SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 23, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11056-
11056A Index 653618/12

BDO USA, LLP,
Plaintiff-Respondent,

-against-

Phoenix Four, Inc., et al.,
Defendants-Appellants.

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Cole Schotz, Meisel, Forman & Leonard, P.A., New York (Jed M. Weiss of counsel), for Phoenix Four, Inc., appellant.

Mound Cotton Wollan & Greengrass, New York (Mark S. Katz and Sanjit Shah of counsel), for Strategic Resources Corporation, Paul Schack and James J. Hopkins, III, appellants.

Morvillo LLP, New York (Andrew J. Morris of the bar of the State of Maryland and District of Columbia, admitted pro hac vice, of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered February 6, 2013, which deemed defendants Strategic Resources Corp., Paul Schack and James J. Hopkins, III's (collectively SRC) motion, and defendant Phoenix Four, Inc.'s (Phoenix) cross motion to discontinue the action with prejudice under CPLR 3217(b) withdrawn on the ground that the action had

been discontinued, unanimously reversed, on the law and in the exercise of discretion, without costs, plaintiff BDO USA, LLP's (BDO)[1] notice of discontinuance under CPLR 3217(a)(1) deemed a nullity, defendants' motions to discontinue the action with prejudice under CPLR 3217(b) denied, the complaint reinstated, and plaintiff's new action commenced under Index Number 650114/2013 dismissed. Order, same court and Justice, entered February 6, 2013, which deemed defendant Phoenix's motion to dismiss the complaint under CPLR 3211(a)(1) and (a)(7) as withdrawn on the ground that the action had been discontinued, unanimously reversed, on the law, without costs, the motion reinstated, and the action remanded for further proceedings consistent herewith.

This procedurally complicated matter arose from a business relationship that began almost two decades ago. In 1994, defendant Phoenix, a mutual fund, retained defendant SRC as its investment advisor and plaintiff BDO as its accountant. In May 2005, Phoenix commenced an action in federal court against SRC, alleging that SRC had fraudulently overstated Phoenix's assets in order to charge higher fees. Phoenix also commenced an

[1] Formerly known as BDO Seidman LLP.

arbitration proceeding against BDO for failing to uncover SRC's fraud.

In July 2007, Phoenix and SRC settled the federal action. Under the settlement agreement, SRC was to pay Phoenix $12.5 million, and Phoenix was to indemnify SRC against any contribution claim BDO brought against SRC to recover for SRC's equitable share of liability on any arbitration award against BDO. In August 2008, the arbitration panel found against BDO and awarded Phoenix approximately $11.9 million in damages.

BDO then commenced a contribution action against SRC in Supreme Court, and the action was assigned to a Commercial Division part. SRC moved to dismiss the complaint; the court denied the motion, and SRC appealed to this court (*BDO Seidman LLP v Strategic Resources Corp.*, 70 AD3d 556 [1st Dept 2010]). Pending the appeal, the motion court referred the action to mediation, and the parties attended three mediation sessions in late 2009. Although it was not a party to the action, Phoenix participated in the mediation because of its indemnification obligations to SRC.

During the mediation session on November 30, 2009, and while the appeal on the contribution action was still pending before this Court, the parties orally agreed to a settlement containing

several material terms: general releases between and among all of the parties, a $650,000 payment from Phoenix to BDO, dismissal with prejudice of the contribution action and withdrawal of SRC's appeal. The mediator directed BDO to notify the motion court of the settlement and directed SRC to so notify this Court. BDO's counsel notified the motion court by informing the Commercial Division justice's law clerk that subject to the negotiation and signing of documentation, the parties had resolved the action through mediation and would be filing a stipulation of dismissal as soon as the settlement documents were signed.

As clarified at the oral argument of this appeal, SRC's counsel maintained that he had had a telephone conversation with the then-Clerk of this Court, who told counsel that SRC could withdraw its appeal when a settlement was complete. Counsel took the position that the parties had never actually settled the action because the parties never reached a completed and signed settlement, and therefore, counsel could not withdraw the appeal without prejudicing his clients' rights. Thus, SRC never effectively informed this Court that the parties had settled during the mediation.

