SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 17, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Saxe, DeGrasse, Román, JJ.

7761 Quoizel, Inc., Index 601321/09
Plaintiff-Respondent-Appellant,

-against-

Hartford Fire Insurance Company,
Defendant-Appellant-Respondent.

Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for appellant-respondent.

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

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 14, 2011, which denied defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment on its complaint seeking the difference between the amount defendant paid it on its property damage claim, i.e., the cost of replacement, and the selling price of the damaged property, affirmed, without costs.

The disputed stock inventory, consisting of lamps and

lighting products, was damaged during a sprinkler system leak in plaintiff's South Carolina warehouse in 2008. The issue before us is whether this stock is to be valued at the selling price or replacement cost under the insurance policy defendant issued to plaintiff.

The policy provides for valuation at the selling price, rather than at the cost of replacement, of damaged "'[s]tock' you have manufactured" and of "component parts manufactured by others that will become a part of your finished product." Although the term "manufacture" or "manufacturer" is not defined, the dissent opines that our decision in *Bijan Designer For Men v Fireman's Fund Ins. Co.* (264 AD2d 48 [1st Dept 2000], *lv denied* 96 NY2d 707 [2001]) is dispositive and that plaintiff may not be deemed to have manufactured the stock within the meaning of the policy because it was assembled by factories in China, which sold it to plaintiff. However, *Bijan* is distinguishable and the motion court correctly found that neither party demonstrated conclusively whether plaintiff can be deemed the manufacturer of the inventory.

Bijan, a retailer of high-fashion menswear, selected the materials, designed the clothing line and provided detailed specifications for its manufacture by Italian factories (264 AD2d

at 50). While it may have been considered the manufacturer as that term was used in the fashion industry, we held that the reference in the insurance policy to "'finished goods . . . manufactured by you,' plainly contemplates the concept of manufacturing in its ordinarily understood sense, i.e., the fabrication of a final product through the use of raw materials" (*id.* at 52). Thus, we found that Bijan was not the manufacturer for the purposes of the policy because the actual physical production of the clothing was carried out by foreign factories, which held title to the goods until Bijan received and accepted the finished product (*id.* at 54). However, unlike Bijan, which only visited the factories from time to time to provide oversight (*id.* at 50), here plaintiff asserts that it was intricately involved in the management and daily process of manufacturing at the factories in China, and that it is more than just the architect of the damaged stock.

Plaintiff is a member of the American Association of Lighting Manufacturers and the originator and owner of 54 active patents and 14 active trademarks concerning the design and manufacture of its products. Its consolidated financial statements identify it as a manufacturer, as does its website.

In 2008, plaintiff maintained an office in China, with a

staff of approximately 27 employees, and expended almost $3 million for the daily employment of its own engineers, designers and “cad operators” who worked closely with 15 factories, one of which was allegedly co-owned by plaintiff. All products manufactured in China bore stamps with plaintiff’s name, and plaintiff provided a lifetime warranty and performed the warranty repairs.

Plaintiff also alleges that it approved all sources of raw materials and selected the specific raw materials used in the manufacture and assembly of its products. It alleges that its designers were regularly present at each of the factories to oversee production runs to ensure that its design specifications were being followed, and that its manufacturing engineers and inspectors were present on a daily basis at each of the factories then in production to oversee fabrication and manufacturing operations, to perform spot inspections during each step of the manufacturing process, and to inspect and approve finished goods prior to shipment to its South Carolina warehouse. Most significantly, plaintiff alleges that, throughout the manufacturing process, it maintained ownership of the stock in production, and that the purchase orders were used by the parties as a means by which the stock entered the United States.

This active role in the fabrication of its product, including oversight and quality control procedures that permitted plaintiff to “stop production” in the Chinese factories, raises a material issue of fact as to whether plaintiff may be deemed a manufacturer of the disputed stock.

Accordingly, the respective summary judgment motions of the parties were correctly denied.

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

All concur except Gonzalez, P.J. and DeGrasse, J. who dissent in part in a memorandum by DeGrasse, J. as follows:

DEGRASSE, J. (dissenting in part)

I respectfully dissent as I would modify the order entered below and grant the motion by defendant, Hartford Fire Insurance Company, for summary judgment dismissing the complaint.

Hartford issued a commercial property insurance policy to plaintiff, Quoizel, Inc. This case turns on the meanings of two phrases used in the policy: "'Stock' you have manufactured" and "component parts manufactured by others that will become a part of your finished product." In my view, the unambiguity of the policy language at issue, coupled with the undisputed facts in the record, mandates summary judgment in favor of Hartford.

Quoizel is a vendor of decorative lighting fixtures. On September 2, 2008, Quoizel sustained water damage at its warehouse in South Carolina. The relevant claim under the policy stems from damage to inventory consisting of lamps and other lighting products that were boxed in the warehouse. The parties differ as to how the damaged inventory should be categorized under the policy.

The policy obligated Hartford to "pay for direct physical loss or direct physical damage to Covered Property caused by or resulting from a Covered Cause or Loss." It is undisputed that the inventory constituted "Covered Property" and that the water

damage constituted a "Covered Loss." The policy provided the following with respect to the valuation of covered property:

> "**E. LOSS PAYMENT AND VALUATION CONDITIONS**
> Covered Property will be valued at either Replacement Cost or Actual Cash Value, as stated in the Property Choice Declarations and as described below except for the items listed below in item 3.
>
> . . .
>
> 3. Specific Property Valuations
>
> . . .
>
> **g. 'Stock'**
>
> **(1) Manufactured Stock**
>
> We will determine the value of 'Stock' you have manufactured at the selling price less discounts and expenses you otherwise would have incurred.
>
> This also applies to component parts manufactured by others that will become a part [*sic*] of your finished product."

After reporting the loss to Hartford, Quoizel made a claim under the policy. Hartford determined that the claim for the damaged inventory should be adjusted on the basis of actual cash value or replacement cost pursuant to the policy's loss payment and valuation conditions. Quoizel contends that the claim should have been adjusted on the basis of the selling price of the damaged inventory. In particular, Quoizel alleges that the damaged inventory consisted of stock that it had manufactured.

Quoizel brought this action to recover the difference between the selling price of the damaged inventory and the amount paid by Hartford as its undisputed actual cash value. The motion court denied the parties' respective motions for summary judgment, finding a factual issue as to whether the damaged inventory was manufactured by Quoizel within the meaning of the policy. Based on the following undisputed facts, I would modify to the extent of granting Hartford's motion.

Quoizel's damaged inventory was manufactured at 15 factories that were operated by third-party entities in the People's Republic of China.[1] The inventory consisted of products that were fabricated according to Quoizel's drawings and specifications. Except as stated in the footnote below, Quoizel did not own the factories and held no interest in the entities that ran them. The third-party operating entities purchased the raw materials, supplied the labor force, owned the machinery and applied the physical labor that went into production of the finished product that constituted Quoizel's inventory. Quoizel incurred no expense in connection with incidents of production,

[1]Quoizel was the co-owner of one factory that was operated by a company named Design Emporium, Ltd. Approximately 15% of Quoizel's annual production output came from that factory.

i.e., the raw materials, labor, overhead or machinery. Instead, Quoizel paid for finished products under the terms of standard form purchase orders that it issued. Quoizel maintained a staff of approximately 27 employees who worked at one office in China. Those employees consisted of designers, computer assisted design operators and inspectors who worked closely with the operators of the 15 factories. I do not share the majority's view that Quoizel's employment of these professionals is sufficient to raise an inference of de facto ownership and control over the manufacture of the products.

Quoizel makes much of the fact that its products had been certified by Underwriters Laboratories (UL), a product safety testing and certification organization. Quoizel's vice president stated in an affidavit that it was his "understanding" that UL grants such certifications to manufacturers only. This assertion is based on hearsay and belied by the record. By their own terms, the purchase orders are the only legally binding documents for Quoizel's purchases from its suppliers. The terms and conditions set forth on Quoizel's purchase order form provide as follows:

> "All products must be manufactured and labeled in accordance to Underwriter [*sic*] Laboratories Standard 1598 for Incandescent and Fluorescent Luminaries or

> Standard 153 for Portable Lamps. *Quoizel* will be responsible for submitting product for UL testing and fees associated with maintaining the UL procedures for those products. *The Manufacturer* will be responsible for purchasing all labels from UL and for any fees associated with local inspections. . . . *[T]he Manufacturer will be required to provide a complete packaged sample (free of charge) to Quoizel . . .*" (emphases added).

Here, the terminology Quoizel used in its purchase order form clearly demonstrates that it did not regard itself as a manufacturer. I, therefore, find no basis for the motion court's conclusion that the purchase orders are not dispositive evidence that Quoizel is not a manufacturer but are merely the means of getting the products into the United States. It is well established that clear and unambiguous provisions of an insurance policy must be given their plain and ordinary meaning (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]). In my view, the motion court erred in finding an issue of fact. The interpretation of an unambiguous insurance policy provision, which is all the parties' motions called for, is a matter of law for the court (*see White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007][citations omitted]). Our decision in *Bijan Designer for Men v Firemen's Fund Ins. Co.* (264 AD2d 48 [1st Dept 2000], *lv denied* 96 NY2d 707 [2001]) is controlling with respect to the interpretation of the phrase "'Stock' you have manufactured" in

the insurance policy before us.

