SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 8, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8108 Linda P. Nash, Index 129074/93
Plaintiff-Appellant,

-against-

The Port Authority of New York
and New Jersey,
Defendant-Respondent.

Louis A. Mangone, New York, for appellant.

Weil, Gotshal & Manges, LLP, New York (Howard B. Comet of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May 15, 2012, which granted defendant's motion to vacate the judgment, same court and Justice, entered January 15, 2010, in plaintiff's favor, affirmed, without costs.

In *Matter of World Trade Ctr. Bombing Litig.* (17 NY3d 428, 455 [2011]), the Court of Appeals held that the doctrine of governmental immunity insulated the Port Authority from tortious liability for injuries claimed in connection with the 1993 World Trade Center bombing. That case involved litigation by hundreds

of plaintiffs who sued the Port Authority for injuries incurred in the terrorist bombing. Most of the plaintiffs were represented by counsel for a steering committee appointed by a trial court, but some plaintiffs, including Nash, had separate counsel. The cases were all consolidated for proceedings to determine the Port Authority's alleged liability, and a joint liability trial of the consolidated cases, including the *Nash* case, resulted in a single verdict finding the Port Authority liable for negligence.

This Court affirmed the trial court's order denying the Port Authority's motion to set aside the verdict, rejecting the Port Authority's governmental immunity argument (*Nash v Port Auth. of N.Y. and N.J.*, 51 AD3d 337, 344 [1st Dept 2008]). The cases were then separated for individual damages proceedings in the trial court. After a damages judgment was entered in favor of Nash, the Port Authority appealed, and by order dated June 2, 2011, we affirmed "insofar as appealed from as limited by the briefs, awarding postjudgment interest at the fixed rate of nine percent per annum" (*Nash v Port Auth. of N.Y. and N.J.*, 85 AD3d 414 [1st Dept 2011). Defendant did not seek leave to appeal from that order.

After a damages judgment was entered in favor of a different

plaintiff, Ruiz, defendant sought leave to appeal to the Court of Appeals from the judgment of Supreme Court pursuant to CPLR 5602(a)(1)(ii), and the Court granted leave. The appeal brought up for review both the judgment in the *Ruiz* action and our prior order as to Ruiz (17 NY3d at 441). The Court of Appeals reversed the judgment entered in favor of plaintiff Ruiz, as well as our order which had affirmed the trial court's denial of the Port Authority's motion to set aside the liability verdict.

Since the judgment in plaintiff's favor was based on an order that had been reversed, the trial court properly vacated the judgment (*see* CPLR 5015[a][5]; *McMahon v City of New York*, 105 AD2d 101 [1st Dept 1984]). The dissent is correct that in *McMahon*, the order that was vacated was subject to appeal, while the order here (the *Nash* judgment) was no longer subject to appeal. Despite this difference in procedural posture of the two cases, we believe that the underlying reasoning expressed in *McMahon* applies here as well. As in *McMahon*, since the final judgment in this case holds the defendant liable for "damages in a case in which, as a matter of law as established by the [*Matter of World Trade Ctr. Bombing Litig*] decision [ ], the [defendant] should not be liable at all" (105 AD2d at 103), the judgment should be vacated. Regarding the Court of Appeals's statement in

Matter of World Trade Ctr. Bombing Litig. that the *Nash* action is beyond the scope of that appeal (17 NY3d at 441 n 7), this is simply an acknowledgment that while Nash was given permission to argue the appeal before the Court, her action was not being addressed by the Court. It does not render the motion court's action in vacating Nash's judgment improper. The motion court did not abuse its discretion by vacating a final judgment where the Court of Appeals had reversed "the interlocutory judgment of liability on which the final judgment was based" (*McMahon* at 102).

All concur except Acosta and Manzanet-Daniels, JJ. who dissent in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting)

The order of this Court, entered June 2, 2011, affirming the judgment entered by the trial court awarding plaintiff $4,463,856.89, plus interest, stands as a final judgment in plaintiff's favor which may not now be disturbed (85 AD3d 414 [2011]). I would accordingly find that the motion court erred in vacating plaintiff's judgment on the basis that she was bound by the Court of Appeals' determination in *Matter of World Trade Ctr. Bombing Litig.* (17 NY3d 428, 455 [2011]). The Court of Appeals itself stated that the *Nash* action was "beyond the scope of the [*Ruiz*] appeal," inasmuch as "[a] judgment in the Nash action was recently affirmed by the Appellate Division" (*id.* at 441 n7).

An explanation of the complex procedural history of this case is in order. In 1993, Nash commenced a personal injury action against the Port Authority of New York and New Jersey in the Supreme Court, New York County. Meanwhile, hundreds of other actions were commenced against the Port Authority in connection with the 1993 bombing of the World Trade Center. These actions, including the *Nash* action, were consolidated into a single action for the purpose of determining liability (*see Matter of World Trade Ctr. Bombing Litig.*, 3 Misc 3d 440, 442 [Sup Ct, NY County 2004]). Most of the plaintiffs were represented during the

liability phase by counsel for a steering committee appointed by the trial court (*see id.*; 17 NY3d at 439). Several plaintiffs, including Nash, retained separate counsel to represent them in the liability phase, as well as in subsequent damages trials.

On October 26, 2005, the jury in *World Trade Ctr. Bombing Litig.* returned a verdict as to liability, finding that the Port Authority's failure to maintain a secure and safe premises, in light of known dangers, was a substantial factor in causing the plaintiffs' injuries. The Port Authority moved to set aside the verdict or, in the alternative, for a new trial (*see World Trade Ctr. Bombing Litig.*, 2007 NY Slip Op 34467U [Sup Ct NY County 2007, Figueroa, J.]). The motion was denied and the Port Authority appealed. This Court affirmed by order entered April 29, 2008 (51 AD3d 337 [2008]). The Port Authority did not seek leave to appeal from the order, and instead permitted the parties to try their respective damages claims.

In early 2009, the damages trial in *Nash* resulted in a verdict, dated March 9, 2009, in favor of Nash and against the Port Authority in the amount of $4,463,856.89, plus 9% interest. This Court affirmed by order entered June 2, 2011 (*see Nash*, 85 AD3d 414 [2011]). The Port Authority did not seek leave to appeal to the Court of Appeals from the order, which of course

would have brought up for review not only the issue of damages, but any issue necessarily affecting the judgment, including the interim liability determination.

After a jury verdict was rendered on damages in the case of plaintiff Antonio Ruiz, the Port Authority elected to appeal that judgment directly to the Court of Appeals, bringing up for review the interim liability determination of this Court (*World Trade Ctr. Bombing Litig.* 17 NY3d at 440-441 [2011] [henceforward herein, *Ruiz* or the *Ruiz* appeal]).

The Port Authority did not believe Nash to be a party respondent to the *Ruiz* appeal. Indeed, when plaintiff requested to be declared a respondent to the Port Authority's appeal from Ruiz's final judgment, the Port Authority opposed the request, stating:

> "[Ms. Nash] is not a respondent [on the *Ruiz*] appeal because the Port Authority did not seek (and was not granted) leave to appeal from a judgment in favor of Ms. Nash – nor could it have, because Ms. Nash's case is currently pending before the Appellate Division.
>
> "The confusion as to Ms. Nash's status as a respondent appears to arise from the mistaken impression that this is an appeal '*from* the Appellate Division's April 29, 2008 *Nash* decision' . . . It is, in fact, an appeal *from* the final judgment in favor of Mr. Ruiz, entered in the office of the County Clerk on

> January 20, 2010. . . [T]he appeal from that judgment brings up for review all intermediate orders necessarily affecting the judgment, CPLR 5501(a)(1), including, of course, the April 2008 order holding the Port Authority liable for the bombing. However, the appeal is not taken from that interlocutory April 2008 liability ruling itself. See CPLR 5602(a)(ii) (authorizing appeal 'from a final judgment')."

Nash submitted a brief in the *Ruiz* appeal, and participated in the initial oral argument on June 1, 2011.

Meanwhile, the Port Authority having failed to appeal directly from this Court's order entered June 2, 2011, Nash's judgment became final and was beyond further review or interference. On or about July 18, 2011, Nash formally withdrew from participating in argument of Ruiz's appeal.

At the August 24, 2011 reargument of the *Ruiz* appeal, Judge Ciparick inquired of Port Authority's counsel, Mr. Rothman, whether a reversal of the liability finding would "unravel" final dispositions that had been previously made. Mr. Rothman replied "no." When Judge Ciparick further inquired if a reversal of the liability finding would affect "future cases . . . that are still in the pipeline," Mr. Rothman responded that it "would [a]ffect cases that are still in the pipeline."

