, and that he had not been planning to arrest defendant when he directed him to step out of the car and patted him down.

Merino's factual testimony, which the hearing court found credible, establishes the propriety of the initial stop, based on defendant's erratic driving and traffic law violations. His additional observations outside of defendant's stopped car -- the two plastic cups in the center console, the smell of an alcoholic beverage, defendant's watery eyes and disheveled clothing, and defendant's odd response to the question of whether he had been drinking -- were sufficient to create probable cause that defendant had been driving while intoxicated.

This probable cause to arrest defendant for driving while intoxicated existed regardless of whether, at the moment of searching defendant, Merino intended to make an arrest on those grounds. "In determining whether probable cause exists, an 'objective judicial determination of the facts in existence and

known to the officer' prevails over the officer's 'subjective evaluation'" (*People v Robinson*, 271 AD2d 17, 24 [1st Dept 2000], *affd* 97 NY2d 341 [2001]).

In *People v Rodriguez* (84 AD3d 500 [1st Dept 2011], *lv denied* 17 NY3d 861 [2011]), a detective investigating a murder came upon the defendant, whom he suspected of some connection to the murder, in unlawful possession of marijuana. Because the officer had probable cause for the marijuana possession arrest he made, it was irrelevant whether the arrest was motivated by the desire to obtain evidence relating to the homicide. This Court explained that "[a]n 'arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause,' and 'his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause'" (*id.* at 501, quoting *Devenpeck v Alford*, 543 US 146, 153 [2004]).

In *Devenpeck*, the Supreme Court considered *and rejected* a rule applied by the Ninth Circuit, requiring that for a warrantless arrest to be proper, not only must there be probable cause to believe that a crime has been committed, but "the offense establishing probable cause must be 'closely related' to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest" (543

US at 153). The Supreme Court explained that the "[s]ubjective intent of the arresting officer, *however* it is determined, . . . is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest" (*id.* at 154-155).

Under the rule stated in *Rodriguez* and *Devenpeck*, we conclude that, even if the police are incorrect in their assessment of the particular crime that gives them grounds to conduct the search, or if they incorrectly assess the level of police activity that is justified by their knowledge, where the facts create probable cause to arrest, a search must be permissible.

We reject defendant's suggestion that this case is governed by the principle that a search is not a valid search incident to arrest where the fruits of the search constitute the probable cause for the arrest itself (*see Johnson v United States*, 333 US 10, 16-17 [1948]). The cases he cites involve circumstances in which there was no probable cause at all before the challenged search has concluded. Defendant's analysis would be correct if the facts known to Officer Merino before the search failed to provide any legal justification authorizing the search. However, that is not the situation here.

The circumstances presented in *People v Evans* (43 NY2d 160

[1977]) are distinguishable from those presented here, and the rule pronounced there is therefore inapposite here. In *Evans*, although the police had probable cause to arrest the defendant when they stopped and searched him, they did not arrest him at that time. The Court held that even if the police have probable cause to arrest a defendant, they may not conduct a search incident to an arrest where they do not make the arrest to which the search was purportedly incident. It explained, "To adopt the proposition that the search was valid because there was probable cause to arrest puts the cart before the horse. An arrest is an essential requisite to a search incident" (*id.* at 165). The *Evans* Court was concerned about the possibility that the police, having probable cause to arrest a suspect, might instead engage in abusive practices toward the suspect while allowing him to remain at large. Those concerns are inapplicable to the present case.

Those cases using the "one event" or "res gestae" analysis to uphold searches that immediately precede an arrest as long as they are "nearly simultaneous so as to constitute one event" (*id.* at 166) are of limited value as applied here. Such cases routinely refer to the arrest as "the formal arrest," indicating that at the time of the search the police already understood that they had grounds for the arrest (*see e.g. People v Charles*, 222

AD2d 688 [2nd Dept 1995], *lv denied* 87 NY2d 971 [1996]). For instance, in *People v Valenzuela* (226 AD2d 154 [1st Dept 1996], *lv denied* 88 NY2d 1072 [1996]), the police stopped the defendant and an accomplice, who closely matched the description of two men who had committed a robbery, moments after the crime took place and 1½ blocks away, making the order of the search and the "formal arrest" immaterial (*id.* at 155). Here, by contrast, from the point of view of the police at the time, the arrest was not merely a formality that they happened to leave until after the search.

If the police had lacked probable cause to arrest defendant for driving while intoxicated, then the arrest would have been impermissible because the remaining facts would not have provided grounds for the search that disclosed the knife. Although "[u]pon making [a] valid traffic stop, the police [have] discretion to order the occupants to exit the vehicle" (*see People v Grant*, 83 AD3d 862 [2d Dept 2011], *lv denied* 17 NY3d 795 [2011]), that authority does not automatically include frisks; rather, before a patdown search is performed, "[t]he officer must have knowledge of some fact or circumstance that supports a reasonable suspicion that the suspect is armed or poses a threat to safety" (*see People v Batista*, 88 NY2d 650, 654 [1996]). "Relevant considerations in the determination of whether there is

reasonable suspicion that the suspect poses a danger include, among others, the substance and reliability of the report that brought the officers to the scene, the nature of the crime that the police are investigating, the suspect's behavior and the shape, size, and location of any bulges in the suspect's clothing" (*see People v Shuler*, 98 AD3d 695, 696 [2d Dept 2012]). A traffic stop alone does not provide authorization for frisking the driver, and the information possessed by Officer Merino did not supply a reasonable basis for suspecting that the driver was armed and might be dangerous. However, his search of defendant was permissible because at the time of the search probable cause existed to arrest defendant for driving while intoxicated. Because our determination of the permissible police conduct derives from the facts, rather than from the arresting officer's beliefs as to what steps are authorized by those facts (*see People v Rodriguez*, 84 AD3d at 501), the initial search that disclosed the knife was justified, as was the ensuing full search incident to arrest.

Accordingly, the judgment of the Supreme Court, New York County (Arlene D. Goldberg, J.), rendered March 4, 2010, as

amended March 18, 2010, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, should be affirmed.

All concur.

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

ENTERED: JANUARY 3, 2013

CLERK