Bijan involved a claim under a commercial policy for damage to inventory consisting of clothing. The insured in *Bijan* was a designer and retailer of the clothing. The insured in *Bijan* sought to recover from the insurer the selling price of the damaged clothing as opposed to its replacement cost. The policy that was before us in *Bijan* provided that "[s]tock that is *finished goods and manufactured by you* will be valued at the price for which it could have been sold if there had been no loss, less discounts and unincurred expenses" (264 AD2d at 49). The *Bijan* policy also provided that "[s]tock that is *finished goods that you have purchased from others for resale* will be valued at Replacement Cost" (*id.*). In analyzing the policy in *Bijan*, we concluded that its reference to "'finished goods . . . manufactured by you,' plainly contemplate[d] the concept of manufacturing in its ordinarily understood sense, i.e., the fabrication of a final product through the use of raw materials" (*id.* at 52). Accordingly, we deemed the phrase a reference to "goods resulting from actual, physical work performed on raw materials" (*id.*). Like Quoizel, the insured in *Bijan* conceived and designed the merchandise it sold, selected the materials from which it was made and provided detailed specifications for its

manufacture (*id.* at 50). Nevertheless, the actual physical production of the clothing involved in *Bijan* was carried out by factory operators that contracted with the insured (*id.*). *Bijan* is also similar to the case now before us because title to the goods did not pass to the insured until they were received with an accompanying invoice (*id.*).

Quoizel argues that the instant policy is ambiguous because a Hartford employee stated in an internal email that he was uncertain as to whether the subject claim should be adjusted on the basis of cost or selling price. As I note above, the key word "manufactured," as used in the policy before us, is clear and unambiguous and must be given its ordinary meaning (*see United States Fid. & Guar. Co.*, 67 NY2d at 232). Therefore, extrinsic evidence of what the parties understood, such as the email that Quoizel relies upon, is irrelevant and insufficient to create an issue of fact (*see Katz v American Mayflower Life Ins. Co. of N.Y.*, 14 AD3d 195, 200 [1st Dept 2004], *affd* 5 NY3d 561 [2005]).

Finally, there is also no merit to Quoizel's claim that the damaged inventory should be valued at its selling price because each piece of inventory consisted of component parts. As stated above, the value Quoizel seeks applies to component parts

manufactured by others that *will* become parts of finished products. Accordingly, Quoizel cannot obtain the requested value for products that are already completed, even if the products' component parts were manufactured by others.

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

ENTERED: JANUARY 17, 2013

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8207 James L. Melcher, Index 650188/07
Plaintiff-Respondent,

-against-

Greenberg Traurig, LLP, et al.,
Defendants-Appellants.

Simpson Thacher & Bartlett LLP, New York (Roy L. Reardon of counsel), for appellants.

Jeffrey A. Jannuzzo, New York, for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 14, 2011, which denied defendants' motion to dismiss the complaint on statute of limitations grounds, reversed on the law, without costs, the motion granted and the amended complaint dismissed in its entirety. The Clerk is directed to enter judgment accordingly.

This action was commenced on June 25, 2007. Plaintiff's sole cause of action is based on Judiciary Law § 487, which provides for an award of treble damages to an injured party where an attorney "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . ." At all relevant times, defendant Greenberg Traurig, LLP (GT) and Leslie Corwin, a partner therein, were the

attorneys for Apollo Medical Fund Management L.L.C. and its principal, Brandon Fradd, in an action that plaintiff brought against them in 2003 (the Apollo Management action). Plaintiff brought the Apollo Management action to recover his membership share of profits under Apollo's 1998 operating agreement.

In the instant complaint, it is alleged that at a January 27, 2004 meeting, Corwin represented to plaintiff and his counsel that plaintiff's case lacked merit because his membership rights to a share of Apollo's profits had been drastically diminished by a purported May 21, 1998 amendment of the operating agreement. Corwin told plaintiff and his counsel that he personally confirmed the authenticity of the amendment with Jack Governale, the lawyer said to have drafted it. The amended complaint describes this January 27, 2004 statement it attributes to Corwin as "an outright lie." Plaintiff alleges that at the meeting and by letter faxed the same day, his counsel requested that defendants make the signed original of the claimed amendment available for forensic chemical testing that would have enabled plaintiff's experts to determine the time frame when any ink found on the document was applied. As stated in the amended complaint, chemical testing would have established to a scientific certainty that the purported amendment was a "back-

dated forgery."

According to the amended complaint, Fradd informed Corwin by email dated February 1, 2004, that he had accidentally set fire to the two-page amendment while making tea. Specifically, Fradd allegedly advised Corwin that the top page had been destroyed and the bottom page singed. Nevertheless, on February 17, 2004, GT and Corwin made a motion on behalf of their clients for an order dismissing the Apollo Management complaint pursuant to CPLR 3211 (a)(1) on the basis of a defense founded upon documentary evidence consisting of the purported amendment of the operating agreement. This motion was made while plaintiff's February 5, 2004 motion to compel the production of the claimed original amendment was sub judice. On the February 23, 2004 hearing date of plaintiff's motion to compel, Corwin allegedly represented to the motion court that he was holding the original of the amendment in escrow but did not disclose to the court the burning that had been reported by Fradd. The amended complaint alleges that

> "[d]efendants made the false and misleading statement to the Supreme Court that they were holding the originals 'in escrow' to mislead the Supreme Court that the document was safe and had not been tampered with, when the truth was the opposite. Defendants falsely and misleadingly represented to the Supreme Court that they were holding the originals 'in escrow' with intent

> to deceive, to prevent the Supreme Court and plaintiff from ever discovering that the 'amendment' had been burned under highly suspicious circumstances, that the files of the law firm that supposedly drafted it contained no evidence that it ever existed, and that the lawyers who supposedly drafted it had no knowledge of it."

An "action to recover upon a liability, penalty or forfeiture created or imposed by statute . . ." must be commenced within three years (CPLR 214[2]). A cause of action under Judiciary Law § 487 is purely statutory in nature and therefore subject to the three-year statute of limitations. Judiciary Law § 487 "is a unique statute of ancient origin in the criminal law of England" (*Amalfitano v Rosenberg*, 12 NY3d 8, 14 [2009]).

The next question is when plaintiff's cause of action accrued. An action seeking damages under Judiciary Law § 487 must be commenced within the longer of three years from the time of the underlying deceit or collusion or within two years from the time the deceit or collusion was discovered, or with reasonable diligence, could have been discovered (CPLR 214[2]; *see* CPLR 203[g]; *cf. Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]). Accordingly, there is no merit to plaintiff's argument that the statute of limitations does not begin to run until the conclusion of the underlying case. As the motion court correctly found, plaintiff knew of GT's and Corwin's alleged deceit

concerning Fradd's destruction of the purported amendment more than three years before this action was commenced. Specifically, by letter to the motion court dated March 20, 2004, plaintiff's counsel complained of "the defendants' concealment of material facts and misleading representations" in connection with the aforementioned motion to compel the production of the original document. In the letter, plaintiff's counsel acknowledged that on March 18, 2004, he was made aware of Fradd's claimed destruction of the original first page of the purported two-page amendment. Plaintiff's counsel also noted that at the February 23, 2004 hearing, Corwin assured the court that he had the original amendment in his personal possession while concealing the information about Fradd's claimed destruction of the document. The letter also accused GT and Corwin of misleading plaintiff about the fact that they had hired their own ink testing expert. The letter further suggested that GT and Corwin deceived their ink chemistry expert by having him unwittingly render a report on his examination of a photocopy that was apparently passed off to him as the supposed original amendment of the operating agreement.

We do not share the dissent's footnoted view that plaintiff's March 20, 2004 letter did not accuse GT and Corwin of

collusion or deceit under Judiciary Law § 487 because it merely spoke of concealment on their part. On the contrary, the then-existing Code of Professional Responsibility DR 7-102(a)(3) (formerly 22 NYCRR 1200.33[a][3]) imposed upon attorneys, as officers of the court, an obligation to disclose crucial information to a tribunal (*see Schindler v Issler & Schrage, P.C.*, 262 AD2d 226, 228-229 [1st Dept 1999], *lv dismissed* 94 NY2d 791 [1999]). An attorney's withholding of crucial information from a court falls within the proscription of Judiciary Law § 487 (*id.*). Stated differently, an attorney's concealment from a court of a fact he or she is required by law to disclose is tantamount to the assertion of a false material fact (*see Matter of Shearer*, 94 AD3d 128 [1st Dept 2012]. Accordingly, Corwin's concealment from the court of information regarding the claimed incineration of the purported document upon which he based his clients' motion to dismiss the Apollo Management complaint was actionable under the statute. Notwithstanding the dissent's position, for purposes of Judiciary Law § 487, it does not matter whether the concealed information would "have altered the determination of defendants' motion to dismiss . . ." The statute's application is not limited to successful deceits (*Amalfitano v Rosenberg*, 12 NY3d at 11-14). That is because the

statute's "evident intent" is "to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function" (*id.* at 14). Therefore, the concealment recounted in plaintiff's March 20, 2004 letter would have constituted a significant breach of Corwin's duty as an attorney. This action is time-barred by reason of plaintiff's admitted awareness of the alleged concealment for more than three years before he filed suit.