Nash's case, of course, was not still "in the pipeline"; the

time to seek reargument and/or leave to appeal from the order of this Court, entered June 2, 2011, had already expired. Indeed, the Court of Appeals' opinion in *Ruiz* expressly noted that Nash, while a plaintiff in another action, had requested, and been granted, permission "to present argument" on the *Ruiz* appeal (17 NY3d at 441 n 7). The Court of Appeals noted, however, that the *Nash* action was "beyond the scope of [the *Ruiz*] appeal," as "[a] judgment in the Nash action was recently affirmed by the Appellate Division (*id*.).

On July 20, 2011, the Port Authority moved in the Court of Appeals for a declaration that an automatic stay as to Nash was "in effect or, alternatively, for a discretionary stay" (*Ruiz*, 17 NY3d 856 [2011]). The motion was of course premised on the contention that Nash was a party to the *Ruiz* appeal.

By order entered September 22, 2011, the Court of Appeals unanimously "dismissed" the "stay" motion on the ground that it lacked "jurisdiction to entertain [it]," inasmuch as "no appeal or motion for leave to appeal in the Nash action [was] pending before th[e] Court (*see* CPLR 5519)" (*id*.)

Nash's judgment having become final, the Port Authority cannot avoid its enforcement (*see Lacks v Lacks*, 41 NY2d 71, 73, 77 [1976] ["(T)he judgment was affirmed by the Appellate Division

on October 26, 1972. Leave to appeal to the Court of Appeals was denied by both the Appellate Division and this [C]ourt. The final judgment was thus beyond further review"]). The Court has stated that to vacate a final judgment after the right to appeal had been exhausted "would be to undermine significantly the doctrine of *res judicata*, and to eliminate the certainty and finality in the law and in litigation which the doctrine is designed to protect" (*id*. At 77)

The Port Authority made a strategic decision not to appeal either the liability or the damages determination in *Nash*, instead prosecuting the *Ruiz* case. The Port Authority thereafter abandoned any claim that it was not liable to Nash, and represented to the Court of Appeals that a reversal in *Ruiz* would not affect cases like Nash's that had been finally determined. Having failed to seek leave to appeal from Nash's affirmed final judgment, the Port of Authority cannot maintain that Nash's case was still "in the pipeline" such that Nash was bound by the Court of Appeals' subsequent determination in the Ruiz case.

The Port Authority asserts that Nash's submission of a brief in *Ruiz* and participation in oral argument, at least initially, render her bound by the outcome in that case, notwithstanding the fact that the decision in *Ruiz* was rendered subsequently to this

Court's affirmance of Nash's final judgment. The problem with this argument is that at the time the decision in *Ruiz* was rendered, the judgment in Nash's favor in the Appellate Division case was already final and thus beyond further review or collateral attack (*see Lacks*, 41 NY2d at 73, 77). Thus, the Court of Appeals had no jurisdiction to make a pronouncement as to the outcome of Nash's case, as the Court itself expressly recognized in stating that the *Nash* action was "beyond the scope of the [*Ruiz*] appeal," inasmuch as "[a] judgment in the Nash action was recently affirmed by the Appellate Division," and in dismissing the Port Authority's motion for a stay on the basis of "lack of jurisdiction." As Professor Siegel notes in the Practice Commentaries accompanying CPLR 5513, "The time in which to appeal or to move for leave to appeal if leave is necessary is one of the most rigid in all of procedure. Its passing without the proper step being taken forfeits the appeal and puts an end to the matter . . . In fact, *the passing of the period is deemed to go to the jurisdiction of the court – to its subject matter jurisdiction*" (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 5513:1 [emphasis added]).

McMahon v City of New York (105 AD2d 101 [1984]), relied on by the Port Authority, is distinguishable and in fact supports

Nash. In *McMahon*, the Court of Appeals had reversed an underlying liability determination in *O'Connor v City of New York* (55 NY2d 184 [1983]) while an appeal from McMahon's separate damages case was still pending in the Appellate Division. When the Court of Appeals reversed the liability order in the *O'Connor* case, the City moved for reargument of our prior affirmance on liability and for an extension of time to perfect the damages appeal in McMahon's case. We denied the motion *without prejudice* to applications for appropriate postjudgment relief in the Supreme Court in light of the Court of Appeals' reversal of the interlocutory liability determination.

Here, in contradistinction, Nash's appeal before our Court had been submitted, argued, decided, and the time to move for reargument and/or leave to appeal *had already expired* prior to the Court of Appeals' determination in *Ruiz*. Nash's case, unlike McMahon's was not "in the pipeline." In *McMahon*, we noted "at the time the supervening judgment of the highest court was rendered, a direct appeal *was still pending from the final judgment in the other appeal [] and the issues were still subject to review on that appeal*" (105 AD2d at 106 [emphasis added]). Since the time to appeal from the order finally determining the rights of the parties in *Nash* had already expired prior to the

time the Court of Appeals decided *Ruiz*, Nash's judgment could no longer be disturbed. I would accordingly hold that the motion court improvidently exercised its discretion in granting the motion to vacate the judgment.

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

ENTERED: JANUARY 8, 2013

CLERK

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

8437 AB Green Gansevoort, LLC, Index 105733/10
Plaintiff-Respondent,

-against-

Peter Scalamandre & Sons, Inc., et al.,
Defendants,

Liberty Mutual Insurance Company,
Defendant-Appellant.

Jaffe & Asher LLP, New York (Marshall T. Potashner of counsel), for appellant.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered December 20, 2011, which, to the extent appealed from, denied defendant Liberty's motion for summary judgment dismissing the amended complaint as against it, unanimously modified, on the law, to declare that Liberty has no obligation to defend or provide insurance coverage for plaintiff AB Green Gansevoort, LLC (Green) in the underlying personal injury action, and otherwise affirmed, without costs.

Plaintiff Green commenced this declaratory judgment action seeking liability coverage from defendant Liberty Mutual Insurance Company as an additional insured. The underlying

action was brought by Juan Vargas, who alleges that he suffered bodily injury while working on a construction site owned by Green. Pavarini McGovern, LLC served as general contractor on the construction site. Pavarini then retained as a subcontractor Peter Scalamandre & Sons, Inc. Scalamandre then purchased concrete from Ferrara Brothers Building Materials Corp. pursuant to an unsigned purchase order.

Ferrara obtained a commercial lines insurance policy from Liberty. The policy stated, in pertinent part, that an organization is added as an additional insured "when you and such . . . organization have agreed in writing in a contract or agreement that such . . . organization be added as an additional insured on your policy."

Liberty moved for summary judgment dismissing Green's complaint seeking coverage as an additional insured under the policy issued to Ferrara. Liberty asserted that since Green did not produce any written agreement between itself and Ferrara naming Green as an additional insured, under the plain language of the policy, there was no question of fact as to whether an agreement existed between Ferrara and Green. The motion court denied Liberty's motion for summary judgment and this appeal ensued.

Liberty persuasively argues that this Court's decision in *Linarello v City Univ. of N.Y.* (6 AD3d 192 [1st Dept 2004]) requires that there be an express written agreement between Ferrara and Green for Green to be an additional insured (*id.* at 195). The language of the insurance policy at issue in *Linarello* is exactly the same as the policy here. It specifically provides that there must be a written agreement between the insured and the organization seeking coverage to add that organization as an additional insured. No such agreement exists here. Absent such an agreement, the plain terms of the policy have not been met and Green cannot seek coverage from Liberty as an additional insured. Although policies containing broader language have been found to allow for an agreement naming an additional insured without an express contract between the parties, the language at issue here is restricted to its plain meaning (*cf. Am. Home Assur. Co. v Zurich Ins. Co.*, 26 Misc3d 1223(A) [Sup Ct, NY County 2010]).

In opposition, Green argues that the title of the provision, "Additional Insured - Owners, Lessees or Contractors - Automatic status when required in construction agreement with you," automatically made Green an additional insured when Ferrara entered into a purchase order with Scalamandre in which it agreed to "assume all the obligations and risks which . . .

[Scalamandre] assumed towards" Green. However, Green's reliance on the title of the policy provision is misplaced as a heading "cannot alter . . . the effect of the unambiguous language in the body of the clause itself" (*Albany Med. Ctr. v Preferred Life Ins. Co. of New York*, 19 Misc3d 209, 215 [Sup Ct, Albany County 2008]; *see also Rivers v Sauter*, 26 NY2d 260, 262 [1970]). Alternatively, Green argues that the terms of the policy itself are ambiguous because the policy can be read to mean that the named insured and the party seeking to be an additional insured only need enter into written agreements with another party, not necessarily with each other. Under this interpretation of the policy, there is a question of fact as to whether the incorporation by reference language in the Scalamandre/Ferrara purchase order sufficed to establish a written agreement between Ferrara and Green as contemplated by the insurance policy. However, this reading is inconsistent with *Linarello* and we see no reason to depart from this controlling precedent (*Linarello,* 6 AD3d at 195). Moreover, Green's argument requires reading terms into the policy that do not exist. The policy does not provide that there only be some writing, but rather that there be a written contract between the named insured and the organization seeking coverage.

Here, there is no question of fact as to whether a written contract between Green and Ferrara existed and, therefore, Liberty is entitled to a declaration in its favor. Having reached a decision on this ground, we need not address Liberty's additional argument raised on appeal.

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

ENTERED: JANUARY 8, 2013

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8502-
8502A-
8502B-
8502C

Index 651489/10

Abdul Hussain Jaffar Rahmat Allah Al Lawati, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Montague Morgan Slade Ltd., et al.,
Defendants,

Peter Rigby,
Defendant-Appellant-Respondent,

JST Lawyers, et al.,
Defendants-Respondents,

Montague Morgan Slade Limited, et al.,
Nominal Counterclaim Defendants.

Morrison Mahoney, LLP, New York (Arthur J. Liederman of counsel), for appellant-respondent.

Schlam Stone & Dolan LLP, New York (Samuel L. Butt of counsel), for respondents-appellants.

D'Amato & Lynch, LLP, New York (David A. Boyar of counsel), for JST Lawyers, respondent.

Kissel Hirsch & Wilmer LLP, Tarrytown (Frederick J. Wilmer of counsel), for Keith Park Solicitors, respondent.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered January 25, 2012, which granted so much of defendant Rigby's motion to dismiss as sought dismissal of plaintiff's RICO

claims, and denied so much of Rigby's 's motion as sought to dismiss the complaint for lack of personal jurisdiction and forum non conveniens, or, in the alternative, to dismiss the common-law fraud claims; order, same court, Justice, and date of entry, which granted defendant Keith Park Solicitors' (KPS) motion to dismiss the complaint as against them for lack of personal jurisdiction; order, same court and Justice, entered January 26, 2012, which granted defendant JST Lawyers' (JST) motion to dismiss the complaint as against them for lack of personal jurisdiction; and order, same court and Justice, entered January 26, 2012, which, to the extent appealed from, denied plaintiffs' motion for a default judgment against certain corporate defendants, unanimously affirmed, without costs.

The complaint sufficiently alleges jurisdiction over Rigby under CPLR 302(a)(2) insofar as the complaint pleads that Rigby was a part of a conspiracy involving the commission of several overt tortious acts in New York (*see Best Cellars Inc. v Grape Finds at Dupont, Inc.*, 90 F Supp 2d 431, 446 [SD NY 2000] [for purposes of personal jurisdiction, "(t)he requisite relationship between the defendant and its New York co-conspirators is established by a showing that (a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of

the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control, or at the request of or on behalf of the out-of-state defendant" [internal quotation marks omitted]; *Cleft of the Rock Found. v Wilson*, 992 F Supp 574, 582-583 [ED NY 1998]). Specifically, the complaint, the allegations of which on a motion to dismiss we must deem to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]), pleads that defendants Montague Morgan Slade LTD (MMS), albeit through a virtual office, predominantly existed in New York and committed the torts underpinning the conspiracy there. The complaint further pleads that Rigby, to further the conspiracy and to dissuade plaintiffs from taking any action against the defendants, communicated with the plaintiffs, telling them that their investments were safe and that redemptions would soon be paid, and reassured plaintiffs that he was in communication with MMS's New York office. While the complaint alleges that Rigby was acting under the control and at the behest of MMS and the co-conspirators, rather than directing MMS to commit tortious acts in New York, jurisdiction is nonetheless established since the complaint alleges that Rigby was aware of the torts being

committed by MMS and other defendants in New York (*Dixon v Mack*, 507 F Supp 345, 351-352 [SD NY 1980] [last prong of the test set out in *Best Cellars, Inc.* (90 F Supp at 46) is satisfied when it is alleged that the out-of-state co-conspirator has knowledge of the tortious acts being perpetrated in New York]). Here, the existence of the virtual office in New York creates sufficient "minimum contacts" with the State such that assertion of jurisdiction over Rigby does not violate "traditional notions of fair play and substantial justice" (*International Shoe Co. v Washington*, 326 US 310, 316 [1945] [internal quotation marks omitted]; *Banco Nacional Ultramarino v Chan*, 169 Misc 2d 182, 187 [Sup Ct, NY County 1996], *affd* 240 AD2d 253 [1st Dept 1997]). We also note that insofar as plaintiffs pleaded that Rigby, for purposes of furthering the fraud of his co-conspirators, repeatedly reassured plaintiffs that he was communicating with MMS's New York office, he "[b]y joining the conspiracy with the knowledge that overt acts in furtherance of the conspiracy had taken place in New York . . . purposely [availed himself] of the privilege of conducting activities within [New York]" (*Cleft of the Rock,* 992 F Supp at 585 [second alteration in original] [internal quotation marks omitted]). Accordingly, he should not be surprised or heard to complain about being sued here.

After considering the relevant factors (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]), the court providently exercised its discretion in declining to dismiss the action against Rigby on forum non conveniens grounds (*see* CPLR 327[a]; *Pahlavi*, 62 NY2d at 479). We note that defendants MMS, Montague Morgan Slade Absolute Performance Fund PLC, Montague Morgan Slade Highly Diversified Fund PLC, and Montague Morgan Slade 1095 Fund PLC have stipulated to jurisdiction and venue in New York. Further, the motion court declined to dismiss the action as asserted against Rigby's co-conspirators on forum non conveniens grounds, based on the fact that this is a multijurisdictional action with no single convenient forum amenable to all the parties.

The complaint sufficiently alleges a claim for fraud against Rigby based on the various statements concerning the redemptions of plaintiffs' investments (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The allegations that Rigby had told one of the plaintiff investors that he was communicating with the New York office to resolve an issue concerning the contract notes, and had made references to operations in that office, while a New York office did not actually exist, permit a reasonable inference that he knew the

statements related to the investment redemptions were false (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492-493 [2008]). Further, the complaint sufficiently alleges that the statements caused plaintiff to delay seeking redemption and initiating legal proceedings, thereby permitting defendants to funnel monies to themselves in the interim.

Plaintiffs also stated a claim for fraud against Rigby based on the false statements concerning the Wall Street office, the amount of funds under MMS's management, the MMS Funds' past performance, the investment of the monies, the guaranteed returns, and the valuations of the investments. Although the complaint does not allege that Rigby had made these misrepresentations, the allegations support a claim for fraud against his co-conspirators (*see Eurycleia Partners*, 12 NY3d at 559), and Rigby can be connected to the false statements, given the allegations of a conspiracy (*see Brackett v Griswold*, 112 NY 454, 466-467 [1889]; *SRW Assoc. v Bellport Beach Prop. Owners*, 129 AD2d 328, 332-333 [2d Dept 1987]).

The court properly dismissed plaintiffs' civil RICO claims (18 USC § 1962) as barred by the Private Securities Litigation Reform Act of 1995 (PSLRA) (18 USC § 1964[c], as added by Pub L 104-67, tit I, § 107; *see MLSMK Inv. Co. v JP Morgan Chase & Co.*,

651 F3d 268, 273-274 [2d Cir 2011]). Contrary to plaintiffs' contention, the PSLRA also bars the RICO claims insofar as they are predicated on the acts of money laundering and unlawful money transfers, as such alleged acts were part of the same fraudulent scheme (*see Seippel v Jenkens & Gilchrist, P.C.*, 341 F Supp 2d 363, 373-374 [SD NY 2004]; *Gilmore v Gilmore*, 2011 WL 3874880, *6, 2011 US Dist LEXIS 99441, *17 [SD NY, Sept. 1, 2011, No. 09-Civ-6230 (WHP)], *affd* 2012 WL 5935341, 2012 US App LEXIS 24403 [2d. Cir, Nov. 28, 2012, No. 11-4091-cv]).

The court properly dismissed the action as asserted against defendants KPS and JST for lack of personal jurisdiction. The allegations that Rigby had used the law firms' letterheads and email addresses to communicate with plaintiffs are insufficient to show that the firms had control over Rigby in the matter, or that Rigby had acted with the firms' knowledge and consent (*see generally Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *Morgan v A Better Chance, Inc.*, 70 AD3d 481, 482 [1st Dept 2010]). Nor does MMS's unilateral wiring of a small amount of money to JST's account sufficiently demonstrate knowledge or consent of Rigby's alleged unlawful acts. Plaintiffs' assertion that other individuals from KPS and JST had communicated with plaintiffs is unavailing, as plaintiffs failed to allege that any

JST or KPS lawyer, aside from Rigby, had communicated with plaintiffs about MMS. Further, there is no indication that any communication was made on behalf of the firms, independent of Rigby, or with the firms' knowledge of the fraud.