We also reject plaintiff's argument that the accrual date was extended by GT's and Corwin's subsequent alleged cover-up of their deceit on the court. Within the analogous context of a fraud action, this Court held:

> "A new cause of action for fraud does not accrue each time a plaintiff discovers new elements of fraud in a transaction or new evidence to prove such fraud. Where there is knowledge of facts sufficient to suggest to a person of ordinary intelligence the probability that he [or she] has been defrauded, a duty of inquiry arises, and may thus start the running of the statute" (*Augstein v Levey*, 3 AD2d 595, 599 [1st Dept 1957], *affd* 4 NY2d 791 [1958] [internal quotation marks and citation omitted]).

The accrual date was not extended here because, as noted above, plaintiff was aware of the basic facts relative to defendants' alleged deceit more than three years before this action was commenced. For the same reason, we find that the motion court

erroneously determined that GT and Corwin were equitably estopped from asserting the statute of limitations as a defense. The doctrine of equitable estoppel does not apply here because plaintiff has not met the fundamental requirement of establishing that subsequent and specific actions by defendants somehow kept him from timely bringing suit (*see Corsello v Verizon New York*, 18 NY3d 777, 789 [2012]). Equitable estoppel is inapplicable for the additional reason that plaintiff does not allege an act of deception separate and apart from the ones upon which he sues (*id.*)

All concur except Freedman and Román, JJ. who dissent in a memorandum by Román, J. as follows:

ROMÁN, J. (dissenting)

Because I believe that plaintiff's cause of action pursuant to Judiciary Law § 487 accrued within the three year statute of limitations prescribed by CPLR § 214(2), this action was timely commenced, the motion court properly denied defendants' motion to dismiss, and therefore I dissent.

Pursuant to Judiciary Law § 487 an attorney who engages in "deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . [i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action." While we previously held that a cause of action pursuant to Judiciary Law § 487 did not give rise to "a unique form of liability unknown at common law," and was thus governed by a six-year statute of limitations (*Guardian Life Ins. Co. of Am. v Handel*, 190 AD2d 57, 62-63 [1st Dept 1993]), it is now well settled that Judiciary Law § 487 "is not a codification of a common-law cause of action for fraud. Rather, section 487 is a unique statute of ancient origin in the criminal law of England" (*Amalfitano v Rosenberg*, 12 NY3d 8, 14 [2009]). Accordingly, pursuant to CPLR § 214(2), a cause of action pursuant to Judiciary Law § 487 is "an action to

recover upon liability, penalty or forfeiture created or imposed by statute," and is thus governed by a three-year statute of limitations.

Here, plaintiff's complaint, the allegations of which must be taken as true on a motion to dismiss *(Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 [1998]), alleges many instances of deceit by Brandon Fradd, a principal of Apollo Management Medical Fund, L.L.C., e.g., the intentional destruction of evidence by burning the amendment which purportedly diminished plaintiff's share of Apollo Management's profits. However, according to the complaint, actual deceit by defendant Leslie D. Corwin, legal counsel to Fradd and Apollo Management, giving rise to plaintiff's cause of action pursuant to Judiciary Law §487, first occurred on January 27, 2004. On that date, Corwin, in the course of representing Fradd and Apollo Management, stated that he had contacted Jack Governale, prior counsel to Apollo Management, and had personally confirmed that the amendment that diminished plaintiff's share of Apollo Management's profits was

authentic and had in fact been drafted by Governale. According to the complaint, however, plaintiff did not become aware that Corwin's assertions were false until December 7, 2005 when Governale was deposed and testified that he knew nothing about the amendment at issue and that his files contained no indication of any such amendment. Plaintiff pleads that when Governale denied drafting the amendment, it then became clear that Corwin could not have verified the amendment's authenticity with Governale as he previously represented and that therefore, Corwin, with his statements on January 27, 2004, had deceived him.

"A cause of action accrues, for the purpose of measuring the period of limitations, when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court" *(Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 221 [1996] [internal quotation marks omitted]). Accordingly, given the allegations in the complaint, plaintiff's cause of action could not have accrued

until December 7, 2005[2]. While Corwin's representation on January 27, 2004 was allegedly subterfuge, which violated Judiciary Law § 487, plaintiff did not become aware of this alleged deception until December 7, 2005, when Governale was deposed. Therefore, it was not until this date, when all the facts necessary to a cause of action pursuant to Judiciary Law §487 were known that plaintiff's cause of action accrued. Specifically, it was on that date that the realization that plaintiff had been deceived by Corwin occurred. Because "[a]n action is commenced by filing a summons and complaint or summons with notice (CPLR 304)," plaintiff, who filed his summons with notice on June 25, 2007, less than two years after his cause of action against defendants accrued, timely commenced this action. Defendants' motion to dismiss was therefore properly denied.

While I agree with the majority's assertion that silence on

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[2] Contrary to the majority's assertion, a letter to the court by plaintiff's counsel dated March 20, 2004, did not accuse the defendants of collusion or deceit under Judiciary Law § 487. Instead, the letter only accused Fradd and Apollo Management of concealment in connection with an already submitted motion to dismiss and merely accused the defendants of omissions to the court in connection therewith. Accordingly, these facts do not, as argued by defendants, evince that plaintiff was aware of defendants' deception as early as March 20, 2004 so as to constitute accrual of his cause of action pursuant to Judiciary Law § 487.

certain issues may very well constitute fraudulent concealment such that an attorney who knowingly withholds crucial information from the court violates Judiciary Law § 487 (*Schindler v Issler & Schrage, P.C.*, 262 AD2d 226, 229 [1st Dept 1999], *lv dismissed* 94 NY2d 791 [1999]), I disagree that defendants' failure to apprise the court that the agreement at issue had been destroyed was crucial information such that the failure to disclose violated Judiciary Law § 487.

The facts here and those in *Schindler* are inapposite. In *Schindler*, the defendant, an attorney, who represented a client in a declaratory judgment action regarding money held in a bank account, violated Judiciary Law § 487 by failing to advise the court that the client had already been held in contempt by another court for withdrawing the very money at issue and that a judgment had been issued against the client for those sums (*id.* at 227). Certainly, this information, a prior order from another court, was crucial and would likely have been dispositive to the court in the declaratory judgment action. Thus, the failure to disclose this information to the court was, insofar as designed to alter the outcome of the litigation, fraudulent concealment in violation of Judiciary Law § 487.

By contrast, here, the allegations against defendants in

plaintiff's counsel's letter dated March 24, 2004 merely accused them of failing to voluntarily disclose that an original document had been destroyed. While this document was indeed the crux of the action brought by plaintiff against Fradd and Apollo Management, defendants were under no legal obligation to disclose that it had been destroyed at that particular juncture. Certainly nothing in the CPLR required the voluntary disclosure of this information. Moreover, since the CPLR does not require the submission of original documents on a motion to dismiss, any claim that the failure to disclose here was, as in *Schindler*, designed to affect the outcome of the already submitted motion is baseless. Thus, because, here, absent a direct inquiry, defendants had no obligation to affirmatively disclose or volunteer that the original agreement had been destroyed by Fradd, any claim of fraudulent concealment stemming from the

aforementioned failure to disclose is baseless and therefore plaintiff's claim pursuant to Judiciary Law §487 could not have accrued, as asserted by the majority, on March 20, 2004. Accordingly, I would affirm the motion court's decision.

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

ENTERED: JANUARY 17, 2013

CLERK

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

8379 Hector Cuentas, Index 114780/09
Plaintiff-Respondent, 591135/10

-against-

Sephora USA, Inc., et al.,
Defendants-Appellants.

[And Another Action]

Biedermann Hoenig Semprevivo, New York (Edward O'Toole of counsel), for appellants.

Larry Dorman, P.C., Astoria (Michael S. Murphy of counsel), for respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered September 15, 2011, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), unanimously affirmed, without costs.

In evaluating a claim under Labor Law § 240(1), "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). "It is well settled that failure to properly secure a ladder to insure that it remains steady and erect while being

used constitutes a violation of Labor Law § 240(1)" (*Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381, 381 [1st Dept 1996]). Plaintiff's testimony that the ladder he was using was both unsteady as he was ascending it and too short to enable him to reach the window he was cleaning establishes prima facie that defendants failed to provide him with an adequate safety device under Labor Law § 240(1) and that their failure proximately caused his injuries (*see Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]).