Based on the allegations in the complaint, it is unclear as to whether jurisdiction could be exercised over the alleged defaulting parties so as to enable the court to grant a default judgment (*see Royal Zenith Corp. v Continental Ins. Co.*, 63 NY2d 975, 977 [1984]; *Bleier v Koegler*, 28 AD2d 835, 836 [1st Dept 1967]).

We have reviewed the appealing parties' remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: JANUARY 8, 2013

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8562-
8562A Daniel Hernandez, et al., Index 125067/00
590928/01
Plaintiffs-Respondents, 459038/04

-against-

Ten Ten Company, etc., et al.,
Defendants-Respondents-Appellants,

Prudential Securities Incorporated, et al.,
Defendants-Appellants-Respondents,

USA Illumination, Inc.,
Defendant.

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The 1010 Company, L.P., etc., et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

Prudential Securities Incorporated,
Third-Party Defendant-Appellant-Respondent.

- - - - -

Schmergel Construction Corp.,
Second Third-Party
Plaintiff-Respondent-Appellant,

-against-

Roland’s Electric,
Second Third-Party
Defendant-Appellant-Respondent.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for Roland’s Electric, appellant-respondent.

Baxter Smith & Shapiro, P.C., Hicksville (Dennis S. Heffernan of counsel), for Schmergel Construction Corp., appellant-respondent/respondent-appellant.

O’Connor, O’Connor, Hintz & Deveney, LLP, Melville (Eileen M. Baumgartner of counsel), for Prudential Securities Incorporated, appellant-respondent.

DeCicco, Gibbons & McNamara, P.C., New York (Joseph T. Gibbons of counsel), for Ten Ten Company and 1010 Company, respondents-appellants.

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for respondents.

Amended judgment, Supreme Court, New York County (Louis B. York, J.), entered July 13, 2011, after a jury trial, awarding plaintiffs damages, and bringing up for review an order, same court and Justice, entered January 6, 2010, which, to the extent appealed from as limited by the briefs, denied the respective motions of defendant/third-party defendant Prudential Securities Incorporated, defendant/third-party plaintiff Ten Ten Company, and second third-party defendant Roland’s Electric for judgment notwithstanding the verdict or a new trial on liability and damages, granted Prudential’s motion for judgment on its cross claims for common-law and contractual indemnification against Roland’s, denied Prudential’s motion for a posttrial hearing on attorneys’ fees, granted defendant/second third-party plaintiff Schmergel Construction Corp.’s motion for judgment on its second third-party claims for common-law and contractual indemnification against Roland’s, denied Ten Ten’s motion for judgment on its

cross claim for common-law indemnification against Roland's and third-party claim for contractual indemnification against Prudential, unanimously modified, on the law, to the extent of granting Ten Ten's motion, adding a decretal paragraph to the amended judgment awarding Prudential and Schmergel contractual and common-law indemnification against Roland's, granting Prudential's motion for a posttrial hearing on attorneys' fees and remitting the matter to the Supreme Court for such a hearing, and otherwise affirmed, without costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The amended judgment awarding damages and interest against Ten Ten, Schmergel and Prudential is valid and enforceable, even though the verdict sheet did not indicate a finding of liability against those defendants. The defendants, conceding that they would be vicariously liable upon a finding of Roland's negligence (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]), urged the court to leave their names off the verdict sheet. Further, the court instructed the jury that if it found Roland's liable, then the defendants would be liable, and those instructions were noted in the amended judgment.

Roland's failed to preserve its argument that Prudential and

Schmergel had abandoned their motions for indemnification because the proposed judgment was not submitted for signature within the time period set forth in 22 NYCRR 202.48 (a) (*see Chang v Botsacos*, 92 AD3d 610 [1st Dept 2012]). In any event, the record does not support its claim.

The absence of a decretal paragraph in the amended judgment awarding Prudential and Schmergel common-law and contractual indemnification against Roland's is merely an irregularity that can be cured by another amended judgment (*see* CPLR 5019[a]). Indeed, the factual recitation in the amended judgment noted that the court had granted indemnification in an order that was attached to the judgment.

The evidence at trial permitted the jury to rationally conclude that a violation of Industrial Code (12 NYCRR) § 23-1.13 (b) (4) had proximately caused plaintiff's injuries (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1997]). The court properly gave a missing document charge regarding a missing accident report, as there was sufficient evidence for the jury to reasonably conclude that an accident report had been prepared (*see Krin v Lenox Hill Hosp.*, 88 AD3d 597 [1st Dept 2011]). Although the court erred in extending the charge to all the defendants, as opposed to only Ten Ten, the error was harmless.

The award for future lost earnings was sufficiently supported by the evidence, as the expert medical testimony showed that plaintiff was physically unable to work due to his injuries (*see generally Balbuena v IDR Realty LLC*, 6 NY3d 338, 361 [2006]). The jury award of $1,000,000 for past pain and suffering over 8 years, and $2,166,666.67 for future pain and suffering over 25.8 years, does not deviate materially from what is considered reasonable compensation (*see* CPLR 5501[c]). Indeed, the evidence showed that plaintiff had sustained fractures to his tibia and fibula, underwent leg surgery entailing installation of a metal rod and screws in his leg, sustained back injuries, and suffered from reflex sympathetic dystrophy, complex regional pain syndrome, depression, sleep disorder, and sexual dysfunction (*see Serrano v 432 Park S. Realty Co., LLC*, 59 AD3d 242, 243 [1st Dept 2009], *lv denied* 13 NY3d 711 [2009]). Nor was the award of $341,666.66 to plaintiff's wife for past loss of services for eight years, and $0 for future loss of services, excessive, given the evidence showing that plaintiff could no longer help care for the children, perform household chores, take his wife out, or engage in intimate relations (*see Villaseca v City of New York*, 48 AD3d 218 [1st Dept 2008]).

Prudential waived its claim for contractual indemnification against Schmergel as it failed to appeal from the court's October 2004 order denying its motion for summary judgment on its claim against Schmergel, and dismissing the complaint and the third party complaint.

Prudential's entitlement to contractual indemnification from Roland's arises from its capacity as a third-party beneficiary of the contract between Schmergel and Roland's and not, as the court found, pursuant to a nonexistent contract between Prudential and Roland's. Pursuant to the contract between Schmergel and Roland's, Prudential is entitled to attorneys' fees. With respect to Prudential's common-law indemnification claim against Roland's, the court should have awarded attorneys' fees for Prudential's defense of the main action. Prudential, however, is not entitled to recover fees incurred in prosecuting the common-law indemnification claim (*see Chapel v Mitchell*, 84 NY2d 345, 348 [1994]). The matter is remanded for a hearing to determine the amount of attorneys' fees owed by Roland's.

The court should have granted Ten Ten's motion for judgment on its common-law indemnification cross claim against Roland's. Contrary to the court's conclusion, Ten Ten could properly bring the cross claim against Roland's (*see* CPLR 3019[b]; Michael H.

Barr et al., New York Civil Practice Before Trial § 14:646 at 14-64 [2011]). Ten Ten is also entitled to contractual indemnification from Prudential pursuant to the terms of the lease between the parties. Because Ten Ten's liability is vicarious, and not based on its own negligence, General Obligations Law § 5-322.1 is inapplicable (*see Linarello v City Univ. of N.Y.*, 6 AD3d 192, 193-194 [1st Dept 2004]; *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178-181 [1990]).

We have reviewed the remaining contentions, including the challenges to the court's various rulings during trial, and find them unavailing.

M-4846 - Hernandez, et al., v Ten Ten Company, et al.,

Motion to strike brief granted.

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

ENTERED: JANUARY 8, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Román, Gische, JJ.

8667 The People of the State of New York, Respondent, Ind. 1834/09

-against-

Kevin King, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered January 12, 2010, convicting defendant, after a jury trial, of criminal possession of stolen property in the fourth degree, and sentencing him to a term of 1⅓ to 4 years, unanimously affirmed.

Contrary to defendant's assertion, the trial court properly deemed that a "training receipt" was a business record, that a proper foundation for its admission was laid and that it was therefore admissible in evidence. Pursuant to CPLR 4518(a), made applicable to criminal proceedings pursuant to CPL 60.10, a document is admissible as a business record, if it is established that it was made in the ordinary course of a business, that it was the regular course of that business to make the record, and

that the record was made contemporaneously with the event memorialized therein (*People v Cratsley*, 86 NY2d 81, 89 [1995]). Here, a senior customer representative (representative) employed by the complainant, an electronics store, testified that a training receipt was created every time the complainant's employees apprehended a shoplifter, that the purpose of the receipt was to ascertain and memorialize the property that was stolen, that it was the regular course of the complainant's business to create such receipts, and that the receipts were created within minutes of a shoplifter's apprehension. Based on the foregoing, the trial court properly admitted the training receipt in evidence and we find unavailing defendant's assertion that preclusion of the training receipt was warranted on grounds that it was created solely for purposes of litigation (*see People v Foster*, 27 NY2d 47, 52 [1970] ["Of course, records prepared solely for the purpose of litigation should be excluded. However, if there are other business reasons which require the records to be made, they should be admissible" (internal citations omitted)]).

We conclude that the trial court did not err in failing to submit to the jury the lesser included offense of criminal possession of stolen property in the fifth degree. CPL 30.10(4)

requires that "[t]he court must specifically designate and submit, in accordance with the provisions of sections 300.30 and 300.40, those counts and offenses contained and charged in the indictment which the jury are to consider . . . [and] [s]uch determination must be made, and the parties informed thereof, prior to the summations." However, a defendant is only entitled to a lesser included offense charge if he or she establishes "that the additional offense that he desires to have charged is a 'lesser included offense,' i.e., that it is an offense of lesser grade or degree and that in all circumstances, not only in those presented in the particular case, it is impossible to commit the greater crime without concomitantly, by the same conduct, committing the lesser offense. That established, the defendant must then show that there is a reasonable view of the evidence in the particular case that would support a finding that he committed the lesser offense but not the greater." (*People v Glover*, 57 NY2d 61, 63 [1982]).

Here, aware that the crime of criminal possession of stolen property in the fourth degree (Penal Law § 165.45[1]) required that the stolen property have a value of $1,000 or more, defendant sought to have the trial court charge criminal possession of stolen property in the fifth degree (Penal Law §

165.40), a lesser included offense with no monetary value as one of its elements. However, while defense counsel made extensive in limine and summation arguments in support of his application to have the trial court charge the lesser included offense, he utterly failed to elicit any evidence controverting the training receipt and the value of the stolen property indicated therein. While generally a defendant has no obligation to present evidence, here, defendant was required to demonstrate entitlement to the lesser offense. While defense counsel cross-examined the representative and the other witness who testified for the People, he failed to pose any questions that cast any doubt as to the accuracy of the contents of the training receipt. Moreover, the record was otherwise bereft of any other evidence with respect to the value of property recovered from defendant's person. Accordingly, no reasonable view of the evidence warranted charging the lesser included offense insofar as the only evidence before the jury with regard to the value of the stolen property was the training receipt, which indicated that it was valued in excess of $1,000.

Given the evidence that defendant stole several video games and that they exceeded $1,000 in value, acquittal would have been unreasonable (*People v Danielson*, 9 NY3d 342, 348 [2007]). Thus,

we conclude that the jury's verdict was not against the weight of the evidence (*id.*).

In light of the foregoing, we do not reach defendant's remaining contentions.

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

ENTERED: JANUARY 8, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Román, Gische, JJ.

8669 James Garten, Index 112114/07
Plaintiff-Appellant,

-against-

Shearman & Sterling LLP,
Defendant-Respondent.

Donald Pearce, New York, for appellant.

Shearman & Sterling LLP, New York (Kirsten Cunha of counsel), for respondent.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 7, 2011, which, in this action alleging legal malpractice, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

On an appeal from a denial of a dismissal motion, this Court found that plaintiff "has stated a cause of action for malpractice by alleging that 'but for' defendant's failure to prepare and procure documents necessary to provide him with a first-priority security interest, he would have been able to recover the amounts owed to him by the defaulting borrower" (52 AD3d 207 [1st Dept 2008]).

Now, after discovery, it is clear that plaintiff cannot establish either a breach of duty or causation, both of which are

necessary to proceed with the claim (*see Wo Yee Hing Realty Corp v Stern*, 99 AD3d 58, 62-63 [1st Dept 2012]).

Plaintiff's own deposition testimony establishes that he understood that at the time he was advancing a loan to Pacific Jet, there was a superior lien on the accounts receivable, which were also being used to collateralize his loan. He knew the identity of the senior creditor and fully understood that his position would be junior when his loan was first made and would remain so, unless and until the first lien was paid off. He was, however, under a mistaken impression about the amounts owed to the senior creditors because his friend, Tim Prero, Pacific Jet's principal, misled him by significantly understating those amounts. Plaintiff's assumptions about his business risk in getting repaid were based upon false factual information about the financial health of Pacific Jet and how quickly the senior creditors would be paid off. Defendant established a prima facie case warranting dismissal of the complaint by showing that plaintiff's losses were caused by Pacific Jet's poor financial condition and plaintiff's misjudgment of risk based upon the false factual information provided to him by Prero. (*see A&R Kalimian v Berger, Gorin & Leuzzi*, 307 AD2d 813 [1st Dept 2003]).

Plaintiff failed to raise any factual disputes in

opposition. There is no evidence that defendant was retained to review Pacific Jet's private corporate records. The undisputed evidence reveals that plaintiff alone reviewed Pacific Jet's private financial records and negotiated the material terms of the transaction. The public UCC records, which defendant searched, revealed a prior security interest, a fact known to all, but no lien amount was recorded. Although plaintiff asked defendant to "document" his first priority interest, he did not have a first priority interest at the time he advanced the loan and had no expectation of a first priority interest before the senior creditor was paid. Subordination agreements or releases from the senior creditor at the time the loan was made, therefore, were not in order. Plaintiff has not elucidated what other documents defendant could have procured or prepared that would have altered the outcome of what was in hindsight a bad business deal.

Plaintiff no longer claims that defendant could have taken actions that would have allowed him to recover the amounts owed. He currently argues that he would not have entered into the transaction had he known his friend was misleading him about the amounts owed to prior creditors. This position is different from the position he prevailed upon on the motion to dismiss. It is

also contrary to his deposition testimony, when in answer to a direct question about whether he considered not making any loans because his friend had failed to show him any documentation, plaintiff could not "speak to his mindset" at the time. Plaintiff's new claim does not create an issue of fact that would defeat summary judgment (*see Madtes v Bovis Lend Lease LMB, Inc.*, 54 AD3d 630 [1st Dept 2008]). Finally, the undisputed evidence reveals that plaintiff was aware that there were risks associated with having a junior security position at the time he advanced the loan proceeds and negotiated his own remedy of enhanced interest.

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8947 The People of the State of New York, Respondent, Ind. 1798/10

-against-

Allen Mack, Defendant-Appellant.

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

Allen Mack, appellant pro se.

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

Judgment, Supreme Court, New York County, (Edward J. McLaughlin, J.), rendered November 30, 2010, as amended March 7, 2011, convicting defendant, after a jury trial, of two counts of grand larceny in the fourth degree, and sentencing him to concurrent terms of two to four years, unanimously affirmed.

Defendant did not preserve his claim that his conviction under a count charging larceny from the person of another (Penal Law § 155.30[5]) was based on legally insufficient evidence, or his related claim concerning the court's charge, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. Since the statute does not contain any element regarding the victim's mental state, the

People are not required to prove that the victim of a larceny from the person was aware of the theft. This statute has commonly been applied to thefts from sleeping or otherwise unconscious victims (*see e.g. People v* Taylor, 114 AD2d 478 [2d Dept 1985], *lv denied* 67 NY2d 890 [1986]). Whether a victim was able to feel something being taken may have some evidentiary significance in a case where there is an issue of whether the victim was in physical contact with the property (*see People v Haynes*, 91 NY2d 966 [1998]; *People v Auguste*, 283 AD2d 373 [1st Dept 2001]). Here, there was no such issue. The police saw defendant cut the sleeping victim's pocket and remove his wallet, while defendant's accomplice took a backpack that was leaning against the victim.

We have considered and rejected defendant's pro se claims.

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8949 Nemon Corp., Index 114058/11
Plaintiff-Appellant,

-against-

45-51 Avenue B, LLC,
Defendant-Respondent.

Goldberg Weprin Finkel Goldstein LLP, New York (Kevin J. Nash of counsel), for appellant.

Kagen Law Firm, New York (Stuart Kagen of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 12, 2012, which, insofar as appealed from, granted defendant's motion for summary judgment dismissing the complaint, directed that the notice of pendency filed by plaintiff in this action be cancelled, and directed that a $150,000 escrowed contract deposit be released to defendant, unanimously affirmed, with costs.