To rebut plaintiff's prima facie case, defendants assert that plaintiff was negligent because he was on top of the ladder. However, because plaintiff has established that no adequate safety device was provided, his own "[n]egligence, if any, . . . is of no consequence" (*id.*, quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *see also Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592, 593 [1st Dept 2010] [holding that where plaintiff's negligence is, at most, only a concurrent cause of the accident, it is not a defense to liability under Labor Law § 240 and will not defeat plaintiff's motion]). Thus, plaintiff's case is distinguishable from those cases in which an adequate ladder was provided and there are issues of fact as to whether the accident occurred solely because

of the plaintiff's loss of balance while using the ladder (*see Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012] ["Defendants would not be subject to statutory liability if plaintiff simply lost his footing while climbing a properly secured, non-defective extension ladder that did not malfunction"]; *Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462 [1st Dept 2007]). In any event, since plaintiff's use of the ladder was consistent with his employer's instructions, any negligence on his part cannot be deemed to be the sole proximate cause (*see Harris v City of New York*, 83 AD3d 104, 110-111 [1st Dept 2011]; *Romanczuk*, 72 AD3d at 592-593).

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

ENTERED: JANUARY 17, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet Daniels, JJ.

7386-
7387 The People of the State of New York, Ind. 2379/07
Respondent,

-against-

Anthony Lewis,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Maxwell T. Wiley, J.), rendered July 30, 2009, as amended May 10, 2011, convicting defendant, after a jury trial, of grand larceny in the third degree (two counts), grand larceny in the fourth degree (three counts), criminal possession of a forged instrument in the second degree (eight counts), identity theft in the first degree (five counts), scheme to defraud in the first degree and criminal possession of forgery devices, and sentencing him to an aggregate term of 9⅓ to 28 years, unanimously affirmed.

During the investigation, the police, without obtaining a warrant, attached a global positioning system (GPS) to defendant's car that provided defendant's location at the moment

information was requested. This case was tried a few weeks before the Court of Appeals decided *People v Weaver* (12 NY3d 433 [2009]), which deals with the legality, under the New York Constitution, of prolonged warrantless use of GPS devices.

Defendant argues that the trial court should have granted his motion to set aside the verdict, at least to the extent of granting a suppression hearing regarding evidence derived from the use of the GPS device. In the alternative, he argues that his attorney rendered ineffective assistance by failing to preserve the issue of the constitutionality of the GPS surveillance.

We conclude that the very limited GPS surveillance in this case was permissible under *Weaver*. The device was attached to defendant's car for approximately three weeks, and was functional for only two of them. Unlike the sophisticated device in *Weaver*, which permitted the police to record all manner of information and to retrieve stored information, it did not track defendant continuously. Rather, reports indicate that the device was only accessed by the police on two days to enhance their visual surveillance.

In any event, regardless of whether the surveillance violated state law, or whether the mere attachment of a GPS

device to defendant's car violated federal constitutional law (*see United States v Jones*, __US__, 132 S Ct 945 [Jan 23, 2012]), we find any error to be harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Evidence derived from the use of the GPS device played a minimal role in the prosecution's overwhelming case. The device was mentioned during testimony at trial in connection with surveillance relating to one day. As to that day, a detective testified that he did not rely solely on the GPS to locate defendant. Other evidence also established defendant's involvement in the crimes at the various stores to which the police followed him, including the testimony of various employees and surveillance tapes, which would not be suppressible as the fruit of the warrantless use of a GPS device (*see People v Mendez*, 28 NY2d 94, 100 [1971], *cert denied* 405 US 911 [1971]). Accordingly, regardless of whether defendant's attorney should have made a timely challenge to the GPS-derived evidence, defendant has not established that he was prejudiced by that omission (*see Strickland v Washington*, 466 US 668, 694 [1984]; *see also People v Benevento*, 91 NY2d 708, 714 [2008]). Furthermore, an attorney is not ineffective for failing to anticipate a change in the law (*see People v Sanchez*, 76 AD3d 122, 130 [1st Dept 2010], *lv denied* 15 NY3d 855 [2010]; *People v*

Brisson, 68 AD3d 1544, 1547 [3d Dept 2009], *lv denied* 14 NY3d 798 [2010]).

Defendant asserts that his grand larceny convictions were against the weight of the evidence. Defendant argues that, as to each of these counts, the evidence failed to establish a larceny from the particular bank or merchant designated as the victim.

This Court "is constrained to weigh the evidence in light of the elements of the crime as charged without objection by defendant" (*People v Noble*, 86 NY2d 814, 815 [1995]). Viewing the evidence in light of the charge, we find that the verdicts at issue were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). To the extent defendant is also claiming that the evidence was legally insufficient to establish his guilt beyond a reasonable doubt, thereby violating his right to due process, or is challenging the court's jury instructions, we find those claims to be unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

Defendant argues that the court violated his constitutional rights by denying his objections to wearing jail-issued orange shoes at trial. Preliminarily, defendant has not preserved his claim that the shoes impinged on his right to testify and we

decline to review it in the interest of justice. When the court asked defendant if he intended to testify, he simply declined. Defendant did not alert the court to his alleged reason for not testifying until deliberations had already commenced (*see People v Narayan*, 54 NY2d 106, 113 [1981]).

The remainder of this claim is without merit. The court stated its belief that the jurors could not see defendant's footwear from the jury box, and neither defense counsel nor defendant contradicted this assertion. The court also directed counsel to position his briefcase so as to block the jury's view, and noted on another occasion that boxes and a cart blocked the jury's view. Defendant was otherwise dressed in civilian clothing and the court observed that the shoes did not have prison markings, but looked like slip-on Converse sneakers, although not as nice (*see People v Johnston*, 43 AD3d 1273 [4th Dept 2007], *lv denied* 9 NY3d 1007 [2007]; *People v Oliveri*, 29 AD3d 330, 332 [1st Dept 2006], *lv denied* 7 NY3d 760 [2006]). Moreover, the court twice offered to sign orders to compel the Department of Corrections to permit defendant to wear his own shoes, but defendant never followed through on the court's attempt to remedy the problem. Nor did defendant seek an alternative means of obtaining non-prison shoes, such as having a

family member bring a pair of shoes to the courtroom.

Defendant's argument that the verdict sheet did not comport with the requirements of CPL 310.20(2) because the court listed crime locations (the stores), rather than the victims (the banks and cardholders), with respect to certain counts is without merit. CPL 310.20(2) provides in relevant part:

> "Whenever the court submits two or more counts charging offenses set forth in the same article of the law, the court may set forth the dates, names of complainants or specific statutory language, without defining the terms, by which the counts may be distinguished; provided, however, that the court shall instruct the jury in its charge that the sole purpose of the notations is to distinguish between counts."

In *People v Miller* (18 NY3d 704, 706 [2012]), the Court of Appeals held that in a criminal case, "[n]othing of substance can be included [in the verdict sheet] that the statute does not authorize." The names of the stores are neither "statutory text" nor "elements of the crimes charged" and simply distinguished the various counts from each other (*see People v McCallum*, 96 AD3d 1638, 1640 [4th Dept 2012] [internal quotation marks omitted]; *People v Evans*, 259 AD2d 629 [2d Dept 1999], *lv denied* 93 NY3d 924 [1999]).

The stores were proxies for the complainants in that they are victims of defendant's fraudulent use of the credit cards,

even if they do not bear the ultimate loss. The larceny statute does not define the crime with respect to a specific "victim," but instead requires proof that property was wrongfully taken from its "owner," meaning anyone with rights superior to those of the taker (*see* Penal Law §§ 155.00[5]; 155.05[1]). Defendant used the forged cards to obtain goods that he did not intend to pay for from the stores. Even though the stores may have been reimbursed by the bank, they nonetheless were affected by defendant's conduct. This interpretation of the statute is consistent with the legislative intent of the amendments to CPL 310.20(2) (*see e.g.* Mem of Off of Ct. Admin No. 64, 2002 NY Legis Ann, at 338-339 [amendment allows a court to "include on the verdict sheet relevant information to assist the jury in distinguishing among the counts" and ensures that "juries would receive the information they need to distinguish among multiple counts in a broader array of cases"]).

We perceive no basis for reducing the sentence. To the extent defendant is arguing that he is entitled to an unspecified

reduction as a matter of law, that argument is without merit.

We have considered and rejected defendant's remaining claims.

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

ENTERED: JANUARY 17, 2013

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7949 QBE Insurance Corporation, Index 11485/10
Plaintiff-Respondent,

-against-

Jinx-Proof Inc., doing business
as Beauty Bar, et al.,
Defendants-Appellants,

Garrett Alarcon,
Defendant.

Devitt Spellman Barrett, LLP, Smithtown (John M. Denby of counsel), for Jinx-Proof Inc., appellant.

Zalman Schnurman Miner, P.C., New York (Marc H. Miner of counsel), for Vera Hendrix, appellant.

Thomas M. Bona, P.C., White Plains (Anthony M. Napoli of counsel), for respondent.

Order, Supreme Court, New York County (Salliann Scarpulla, J.), entered August 17, 2011, which granted plaintiff's motion for summary judgment declaring that it is not obligated to defend defendant Jinx-Proof, Inc. in the underlying action, and denied Jinx-Proof's motion for summary judgment dismissing the complaint as against it, modified, on the law, to declare that plaintiff is not obligated to defendant Jinx-Proof in the underlying action, and otherwise affirmed, without costs.

Friedman and Román, JJ., concur in a separate memorandum by Friedman, J.; Sweeny and Manzanet-Daniels, JJ. concur in a separate memorandum by Manzanet-Daniels, J.; and Andrias, J. dissents in a memorandum, as follows:

FRIEDMAN, J. (concurring)

While the relevant facts are more fully set forth in Justice Manzanet-Daniels's concurring writing, what I find conclusive for the determination of this appeal are the following undisputed points: (1) the liability policy issued by plaintiff QBE Insurance Corporation to defendant Jinx-Proof Inc. contained an assault-and-battery exclusion; (2) in early 2008, when QBE issued the two letters to Jinx-Proof (quoted in pertinent part by Justice Manzanet-Daniels) on which QBE now relies in disclaiming any further duty to defend or indemnify with regard to the underlying barroom incident, the negligence and Dram Shop Act claims potentially covered by the QBE policy (in addition to an assault claim within the exclusion) were still pending against Jinx-Proof in the underlying personal injury action; and (3) in April 2010, the court in the underlying action dismissed the negligence and Dram Shop Act claims, which left pending against Jinx-Proof only the assault claim clearly within the QBE policy's assault-and-battery exclusion. On these undisputed facts, QBE is entitled to a declaration that, now that all potentially covered claims in the underlying action have been dismissed, it has no further duty to defend or indemnify Jinx-Proof in that lawsuit.

I emphasize that my vote in favor of the insurer's position

under the particular circumstances of this case does not mean that an insurer is generally permitted to assume the defense of a case under a purported reservation of the right to disclaim liability or deny coverage as to any claim at a later time.[3] Rather, in this particular case, QBE's use of the term "reservation of rights" in the letters upon which it relies should not be deemed to negate its otherwise clear and unambiguous disclaimer of coverage of claims falling within the policy's assault-and-battery exclusion because, at the time the letters were issued, QBE was, in fact, obligated to defend even claims falling within that exclusion, and had no right simply to wash its hands of such claims by issuing a disclaimer.[4]

To reiterate, in early 2008, when the letters on which QBE relies were issued, negligence and Dram Shop Act claims

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[3]Generally, with respect to a claim arising from death or bodily injury, a liability insurer is required to give the insured written notice of a disclaimer of liability or denial of coverage "as soon as is reasonably possible" (Insurance Law § 3420[d][2]), and the time within which to issue such a disclaimer or denial cannot be extended by reserving the right to do so in the future (*see Allstate Ins. Co. v Gross*, 27 NY2d 263 [1970]).

[4]QBE relies on two letters, one issued three days after it received notice of the claim from Jinx-Proof and the other issued 29 days after it received such notice. Since the first letter was clearly timely, I see no need to address the timeliness of the second letter.

potentially covered by the subject policy were still pending against Jinx-Proof in the underlying action. In view of the broad allegations supporting those claims, it cannot be said that the pleading in the underlying action is "cast . . . solely and entirely within the [assault-and-battery] policy exclusion[], and . . . that the allegations, *in toto*, are subject to no other interpretation" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotation marks omitted]). Accordingly, while those negligence claims potentially within the scope of its coverage were pending, QBE was obligated to defend Jinx-Proof in the underlying action, given that an insurer's duty to defend is "broader than its duty to indemnify" (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011]) and that the duty to defend "arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (*id.* [internal quotation marks omitted]). Moreover, and most critically here, QBE's duty to defend, while it was in effect, extended even to claims that fell within the assault-and-battery exclusion (for which it would have no duty to indemnify). As the Court of Appeals has explained, "if *any* of the claims against an insured arguably arise from covered events, the insurer is

required to defend the entire action" (*id.* [internal quotation marks omitted]), and "[i]t is immaterial that the complaint against the insured asserts additional claims which fall outside the policy's general coverage" (*id.* at 265 [internal quotation marks omitted]).

In view of the foregoing principles, because the complaint in the underlying action pleaded claims against the insured potentially within the scope of QBE's coverage, QBE was obligated to defend the entire action — including claims within the scope of the assault-and-battery exclusion — until the potentially covered claims were dismissed. Thus, at the time Jinx-Proof tendered its defense to QBE, QBE had no right simply to disclaim any duty with regard to the claims falling within the scope of the exclusion. This being the case, QBE had no choice, upon tender of Jinx-Proof's defense, but to reserve its right to invoke the assault-and-battery exclusion at such future time as it might become entitled to do so. Once the potentially covered claims were dismissed, QBE had no further obligations to Jinx-Proof with respect to the remaining claims against it, all of which fall within the exclusion, which QBE had timely invoked upon tender of the claim. Accordingly, Supreme Court correctly granted QBE's motion for summary judgment declaring its duty to

defend and indemnify Jinx-Proof to be at an end. I note that we are modifying the order appealed from only to issue the declaration to which QBE is entitled.

MANZANET-DANIELS, J. (concurring)

Plaintiff, Jinx-Proof's insurer, adequately disclaimed coverage based on the policy exclusion for assault and battery. I would therefore affirm the order.

It is undisputed that the event giving rise to Hendrix's injuries and Jinx-Proof's alleged liability was an assault on the premises of the bar owned by Jinx-Proof. Hendrix instituted suit against Jinx-Proof and individuals involved in the alleged assault in December 2007. Jinx-Proof notified plaintiff of the suit on January 28, 2008. Three days later, by letter dated January 31, 2008, plaintiff's claims administrator responded:

> "This company will promptly and diligently attempt to ascertain factual information to help us in establishing if this late notice has in any way handicapped our ability to investigate and defend this claim ... As soon as we can obtain the information, you will be notified of our decision.
>
> "Furthermore, we are making this reservation of rights because your policy specifically excludes coverage for actions and proceedings to recover damages for bodily injuries arising from assault and batteries.... Consequently... *QBE Insurance Company will not be defending or indemnifying you under the General Liability portion of the policy for the assault and battery allegations. Accordingly, we suggest that you consult an attorney in order to protect your interests and provide a defense for the assault and battery claim*"(emphasis added).

On February, 26, 2008, plaintiff's claims administrator sent another letter to its insured, stating:

> "[W]e are defending this matter under the Liquor Liability portion of the CGL coverage, and under strict reservation of rights for allegations of Assault and Battery. Your policy excludes coverage for assault and battery claims.... Therefore, should this matter proceed to verdict, any awards by the Court stemming from allegations of Assault and Battery will not be covered under your Commercial General Liability policy."

Thereafter, upon defendants' motion for partial summary judgment in the underlying action, the court dismissed Hendrix's claims against Jinx-Proof for negligent hiring, supervision and training, and violation of the Dram Shop Act. The order was never appealed.

Plaintiff, on November 15, 2010, commenced this action seeking a declaration that it was not obligated to defend or indemnify Jinx-Proof and Hendrix in the underlying action. The court granted plaintiff's motion for a declaration that it was not obligated to defend or indemnify Hendrix and Jinx-Proof, finding that "the underlying incident ... falls within the assault and battery exclusion of the insurance policy" and that the January 31, 2008 and February 26, 2008 letters served as effective written notices of disclaimer.

I would affirm. The disclaimers, issued three days and one month after receipt of notice from the insured, were timely. Moreover, the letters, taken individually and collectively, apprised the insured in no uncertain terms that coverage was barred by the assault and battery exclusion contained in the policy.[1] Although "reservation of rights" language may have appeared in the letters, the letters clearly state that "QBE Insurance Company will not be defending or indemnifying you under the General Liability portion of the policy for the assault and battery allegations," and "should this matter proceed to verdict, any awards by the Court stemming from allegations of Assault and

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[1]To the extent any negligence claims survive, they, too, arose from the assault and are subject to the assault and battery exclusion (*see Metalios v Tower Ins. Co. of N.Y.*, 77 AD3d 471 [1st Dept 2010] [citing *Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 353 [1996] [assault and battery exclusion bars claims for negligence where no cause of action would exist "but for" an assault, and notwithstanding fact that a third party not employed by the owner of the establishment had perpetrated the assault]). The exclusion, by its terms, "applies regardless of the degree of culpability or intent," and "without regard to 1. [w]hether the acts are alleged to be by or at the instruction or at the direction of the insured, his officers, employees, agents or servants; or by any other person lawfully or otherwise on, at or near the premises owned or occupied by the insured; or by any other person; 2. [t]he alleged failure of the insured or his officers, employees, agents or servants in the hiring, supervision, retention or control of any person...; 3. [t]he alleged failure of the insured or his officers, employees, agents or servants to attempt to prevent, bar or halt any such conduct."