Plaintiff has failed to preserve its argument that the parties orally agreed to adjourn the November 11, 2011, time-is-of-the-essence closing date for sale of the subject property (*see e.g. Credit Suisse First Boston v Utrecht-America Fin. Co.*, 80 AD3d 485, 488 [1st Dept 2011]). In any event, there is no written or other unequivocal evidence that the parties actually

reached an agreement to adjourn the closing, in variance of the proscription in the parties' contract against oral modifications of its terms (*see* General Obligations Law § 15-301[1]; *#1 Funding Ctr., Inc. v H & G Operating Corp.*, 48 AD3d 908, 910 [3d Dept 2008]).

Moreover, contrary to plaintiff's contention, defendant sufficiently established that it was "ready and able to perform its own contractual undertakings on the closing date" (*Huntington Min. Holdings v Cottontail Plaza*, 60 NY2d 997, 998 [1983]).

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8950 Bank of America National Association, as Successor by Merger to Lasalle Bank National Association, etc., Plaintiff, Index 115035/09

-against-

Chau T. Lam, et al., Defendants-Appellants,

Yah Rong Ting, Defendant-Respondent,

Adamar of New Jersey Inc., et al., Defendants.

Mark L. Cortegiano, Middle Village, for appellants.

Rubin & Licatesi, P.C., Garden City (Richard L. Rubin of counsel), for respondent.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered April 9, 2012, which, to the extent appealed from as limited by the briefs, granted so much of the motion of defendant-respondent Yah Rong Ting as sought to modify the terms of the parties' stipulation by lowering the minimum sale price of the subject property, unanimously reversed, on the law, without costs, and the motion denied.

In this foreclosure action, the motion court improperly modified the parties' so-ordered stipulation with regard to the

agreed-upon minimum sale price of the property jointly owned by Ting and defendants-appellants, the latter whom opposed the modification. Ting did not establish that she should be relieved from the consequences of the stipulation due to fraud, collusion, mistake or accident (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]).

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische JJ.

8953 The People of the State of New York, Ind. 3830/06
Respondent,

-against-

Warren Stewart,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson, of counsel), and Debevoise & Plimpton LLP, New York (Stephanie O. Akpa of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Megan R. Roberts of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered March 26, 2010, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him to a term of 5 years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or not fully explained by, the trial record concerning counsel's preparation and strategic choices (*see People v Love*, 57 NY2d 998 [1982]). These matters include, among other things, counsel's reasons for considering but not pursuing an intoxication defense. On the existing record, to the extent it permits review, we find that defendant received effective

assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown "the absence of strategic or other legitimate explanations" for counsel's alleged deficiencies (*People v Rivera*, 71 NY2d 705, 709 [1988]). Furthermore, defendant has not shown that any of these alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. "Counsel may not be expected to create a defense when it does not exist" (*People v DeFreitas*, 213 AD2d 96, 101 [2d Dept 1995], *lv denied* 86 NY2d 872 [1995]). Defendant was caught in the act of committing a burglary, to which he also confessed. There is nothing to indicate that he had a viable intoxication defense, or any other viable defense.

The court properly exercised its discretion in denying defendant's mistrial motion, made after it was determined that a juror had stolen a credit card and MetroCard from another juror. The court conducted a thorough inquiry, in which the victimized juror unequivocally stated that he would be still be able to be fair. Defense counsel expressly agreed to replace only the larcenous juror with an alternate, while retaining the victimized

juror, and defense counsel did not request the court to make any inquiry of the remaining jurors. Under the totality of the circumstances, defendant effectively withdrew the mistrial motion that had been made before the inquiry was complete (*see People v Albert*, 85 NY2d 851 [1995]). In any event, there was no basis for a mistrial. The victimized juror expressly stated that he did not mention the incident to any other jurors, and defendant's assertion that other jurors may somehow have been tainted is speculative.

We find the sentence not to be excessive.

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8954 Fundamental Long Term Care Holdings, LLC, Plaintiff-Appellant, Leonard Grunstein, et al., Plaintiffs, -against- Cammeby's Funding LLC, et al., Defendants-Respondents. Index 650332/11

Arent Fox LLP, New York (Allen G. Reiter of counsel), for appellant.

Dechert LLP, New York (Steven A. Engel of counsel), for respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 18, 2012, which, granted defendants' request for disclosure of financial information relating to plaintiff Fundamental Long Term Care Holdings, LLC, unanimously reversed, on the law and the facts, without costs, and the request denied.

In this action, plaintiffs sought a declaration as to the interpretation of an option agreement. Defendants asserted a counterclaim for breach of contract, seeking specific performance of the option agreement and, in the alternative, damages. In a prior appeal, we affirmed orders that, inter alia, granted defendants' motion for summary judgment dismissing the complaint,

and directed the entry of a judgment declaring that plaintiff Fundamental must issue ownership of one third of its equity units to defendant Cammeby's Funding LLC's designee, without regard to the capital contribution requirement contained in Fundamental's operating agreement (92 AD3d 449 [1st Dept 2012], *lv granted* 19 NY3d 1012 [2012]). Thereafter, defendants sought financial disclosure in order to support a request for additional relief that had not been previously sought or pled — namely, monetary damages in the event that Fundamental's assets had been materially dissipated following the exercise of the option.

Under the circumstances, defendants have failed to establish that the disclosure sought was "material and necessary in the prosecution or defense of" this action or the counterclaim (CPLR 3101[a]).

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8956-
8957 In re Lanelis V.,

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

Daisy C.,
Respondent-Appellant,

Commissioner of Social Services of
the City of New York,
Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the child.

Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about August 5, 2011, which, following a fact-finding hearing that determined that respondent mother had neglected the child, released the subject child to the custody of the mother with 12 months of supervision by petitioner, directed the mother to continue individual therapy, not to interfere with the father's visitation, and to cooperate with petitioner, unanimously affirmed, without costs.

The record supports the court's neglect finding in that the

mother subjected the child to multiple, repeated, intrusive physical and mental health examinations based on her unfounded suspicions that the father had sexually abused the child. The record indicates that the mother's charges were thoroughly investigated, and were contraindicated by the child's occasional statements that she was lying about the abuse, that her mother told her to make the statements, and by the child's vague and fanciful descriptions of events.

A suspended judgment was not warranted where the mother persisted in making the unfounded charges, which were detrimental to the child and the child's relationship with the father.

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8958 QBE Insurance Corporation, et al., Index 116004/10
Plaintiffs-Appellants,

-against-

Public Service Mutual Insurance Company,
Defendant-Respondent,

33rd Street Bakery, Inc., et al.,
Defendants.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Michael E. Gorelick of counsel), for appellants.

Weber Gallagher Simpson Stapleton Fires & Newby LLP, New York (Kenneth M. Portner of counsel), for respondent.

Order, Supreme Court, New York County ((Milton A. Tingling, J.), entered April 18, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiffs' cross motion for summary judgment, unanimously reversed, on the law, with costs, plaintiffs' cross motion granted, and it is declared that the insurance policy issued by defendant insurer, Public Service Mutual Insurance Company (PSM), is primary for plaintiff Dierks Heating Company, Inc. (Dierks), its additional insured, and that it has a duty to defend and indemnify Dierks in the underlying personal injury action, and reimburse Dierks' insurer for attorneys' fees and expenses.

The underlying personal injury action was commenced by an employee of defendant 33rd Street Bakery, a tenant in a building owned by Dierks. PSM issued a commercial general liability (CGL) policy to the Bakery, and in accordance with the lease, Dierks was listed as an additional insured. Dierks also had its own CGL policy issued by plaintiff QBE Insurance Corporation.

PSM's disclaimer, based on the "Intra-Insured" Exclusion which excludes defense and indemnification for any insured against a claim or suit brought by any other insured, is inapplicable based on the plain meaning of the provision (*see Mazzuoccolo v Cinelli*, 245 AD2d 245, 246–47 [1st Dept 1997]). The underlying plaintiff, an employee of the Bakery, is not an insured under the policy which provides coverage for third party liability actions in which an employee is named as a defendant based on "acts within the scope of [his] employment ... or while performing duties related to the conduct of [the] business." Here, the employee is the plaintiff. However, even if the exclusion is ambiguous, it would be construed against the drafter, as PSM provided no extrinsic evidence in support of its contention that the exclusion is applicable (*see Mazzuoccolo*, 245 AD2d at 246–47).

Third party administrator Rockville Risk Management

Associates, Inc., on behalf of QBE and Dierks, provided timely notice of the occurrence involved in the underlying action to PSM and tendered the defense and indemnification of Dierks on February 3, 2007. Although that letter did not explicitly identify Dierks as an additional insured under the PSM policy, from that date until July 2007 Rockville sent various documents (including the Lease and the QBE policy), which made clear that QBE was tendering the defense and indemnification of its insured, Dierks, to PSM as an additional insured under the PSM policy. Further, by correspondence dated January 6, 2010 Rockville again tendered the defense and indemnity of Dierks to PSM under the Bakery's CGL policy. Along with the January 6, 2010 email correspondence, Rockville forwarded the suit papers in the underlying action. Thus, whether PSM's obligation to deny coverage was triggered by the 2007 tenders from Rockville or the January 6, 2010 email from Rockville, PSM's disclaimer on March 22, 2010 was untimely as a matter of law (*see West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278 [1st Dept 2002], *lv denied* 98 NY2d 605 [2002]; *JT Magen v Hartford Fire Ins. Co.*, 64 AD3d 266 [1st Dept 2009], *lv dismissed* 13 NY3d 889 [2009]).