Battery will not be covered under your Commercial General Liability policy." Such statements cannot be construed by a reasonable person as anything other than a disclaimer of coverage on the ground of the exclusion for assault and battery. Notwithstanding the allegedly "contradictory" language, the letters "specifically disclaimed coverage and sufficiently informed the defendants [of the basis for] the disclaimer" (*see Blue Ridge Ins. Co. v Jiminez*, 7 AD3d 652 [2004] [disclaimer effective notwithstanding fact that letter purported to reserve rights as well as to disclaim coverage]).[2]

Further, no reasonable person would have an expectation of coverage under the circumstances. Liability policies, in accordance with public policy, indemnify persons for the unexpected and unforeseen consequences of negligent acts; they do

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[2]The dissent's discussion of informal judicial omissions misses the point. As the case relied on by the dissent notes, an informal judicial omission is a "*fact[]* incidentally admitted during the trial or in some other judicial proceeding" (*Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 103 [1996] [citing Prince, Richardson on Evidence, § 8-219, at 529 [Farrell 11th ed]). Whether plaintiff's letter constituted a sufficient disclaimer is, of course, a legal question (*compare Union Indem. Ins. Co.*, 89 NY2d at 103 [misrepresentations concerning operations and financial condition of company admissible as informal judicial admissions]; *Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673, 673-674 [1st Dept 2010] [admission that company was agent for a party to the litigation]).

not afford coverage for intentional acts. It is not even clear, under the circumstances of this case, whether a disclaimer was necessary, given that an intentional act would not constitute an "occurrence" within the meaning of the policy. An "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general or harmful conditions." In any event, to the extent a disclaimer was necessary, the January 31, 2008 and February 26, 2008 letters sufficiently disclaimed coverage. Since no coverage exists under the policy, plaintiff is under no duty to defend or indemnify, and the order appealed from should be affirmed.

ANDRIAS, J.P. (dissenting)

I do not believe that either plaintiff-insurer's January 31, 2008 or February 26, 2008 letters, both of which plaintiff styled as a reservation of rights, may serve as an effective written notice of disclaimer of coverage of the assault and battery based claims against defendant Jinx-Proof in the underlying litigation. Therefore, I dissent and would modify the order on appeal to deny plaintiff's motion for summary judgment and to declare that plaintiff is obligated to defend Jinx-Proof in the underlying action.

Defendant Vera Hendrix commenced the underlying action to recover for injuries she allegedly sustained on August 25, 2007, when, during an altercation in a bar, defendant Garret Alarcon, a security guard employed by Jinx-Proof, threw a glass at her face. Plaintiff initially undertook the defense of the underlying litigation pursuant to a commercial general liability (GCL) policy it issued to Jinx-Proof. In November 2010, after Hendrix's negligent hiring and supervision and Dram Shop Act claims in the underlying action were dismissed, it commenced this action seeking a declaration that it is not obligated to defend or indemnify any of the defendants on the surviving claims, based on an assault and battery exclusion contained in the policy.

A "disclaimer pursuant to [Insurance Law §] 3420(d) is necessary when denial of coverage is based on a policy exclusion without which the claim would be covered" (*Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188-189 [2000]). "[O]nce the insurer has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage, it must notify the policyholder in writing as soon as is reasonably possible" (*First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 66 [2003]). A "[f]ailure to comply with section 3420(d) precludes denial of coverage based on a policy exclusion" (*Worcester Ins. Co.*, 95 NY2d at 189), "even if that ground would otherwise have merit" (*Adames v Nationwide Mut. Fire Ins. Co.*, 55 AD3d 513, 515 [2nd Dept 2008]).

Supreme Court correctly determined that the GCL policy would have provided the claimed coverage but for the assault and battery exclusion and that therefore a timely disclaimer was necessary (*see Penn-America Group v Zoobar*, 305 AD2d 1116 [4th Dept 2003], *lv denied* 100 NY2d 511 [2003]; *Columbia Cas. Co. v. National Emergency Servs.*, 282 AD2d 346 [1st Dept 2001]). However, the court erred when it found that plaintiff's January 31, 2008 and February 26, 2008 reservation of rights letters served as effective written notices of disclaimer.

A notice of disclaimer should be “unequivocal and unambiguous written notice, properly served” (*Norfolk & Dedham Mut. Fire Ins. Co. v Petrizzi*, 121 AD2d 276, 277 [1st Dept 1986], *lv denied* 68 NY2d 611 [1986]). “A reservation of rights letter may be used to rebut a claim that the carrier waived the right to disclaim by defending its insured” (*New York Cent. Mut. Fire Ins. Co. v Hildreth*, 40 AD3d 602, 606 [2nd Dept 2007]), but it does not qualify as a timely disclaimer and "has no relevance to the question whether the insurer has timely sent a notice of disclaimer of liability or denial of coverage" (*Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1029 [1979]; *see also NYAT Operating Corp. v GAN Nat’l Ins. Co.*, 46 AD3d 287, 288 [1st Dept 2007], *lv denied* 10 NY3d 715 [2008]).

By its own terms, the January 31, 2008 letter is clearly a reservation of the right to disclaim, not a disclaimer. In the letter, plaintiff advised Jinx-Proof that “[b]ased on the information presently available to us, *it is possible* your policy with our company may not provide coverage,” and that “*we are making this reservation of rights* because your policy specifically excludes coverage for actions and proceedings to recover damages for bodily injuries arising from assault and batteries” (emphasis added). Thus, plaintiff did not

definitively disclaim coverage, but rather reserved its right to do so.

In the February 26, 2008 letter, plaintiff confirmed that the January 31, 2008 letter was a reservation of rights, stating that "[a]s previously stated in our Reservation of right letter to you dated January 31, 2008 we are defending this matter under the Liquor Liability portion of the CGL coverage, and under strict reservation of rights for allegations of Assault and Battery." In its verified complaint, plaintiff describes the February 26, 2008 letter as a "reservation of rights letter"; this constitutes a formal judicial admission (*see e.g. Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673, 673-674 [2010]). In addition, plaintiff's counsel's affidavit stating that plaintiff "did not issue a denial" constitutes an informal judicial admission that the letter was intended as a reservation of rights, not a disclaimer (*see e.g. Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 103 [1996]).

The majority believes that these admissions are immaterial and that the January 31, 2008 and February 26, 2008 letters served as effective notices of disclaimer in that they apprised Jinx-Proof in no uncertain terms that coverage was barred by the

assault and battery exclusions of the policy. However, the letters are far from clear.

The January 31, 2008 letter stated that plaintiff "will not be defending or indemnifying you under the General Liability portion of the policy for the assault and battery allegations." However, it mistakenly stated that there was no liquor liability coverage under the policy and concluded that plaintiff was "reserv[ing] *all* rights under the policy" and that Jinx-Proof "ha[d] the right to accept or reject this Reservation of Rights agreement" (emphasis added).

The February 26, 2008 letter stated that "[y]our policy excludes coverage for assault and battery claims." However, it only advised Jinx-Proof that "should this matter proceed to verdict, any awards by the Court stemming from allegations of Assault and Battery will not be covered under your Commercial General Liability policy." It did not state that no defense would be provided, or that coverage would not exist if the matter were settled or resolved by means other than a verdict.

The February 26, 2008 letter also advised Jinx-Proof that "contrary to [the January 31, 2008] letter, your CGL policy does maintain Liquor Liability coverage with limits as stated." The letter did not detail the scope of that coverage, which is a

separate coverage part and not a mere portion of the commercial liability coverage part, and did not state whether the assault and battery conclusion applied to the liquor liability coverage. Further, the February 26, 2008 letter was not sent to the injured party (*see Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648-649 [3d Dept 2001]).

Accordingly, neither of plaintiff's admitted reservation of rights letters, which contain contradictory and confusing language, can be construed as an unequivocal and unambiguous disclaimer of coverage. Because plaintiff failed to timely disclaim coverage based on its policy exclusion, it should be obligated to defend Jinx-Proof, in the underlying action.

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

ENTERED: JANUARY 17, 2013

CLERK

Mazzarelli, J.P., Friedman, Renwick, Freedman, JJ.

8467 Americorp Financial, L.L.C., doing business as Parata Financial,
Plaintiff-Appellant,

-against-

Venkany, Inc., doing business as Frederick Pharmacy, et al.,
Defendants-Respondents.

Index 651234/11

Helfand & Helfand, New York (Aaron Weissberg of counsel), for appellant.

Bachu Law Firm, Kew Gardens (Sharmela Bachu of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered March 8, 2012, which, insofar appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its complaint and dismissing defendants' affirmative defenses, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The motion court erred in denying plaintiff summary judgment. Plaintiff established its entitlement to the damages sought, $96,509.53, under the Lease Agreement, the Agreement to Advance Funds and Security Agreement, and defendant Dhama's guaranties (first, second, third, and fifth causes of action), and to $5,432.84 in attorneys' fees and disbursements (fourth

cause of action). Defendants do not dispute plaintiff's calculations of the amounts due, and they do not contend that any of the contracts they signed are unconscionable. Plaintiff is also entitled to dismissal of defendants' affirmative defenses. As to the first, collateral estoppel, it is undisputed that the prior Civil Court proceeding between nonparty (to this action) Parata Systems, LLC (Parata) and Venkany, Inc. was resolved by a stipulation of settlement. "[C]ollateral estoppel is inapplicable if . . . there has been a stipulation" (*Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 371 [1st Dept 2007]; *see also Robinson v Crawford*, 46 AD3d 252 [1st Dept 2007]). The second affirmative defense, that defendants own the subject equipment, is belied by the clear language of the Lease Agreement.

If we were to consider defendants' res judicata argument – which they eschew on appeal – we would find that, although this doctrine applies to settlements (*see e.g. Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 124 [2008], *cert denied* 555 US 1136 [2009]), defendants failed to raise a triable issue of fact as to whether plaintiff was in privity with Parata. Plaintiff and Parata are separate companies; plaintiff's address is in Michigan, and Parata's is in North Carolina. The Lease

Agreement that defendant Dhama signed as Venkany's president states, "LESSOR [i.e., plaintiff] IS NOT AFFILIATED WITH OR RELATED TO PARATA." It is of no moment that Dhama dealt with only one person when he leased the machine at issue; the Lease Agreement and the Agreement to Advance Funds and Security Agreement, both of which Dhama signed on Venkany's behalf, state that neither Parata *nor any salesperson* is plaintiff's agent. Contrary to the motion court's conclusion, the record contained no evidence that Parata's lawyer said that he had the authority to represent plaintiff.

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

ENTERED: JANUARY 17, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9015 The People of the State of New York, Respondent, Ind. 944/06

-against-

Devon Singleton, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered March 10, 2008, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him, as a second violent felony offender, to a term of 16 years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence clearly established defendant's identity as the person who shot the victim, and there is no reasonable possibility that

the actual assailant was a person who was seen running away with defendant after the shooting.

Only some of the ballistics evidence was properly admitted. Even if excessive, the ballistics evidence introduced by the People did not bear upon a disputed issue. Under the circumstances, we find that any error in admitting such evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court properly received evidence relating to defendant's arrest in Maryland, several months after the shooting, for possession of an illegal knife. When stopped by the Maryland police, defendant gave false names, fled, and struggled violently with the arresting officer. This behavior could be interpreted as evincing a consciousness of guilt concerning the instant charges, and any ambiguity was for the jury to consider (*see People v Yazum*, 13 NY2d 302, 304 [1963]). The jury could have reasonably concluded that defendant's conduct was primarily motivated by a fear of prosecution for the Bronx shooting, rather than fear of prosecution for merely possessing a knife.

The court properly declined to deliver a circumstantial evidence charge, since direct evidence as well as circumstantial evidence established defendant's guilt (*see People v Roldan*, 88 NY2d 826 [1996]). The testimony of the victim and an eyewitness

provided direct evidence of defendant's guilt, even if some of the evidence required the drawing of inferences (*see e.g. People v Civilize*, 288 AD2d 8 [1st Dept 2001], *lv denied* 97 NY2d 703 [2002]*; People v Woolridge*, 272 AD2d 242 [1st Dept 2000], *lv denied* 6 NY3d 840 [2006]; *People v Battle*, 198 AD2d 112 [1st Dept 1993], *lv denied* 83 NY2d 802 [1994]). In any event, there is no reasonable possibility that the absence of a circumstantial evidence charge affected the verdict (*see People v Brian*, 84 NY2d 887, 889 [1994]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 17, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9016 Douglas E. Jones, Index 303955/10
Plaintiff-Appellant,

-against-

Hampshire Hotels and Resorts LLC, et al.,
Defendants-Respondents.

Thomas Torto, New York, for appellant.

Goldman & Grossman, New York (Eleanor R. Goldman of counsel), for respondents.

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered October 7, 2011, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff alleges that he was injured when, while crossing an intersection within the crosswalk, he was struck by defendants' vehicle. The evidence, including defendant driver's testimony that his vehicle was not in the crosswalk at the time of contact,

presents triable issues of fact as to whether plaintiff was indeed in the crosswalk at the time of impact or had failed to exercise due care to avoid the accident (*see e.g. Wein v Robinson*, 92 AD3d 578 [1st Dept 2012]; *Villaverde v Santiago-Aponte*, 84 AD3d 506 [1st Dept 2011]).

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

ENTERED: JANUARY 17, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9017 In re Maria C.,
Petitioner-Appellant,

-against-

Jaime G.,
Respondent-Respondent.

Daniel R. Katz, New York, for appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for respondent.

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about August 31, 2011, which dismissed the family offense petition for an order of protection, unanimously affirmed, without costs.

Petitioner failed to establish by a preponderance of the evidence that respondent committed a family offense (Family Court Act § 832). Petitioner is correct that the court erred in taking judicial notice of post-petition orders of protection issued against her in favor of respondent (*see Matter of Ungar v Ungar*,

80 AD3d 771 [2nd Dept 2011]). However, in light of the court's finding that petitioner's testimony was incredible, the error was harmless (*see Matter of Dakota CC. [Arthur CC.]*, 78 AD3d 1430 [3rd Dept 2010]).

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

ENTERED: JANUARY 17, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9019 Commerce Bank, N.A., Index 603917/08
Plaintiff, 590034/08

-against-

Globe Institute of Technology, Inc., et al.,
Defendants.

- - - - -

Globe Institute of Technology, Inc., et al.,
Third-Party Plaintiffs-Appellants

-against-

878 Education, LLC, et al.,
Third-Party Defendants.

- - - - -

172 Van Duzer Realty Corp.,
Nonparty-Respondent.

Herzfeld & Rubin P.C., New York (David B. Hamm of counsel), for appellants.

Cox Padmore Skolnik & Shakarchy LLP, New York (Noah Potter of counsel), for respondent.

Order, Supreme Court, New York County (Melvyn L. Schweitzer, J.), entered September 8, 2011, which granted the application of nonparty 172 Van Duzer Realty Corp. (Van Duzer) to direct that any award received by third-party plaintiffs be distributed to Van Duzer, unanimously reversed, on the law, without costs, and the application denied.

The order appealed from is the result of an ex parte

application and thus, is not appealable as of right (*see Unanue v Rennert*, 39 AD3d 289 [1st Dept 2007]; CPLR 5701[a][2]). However, under the circumstances presented, we deem the notice of appeal to be a motion for leave to appeal, and grant said leave (*see e.g Ning-Yen Yao v Yao*, 88 AD3d 462 [1st Dept 2011]).

The court's determination to have Van Duzer submit a proposed order directing the distribution to it of any award in this action was incorrect, as was the court's decision to sign the proposed order. The proper procedure for Van Duzer to enforce its rights as a judgment creditor against the cause of action brought by third-party plaintiff Globe Institute of Technology, its judgment debtor, is set forth in CPLR 5227.

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

ENTERED: JANUARY 17, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9020-
9020A Michael Borst, et al., Index 105375/08
Plaintiffs-Appellants,

-against-

Bovis Lend Lease LMB, Inc., et al.,
Defendants-Respondents,

Lower Manhattan Development Corp., et al,
Defendants.

- - - - -

Allen Hay, et al.,
Plaintiffs-Appellants,

-against-

Bovis Lend Lease LMB, Inc., et al.,
Defendants-Respondents,

Lower Manhattan Development Corp., et. al,
Defendants.

Barasch McGarry Salzman & Penson, New York (Dominique Penson of counsel), for appellants.

Newman Myers Kreines Gross Harris, P.C., New York (Stephen M. Bigham of counsel), for respondents.

Orders, Supreme Court, New York County (Barbara Jaffe, J.), entered September 8, 2011, which, in these consolidated personal injury actions, denied plaintiffs' motions for summary judgment as to liability, unanimously affirmed, without costs.

Plaintiffs failed to make a prima facie showing of

entitlement to partial summary judgment as a matter of law. The non-prosecution agreement entered into between the New York County District Attorney's Office (NYDA) and the Bovis defendants (Bovis) following NYDA's criminal investigation of the August 18, 2007 fire at the Deutsche Building in lower Manhattan, was correctly deemed inadmissible as proof of liability. The agreement explicitly provided that Bovis had not admitted liability, that the factual statements contained in the agreement were relevant only for the purposes of the compromise between the NYDA and Bovis, and that Bovis could contradict and/or contest any factual statement in the agreement in a subsequent action or proceeding to which the NYDA was not a party (*see e.g. Kollmer v Slater Elec.*, 122 AD2d 117, 120 [2d Dept 1986]).