As a matter of law, the PSM policy was primary, based on the

policy language, specifically, the other insurance provision in the QBE policy, which states that QBE is excess over "any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement."

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8960-
8960A Index 652266/10

Building Service Local
32B-J Pension Fund, et al,
Plaintiffs-Respondents,

-against-

101 Limited Partnership,
Defendant-Appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for appellant.

Proskauer Rose LLP, New York (Herman ("Hank") Goldsmith of counsel), for respondents.

Resettled order and judgment, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered December 1, 2011, specifying the principal amount awarded and adding prejudgment interest to the principal amount, and order, same court and Justice, entered September 7, 2011, which granted plaintiffs tenants' motion for partial summary judgment with respect to their claim for certain revenue sharing proceeds owed by defendant landlord, unanimously affirmed, with costs.

The court properly granted plaintiffs' motion for partial summary judgment and issued a resettled order and judgment awarding plaintiff a specified amount, including prejudgment interest (*see Trans World Maintenance Servs. v Luna Park Hous.*

Corp., 157 AD2d 586 [1st Dept 1990]). Giving proper effect to terms of the parties' lease precludes defendant from withholding the revenue sharing proceeds admittedly owed to plaintiffs for the purpose of applying those proceeds to offset the repair expenditures defendant purportedly made as a result of plaintiffs' alleged default on their obligation to make repairs and renovations to the building.

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8961 The People of the State of New York, Ind. 3463/10
Respondent,

-against-

Fantasia Quiles,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin 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 (Daniel FitzGerald, J. at plea; Bonnie Wittner, J. at sentencing), rendered on or about April 26, 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 8, 2013

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

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8962 The People of the State of New York, Ind. 2512/08
Respondent,

-against-

Justo Quesado,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Kibbie F. Payne, J.), rendered May 14, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of 1½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. The experienced narcotics officer's observation

of what appeared to be the exchange of a bag of white powder for money provided probable cause for defendant's arrest (*see People v Jones*, 90 NY2d 835 [1997]).

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8963 Jelissa Lugo, an infant by her mother and natural guardian Luz Bermudez, et al., Plaintiffs-Respondents, Index 305754/08

-against-

Adom Rental Transportation, Inc., et al., Defendants-Appellants,

Lynn E. Peters, et al., Defendants.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for appellants.

Melvyn S. Jacknowitz, New York (Barry S. Huston of counsel), for respondents.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered February 7, 2012, which denied defendants Adom Rental Transportation and Mamdee Jomandy's motion for summary judgment dismissing the complaint as against them on the threshold issue of serious injury under Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion as to all plaintiff Luz Bermudez's claims and as to plaintiff Jelissa Lugo's 90/180-day claim, and otherwise affirmed, without costs.

Defendants established prima facie the absence of a serious injury in Bermudez's cervical spine, lumbar spine, and right shoulder by submitting the affirmed report of their orthopedist

who, after examining Bermudez and reviewing her medical records, found no significant limitations in those areas and concluded that the injuries were caused by degenerative conditions consistent with Bermudez's age and history of morbid obesity (*Torres v Triboro Servs., Inc.*, 83 AD3d 563 [1st Dept 2011]; *Pines v Lopez*, 88 AD3d 545, 545 [1st Dept 2011]). Defendants also submitted their radiologist's and Bermudez's own radiologist's CT scan reports noting only degenerative changes. In opposition, Bermudez failed to raise a triable issue of fact, since her treating physician did not set forth findings of limitations in quantitative or qualitative terms (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]).

As to plaintiff Lugo, defendants' orthopedist found normal ranges of motion in the left knee, lumbar spine and cervical spine, and their radiologist opined that the left knee MRI was normal. The orthopedist also opined that Lugo had bilateral patella malalignment, a preexisting condition (*see Pommells v Perez*, 34 NY3d 566, 572 [2005]). In opposition, Lugo raised a triable issue of fact as to her left knee by submitting the reports of her orthopedic surgeon, who, during arthroscopic surgery, observed a chondral lesion that he concluded was caused by trauma, and persisting knee instability and buckling even

after the surgery. The surgeon's conclusion that the worsened apprehension, persistent buckling, and patellofemoral instability were caused by the accident and that the symptoms persisted after surgery, and the conclusion of Dr. Martin Barschi, an orthopedic surgeon retained by the nonappealing defendants to perform an independent medical examination of plaintiff, that the chondral lesion was caused by trauma, raise an issue of fact as to causation (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]). Lugo also raised a triable issue of fact as to the lumbar spine by submitting Dr. Barschi's report finding a significant limitation in range of motion of the lumbar spine. This evidence, in conjunction with the finding by Lugo's radiologist that her MRI showed a herniated disc in the lumbosacral spine, raises an issue of fact as to serious injury to the lumbar spine (*see Toure*, 98 NY2d at 353).

Serious injuries to Lugo's left knee and lumber spine having been established, we need not address her failure to submit evidence of her alleged cervical spine injuries (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

Defendants established that neither plaintiff sustained a 90/180-day injury, based on the deposition testimony of each that

she was confined to home for only a month after the accident (*see Zhijian Yang v Alston*, 73 AD3d 562 [1st Dept 2010]). Neither plaintiff submitted any evidence to the contrary.

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8964 The People of the State of New York, Dkt. 37119C/09
Respondent,

-against-

Karina A.,
Defendant-Appellant.

DLA Piper LLP (US), New York (Andrew O. Bunn of counsel), and The Bronx Defenders, Bronx (Marika Meis of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Lindsey J. Ramistella of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered February 22, 2010, convicting defendant, after a nonjury trial, of possession of graffiti instruments, adjudicating her a youthful offender, and sentencing her to time served, unanimously reversed, on the facts and as a matter of discretion in the interest of justice, and the information dismissed.

An element of possession of graffiti instruments (Penal Law § 145.65) is that a defendant possessed the instrument at issue under circumstances evincing an intent to use it to damage property that the defendant had no permission or authority to mark. The court, sitting as trier of fact, correctly determined that since the officers' testimony as to the status of the

property at issue was refuted by the testimony of a City official called by the defense, there was a failure of proof of the element of lack of permission. Accordingly, the court acquitted defendant of making graffiti (Penal Law § 145.60). For the same reason, the evidence failed to establish the corresponding lack-of-permission element of possession of graffiti instruments.

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8965-
8966 Mark S. Taylor, et al., Index 119108/06
590598/10
Plaintiffs-Respondents,

-against-

Paskoff & Tamber, LLP, et al.,
Defendants-Appellants.

- - - - -

Paskoff & Tamber, LLP, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Laurie Goldheim,
Third-Party Defendant-Respondent.

Paskoff & Tamber, LLP, New York (Adam Paskoff of counsel), for appellants.

Andrew Lavoott Bluestone, New York, for Mark S. Taylor and Nina Z. Parks-Taylor, respondents.

Mound Cotton Wollan & Greengrass, New York (Kenneth M. Labbate of counsel), for Laura Goldheim, respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 7, 2011, which, to the extent appealed from, denied defendants' motion to dismiss plaintiffs' legal malpractice cause of action, granted plaintiffs' motion to sever the third-party complaint, and granted third-party defendant's motion to dismiss the third-party action, unanimously affirmed, without costs.

Order, same court and Justice, entered April 22, 2011, which

granted plaintiffs' motion for summary judgment dismissing defendants' affirmative defense of statute of limitations, and for summary judgment as to liability on the legal malpractice cause of action, unanimously reversed, without costs, on the law, and the motion denied.

Plaintiffs stated a viable cause of action for legal malpractice based on defendants' alleged failure to prepare the proper forms in the underlying private placement adoption (*see generally P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375-376 [1st Dept 2003]). Plaintiffs' argument that, but for the need to serve the subject birth mother with a notice of adoption due to the allegedly invalid extrajudicial consent prepared by defendants, the birth mother would not have challenged the adoption on the grounds of fraud and duress, as well as an invalid consent, was not speculative (*cf. Phillips-Smith Specialty Retail Group II v Parker Chapin Flattau & Klimpl*, 265 AD2d 208, 210 [1st Dept 1999], *lv denied* 94 NY2d 759 [2000]).