Judicial estoppel, and even informal judicial estoppel, cannot be applied here. Bovis was not a party to a legal proceeding when it entered into the non-prosecution agreement (*see generally Ferring v Merrill Lynch & Co.*, 244 AD2d 204 [1st Dept 1997]), and the agreement and related documents amount to a

pre-indictment settlement agreement that was neither judicially endorsed nor approved (*see Douglas v Dashevsky*, 62 AD3d 937, 938 [2d Dept 2009]; *Matter of Costantino*, 67 AD3d 1412, 1413 [4th Dept 2009]).

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

ENTERED: JANUARY 17, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9021 In re Ibn Khalil A-S.,

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

Lisa H. Blitman, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about September 28, 2011, 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 petit larceny and criminal possession of stolen property in the fifth degree, 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]). There is no basis for disturbing the court's credibility determinations. The officer's testimony supports the conclusion that appellant intentionally participated in the theft of a bicycle (*see* Penal Law § 20.00).

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

ENTERED: JANUARY 17, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9022 The People of the State of New York, Ind. 2501/10
Respondent, 4827/10

-against-

Devonne Brown,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse 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 (Edward J. McLaughlin, J.), rendered on or about May 19, 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 17, 2013

CLERK

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

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9025 Anthony J. Gordon, Index 108678/10
Plaintiff-Appellant-Respondent,

-against-

Board of Managers of the 18
East 12th Street Condominium, et al.,
Defendants-Respondents-Appellants,

16-20 Realty Associates L.P., et al.,
Defendants.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for appellant-respondent.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Christopher Cobb of counsel), for Board of Managers of the 18 East 12th Street Condominium and Key Real Estate Associates, LLC, respondents-appellants.

Bonner Kiernan Trebach & Crociata LLP, New York (Alexander H. Gillespie of counsel), for Sweet Construction Corp., respondent-appellant.

Order, Supreme Court, New York County (Salliann Scarpulla, J.), entered April 18, 2012, which, inter alia, denied plaintiff's cross motion for partial summary judgment and upon a search of the record granted summary judgment dismissing his first and second causes of action, denied as moot his motion to quash non-party subpoenas, denied defendant Board of Manager's and Key Real estate's motion for summary judgment on their counterclaim and denied defendant Sweet Construction's motion for

summary judgment dismissing plaintiff's claim against it as untimely, unanimously affirmed, without costs.

In this action by plaintiff condominium owner to recover damages for repairs made to a concrete slab in the ceiling above his condominium unit after a portion of the slab collapsed while he was having alteration work performed to the unit, the motion court properly determined that plaintiff is liable for the cost of the repairs made to the entire slab because he voluntarily assumed the obligation to make the repairs, seeking approval for the work repairing the entire structural slab almost immediately after part of it collapsed and waiting a lengthy period of time before requesting reimbursement.

The November 2009 release did not apply to work that was not done pursuant to the alteration agreement or to continuing obligations, and thus did not bar the Board and Key's counterclaim for attorneys' fees incurred after the settlement date (*see Morales v Solomon Mgt. Co., LLC*, 38 AD3d 381, 382 [1st Dept 2007]); however, the attorneys' fees sought were not for "property damage" under the authorizing provision of the alteration agreement (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]).

The motion court correctly found that plaintiff's claim

against defendant contractor Sweet was timely. The claim accrued on the date of the injury, not on the date of completion of the construction because it is a tort claim (*see IDF Constr. Corp. v Corddry Carpenter Dietz & Zack*, 253 AD2d 89, 92 [1st Dept 1999]).

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

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

ENTERED: JANUARY 17, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9026-
9027 Gitta Rott, Index 110168/05
Plaintiff-Appellant-Respondent,

-against-

Negev, LLC,
Defendant-Respondent,

Hagivah, Inc., et al.,
Defendants.

Duane Morris LLP, New York (Evangelos Michailidis of counsel), for appellant-respondent.

Kral Clerkin Redmond Ryan Perry & Van Etten LLP, Melville (Thomas F. Maher of counsel), for respondent.

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 29, 2010, after a jury trial, awarding plaintiff a total of $139,270.75, and bringing up for review an order, same court (Carol R. Edmead, J.), dated October 25, 2010, to the extent it dismissed plaintiff's claim for lost rent, unanimously affirmed, without costs.

Contrary to Negev, LLC's position, the subject ruling is appealable, as the in limine order dismissing plaintiff's claim for lost rental income did not "merely determine[] the admissibility of evidence," it "limit[ed] the scope of issues to be tried" (*Parker v Mobil Oil Corp.*, 16 AD3d 648, 650 [2d Dept

2005], *affd on other grounds* 7 NY3d 434 [2006]). In the absence of a proffer as to how plaintiff intended to establish lost rental income and to show that the loss was proximately caused by defendants' conduct, the trial court properly precluded plaintiff from offering evidence on this claim (*see e.g. Lee Kin Chiu v City of New York*, 174 Misc2d 422, 426 [App Term, 2d Dept 1997]).

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

ENTERED: JANUARY 17, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9029-
9029A

Acadia Woods Partners, LLC,
Plaintiff-Respondent,

-against-

Signal Lake Fund LP, et al.,
Defendants-Appellants.

Dakota Partners, LLC, et al.,
Intervenors.

Index 651440/10

Siegel & Reiner LLP, New York (Carl D. Bernstein of counsel), for appellants.

Mintz Levin Cohn Ferris Glovsky and Popeo, P.C., New York (Andowah A. Newton of counsel), for respondent.

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 28, 2011, against defendants in the total amount of $6,042,751.23, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered October 26, 2011, which granted plaintiff's motion for summary judgment in lieu of complaint and directed entry of judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff made a prima facie showing of its entitlement to judgment as a matter of law by proffering defendants' unconditional guaranty, an instrument for the payment of money

only, and an affidavit from plaintiff's managing director explaining defendants' default (*see Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]; *Bank of Am., N.A. v Solow*, 59 AD3d 304, 304 [1st Dept 2009], *lv dismissed* 12 NY3d 877 [2009]).

Defendants failed to raise a triable issue of fact as to the enforceability of the guaranty, as their contentions are entirely premised upon the alleged unenforceability of the underlying note. These arguments are unavailing, given that the guaranty is a "separate undertaking" (*American Trading Co. v Fish*, 42 NY2d 20, 26 [1977]) and a "self-standing document[]" (*European Am. Bank v Competition Motors*, 182 AD2d 67, 72 [2d Dept 1992]; *see Eurotech Dev. v Adirondack Pennysaver*, 224 AD2d 738, 739 [3d Dept 1996]). Moreover, paragraph five of the guaranty explicitly disclaims defenses pertaining to the "invalidity, irregularity or

unenforceability" of the note (*see Citibank v Plapinger*, 66 NY2d 90, 93 [1985]; *Lloyds Bank v McCormick & Pryor*, 235 AD2d 292 [1st Dept 1997]).

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

ENTERED: JANUARY 17, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

9031 In re Government Employees Insurance Company, etc.,
Petitioner-Respondent,

-against-

Dawn Martin,
Respondent,

HF Management Services, LLC, et al.,
Proposed Additional Respondents-Appellants.

Index 260311/11

Law Offices of Stewart H. Friedman, Garden City (Robert F. Horvat of counsel), for appellants.

Monfort Healy McGuire & Salley, Garden City (Donald S. Neumann, Jr., of counsel), for Government Employees Insurance Company, respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered December 1, 2011, which, after a framed-issue hearing in this proceeding pursuant to CPLR 7503(b) to permanently stay arbitration of an uninsured motorist claim, granted the petition and permanently stayed the arbitration, unanimously affirmed, with costs.

Petitioner established by admissible proof that a vehicle owned and insured respectively by appellants was involved in the alleged accident. At the hearing, no objection was made to the admission of the police report containing the license plate

number of the vehicle. Accordingly, the evidence is presumed to have been unobjectionable and any error is considered waived (CPLR 4017; *Komsa v Colonial Penn Ins. Co.*, 188 AD2d 367, 367 [1st Dept 1992]). In any event, the contents of the police report were admissible under the present sense exception to the hearsay rule, as they were sufficiently corroborated by respondent's testimony (*see Jara v Salinas-Ramirez*, 65 AD3d 933 [1st Dept 2009]; *People v Brown*, 80 NY2d 729 [1993]).

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

ENTERED: JANUARY 17, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9032 In re Mageedah Akhtab, Index 106770/11
[M-5635] Petitioner,
[M-5746]

-against-

Hon. Joan M. Kenney, etc., et al.,
Respondents.

Mageedah Akhtab, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Garrett Coyle of counsel), for Hon. Joan M. Kenney, respondent.

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

And a cross motion having been made on behalf of respondent Hon. Joan M. Kenney to dismiss the petition,

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

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

ENTERED: JANUARY 17, 2013

CLERK