Plaintiffs' motion for summary judgment, however, should have been denied. The court improperly concluded, as a matter of law, that the subject consent agreement (the "Agreement for Temporary Custody and Adoption of Infant Under Fourteen") was intended to serve as an extrajudicial consent, in that the court

discredited defendants' assertions to the contrary. Such credibility determinations must be left for the finder of fact (*see Narvaez v 2914 Third Ave. Bronx, LLC*, 88 AD3d 500, 501 [1st Dept 2011]). Moreover, construing all facts in the light most favorable to the non-movant defendants (*see People v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]), issues of fact exist as to whether the agreement was intended to be the final consent agreement.

Issues of fact also exist as to whether plaintiffs' relationship with defendants ended on December 24, 2003, when they voided a check paid to defendants, rendering plaintiffs' legal malpractice cause of action, commenced on December 27, 2006, time-barred (*see Waggoner v Caruso*, 68 AD3d 1, 6 [1st Dept 2009], *affd on other grounds* 14 NY3d 874 [2010]; *see also Aaron v Roemer, Wallens & Mineaux*, 272 AD2d 752, 754-755 [3d Dept 2000], *lv dismissed* 96 NY2d 730 [2001]).

The court properly severed and dismissed the third-party action (*see Attie v City of New York*, 221 AD2d 274, 274 [1st Dept 1995]). Defendants failed to raise a triable issue of fact as to

third-party defendant's alleged malpractice (*see Darby & Darby v VSI Intl.*, 95 NY2d 308 [2000]; *Rosner v Paley*, 65 NY2d 736 [1985]). Indeed, the record shows that third-party defendant's conduct constituted proper strategic legal decision-making.

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8967 Guillermo Croussett, Index 104520/08
Plaintiff-Appellant,

–against–

Minalie Chen, et al.,
Defendants-Respondents.

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for appellant.

Hammill, O'Brien, Croutier, Dempsey, Pender & Koehler, P.C., Syosset (Anton Piotroski of counsel), for Minalie Chen, Jackson Hsieh and Vella Interiors, Inc., respondents.

Flynn, Gibbons & Dowd, New York (Lawrence A. Doris of counsel), for 115 Central Park West Corporation and Akam Associates, Inc., respondents.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 20, 2011, which, to the extent appealed from as limited by the briefs, granted the motion of defendant Vella Interiors, Inc., and the cross motion of defendants 115 Central Park West Corporation and Akam Associates, Inc., for summary judgment dismissing the Labor Law § 241(6) claims as against them, unanimously affirmed, without costs.

Plaintiff, a painter employed by a subcontractor on a home renovation project, was injured when he fell off of the ladder on which he was working. With one exception (*see* Industrial Code

[12 NYCRR] § 23-1.21[e][2]), plaintiff relied upon sufficiently specific Industrial Code regulations to form the predicate for his Labor Law § 241(6) claims (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]). However, the specific provisions upon which he relied, which relate to ladder maintenance and slippery conditions, are inapplicable to the facts of this case (*see* 12 NYCRR 23-1.7[d], 23-1.21[b][3][ii], [iv], [4][ii]; [e][3]). Indeed, plaintiff testified that he properly opened and set up the eight- to nine-foot ladder, that the aluminum side supports were in working order, and that the ladder had four rubber footings. There is no evidence of a slippery floor or that the masonite, which covered the ceramic floor, was a foreign substance that caused a slippery footing.

Plaintiff failed to preserve his claim that defendants violated Industrial Code (12 NYCRR) §§ 23-1.21(b)(1) and 23-1.7(e)(2) (*see McMahon v Durst*, 224 AD2d 324, 324 [1st Dept 1996]), and we decline to review it. Were we to review the claim, we would reject it, as both sections are inapplicable. Plaintiff testified that he cleared away the electrical coils, boxes and other materials from the work area before beginning his work (*see* 12 NYCRR 23-1.7[e][2]), and there is no evidence that

the ladder was incapable of supporting four times the maximum load intended to be supported thereon (*see* 12 NYCRR 23-1.7 [b] [1]).

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Gische, JJ.

8968 Mercedes Colwin, Index 111400/09
Plaintiff-Respondent,

-against-

Bruce Katz, M.D., et al.,
Defendants-Appellants,

Juva Skin and Laser Center, Inc.,
Defendant.

Dwyer & Taglia, New York (Peter R. Taglia of counsel), for appellants.

Pollack Pollack Isaac & De Cicco, LLP, New York (Jillian Rosen of counsel), for respondent.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered August 15, 2012, which denied defendants Bruce Katz, M.D. and Bruce Katz, M.D., P.C.'s motion to compel plaintiff to furnish certain medical authorizations and to serve a further bill of particulars specifying her claims, unanimously modified, on the law, defendants' motion granted to the extent that it sought to compel plaintiff to furnish authorizations for those portions of her dental records about her medical history, and otherwise affirmed, without costs.

In this medical malpractice action, plaintiff alleges that defendant dermatologist Bruce Katz, M.D. caused her to suffer an

"aggravation of a pre-existing latent and asymptomatic degenerative condition." Accordingly, defendants sought authorizations for those portions of plaintiff's dental records that discuss her medical history. Inasmuch as plaintiff has clearly voluntarily put her prior medical condition at issue (CPLR 4504[a]; *see Dillenbeck v Hess*, 73 NY2d 278, 283-284 [1989]), such disclosure is material and necessary for the defense of this action so that defendants may ascertain her condition prior to being treated by Dr. Katz (CPLR 3101[a]; *see McGlone v Port Auth. of N.Y. & N.J.*, 90 AD3d 479, 480 [1st Dept 2011]; *Rega v Avon Prods., Inc.*, 49 AD3d 329, 330 [1st Dept 2008]). Contrary to plaintiff's contention, defendants' demand is tailored, directed at relevant material, and is not tantamount to a fishing expedition (*see Ford v Rector, Church-Wardens, Vestrymen of Trinity Church in the City of N.Y.*, 81 AD3d 502 [1st Dept 2011]).

It was not an improvident exercise of discretion for Supreme Court to deny those branches of defendants' motion which sought to compel plaintiff to furnish a more specific supplemental bill of particulars and to strike plaintiff's initial bill of particulars. As we noted on this matter's prior appeal, "[t]he purpose of a bill of particulars is to amplify pleadings .

. . and prevent surprise at trial" (90 AD3d 516, 516 [1st Dept 2011]), which plaintiff's supplemental bill of particulars adequately does (*see Torres v New York City Tr. Auth.*, 78 AD3d 419, 420 [1st Dept 2010]; *Spiegel v Gingrich*, 74 AD3d 425, 426 [1st Dept 2010]). The mere fact that it incorporates the initial bill of particulars, which contained boilerplate averments, is an insufficient ground for disturbing Supreme Court's determination.

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

ENTERED: JANUARY 8, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8969N Maria Rosado, Index 20373/06
Plaintiff,

Theresa Christmas, an infant under
the age of fourteen by her guardian
ad litem, Virginia O'Donnell-McNamara, et al.,
Plaintiffs-Respondents,

-against-

Redland Brick, Inc., etc., et al.,
Defendants-Appellants,

Nicolia Industries, Inc., et al.
Defendants.

Lester, Schwab, Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for State Material & Masonry Supply Corp., appellant.

Michelle S. Russo, P.C., Port Washington (Michelle S. Russo of counsel), for respondents.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered June 6, 2012, which, to the extent appealed from, denied defendants-appellants' motions to transfer venue from Bronx County to Queens County and granted plaintiffs-respondents' cross motion to retain venue in Bronx County, unanimously affirmed, without costs.

This action arises from a multi-car motor vehicle accident that occurred in New Jersey, and resulted in the deaths of three members of the Christmas family and injury to plaintiff Rosado, a resident of the Bronx. Plaintiff Rosado commenced an action in Bronx County, and plaintiffs-respondents, representing the surviving child of the Christmas family and the estates of the deceased members of the family, subsequently commenced two actions in Queens County. In December 2008, Rosado's motion to consolidate all three actions was granted without opposition, and the *Christmas* actions were transferred to Bronx County for joint trial. Bronx County is therefore the proper place for trial of the *Christmas* actions (CPLR 509). Although Rosado has since settled her claims against all defendants, she was a proper party at the outset and there is no contention that plaintiffs engaged in forum shopping (*see Yanez v Western Beef, Inc.*, 28 AD3d 751 [2d Dept 2006]; *compare Halina Yin Fong Chow v Long Is. R.R.*, 202

AD2d 154, 155 [1st Dept 1994]). Furthermore, plaintiffs-respondents made a showing that Bronx County would be a more convenient forum for a nonparty witness.

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

ENTERED: JANUARY 8, 2013

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