Phoenix's counsel later sent all counsel a draft of the settlement agreement, but the parties continued to negotiate the

terms and never signed an agreement. On February 22, 2010, BDO moved to enforce the oral agreement that the parties had reached on November 30, 2009. However, the next day, this Court reversed the motion court's denial of SRC's motion to dismiss and dismissed the complaint (*BDO Seidman LLP*, 70 AD3d at 556). In so doing, we concluded that BDO was collaterally estopped from relitigating the issue of apportionment of liability because it had fully litigated the issue before the arbitration panel, which had rendered a final decision.

In April 2010, notwithstanding this Court's dismissal of the action, the motion court held an evidentiary hearing on BDO's motion to enforce the oral settlement. Following the hearing, the court confirmed the settlement, granted BDO's motion to enforce and entered judgment against SRC. The court found that the parties' evidence established an oral agreement of the material terms. Moreover, the court held, the agreement need not be in writing, because BDO had changed its position in reliance upon the settlement agreement. The court also found that it was "a serious breach of professional conduct" for SRC not to have notified the Appellate Division directly that the parties had settled. Further, the motion court found that this Court had ruled on the appeal as a consequence of SRC's failure directly to

notify this Court of the parties' settlement.

SRC appealed the motion court's confirmation of the oral settlement agreement. On February 2, 2012, this Court vacated the judgment enforcing the oral agreement on the ground that we had already dismissed the action in the prior appeal (*BDO Seidman LLP v Strategic Resources Corp.*, 92 AD3d 426 [1st Dept 2012]).

BDO then commenced this action against SRC and Phoenix, asserting claims for breach of contract and promissory estoppel. BDO alleged that Phoenix had breached the November 2009 oral settlement agreement by refusing to pay BDO $650,000. BDO further alleged that SRC had breached the agreement by refusing to exchange mutual general releases and by failing to notify this Court of the parties' settlement of the contribution action.

Following BDO's filing of the complaint, Phoenix and SRC requested an extension of time to respond, and the parties agreed to a December 24, 2012 response date. However, on December 21, 2012, Phoenix and SRC separately moved to dismiss the complaint under CPLR 3211(a)(1) and (a)(7). Phoenix also filed and served an RJI on the same day. The action was assigned to a non-Commercial Division part.

By letter dated January 3, 2013, BDO requested that Supreme Court transfer the action to a Commercial Division part under 22

NYCRR § 202.70. In opposition, SRC and Phoenix argued that BDO's request was untimely under 22 NYCRR § 202.70(e) because BDO had submitted the request more than 10 days after it had received the RJI on December 21, 2012. BDO argued that the agreement it sought to enforce arose from a previous action in the Commercial Division and, in the interests of efficiency and judicial economy, Supreme Court should transfer the action. BDO conceded that the request was untimely, but explained that its counsel erred in calculating the deadline based on the date the parties had agreed on for defendants to respond to the complaint. The Administrative Judge denied BDO's request as untimely, noting that the 10-day time limit under 22 NYCRR § 202.70(e) is "strictly construed."

BDO then served a notice of voluntary discontinuance without prejudice under CPLR 3217(a)(1). That section provides:

> "Any party asserting a claim may discontinue it without an order . . . by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court."

At the same time, BDO initiated a new action in Supreme Court (Index Number 650114/2013) (the new action) and submitted a

complaint that is essentially identical to the complaint in this action. BDO intended to seek to have the new action transferred to a Commercial Division part once defendants re-filed their motions to dismiss.

In response to BDO's notice of discontinuance, SRC moved and Phoenix cross-moved under CPLR 3217(b) for an order discontinuing the action with prejudice. Both defendants argued that the motion court should deem BDO's notice *with prejudice*, because BDO filed the discontinuance for the sole purpose of circumventing the Administrative Judge's final and non-appealable order. Defendants further argued that the notice of voluntary discontinuance was untimely under CPLR 3217(a)(1) because BDO served it after defendants had filed a responsive pleading - that is, their motions to dismiss. Defendants sought, in the alternative, an order deeming BDO's notice of voluntary discontinuance a nullity.

In opposition, BDO argued that the motion court should deny defendants' motions. First, it claimed that it had an "absolute and unconditional" right to discontinue the action on notice under CPLR 3217(a)(1), and based on its notice of voluntary discontinuance, there was no longer an action pending in which defendants could bring their motions. Second, BDO argued that

defendants may not seek discontinuance with prejudice under CPLR 3217(b) because that provision permits discontinuance only by "a party asserting a claim." Third, BDO argued that its notice of voluntary discontinuance was timely because defendants had not yet served an answer, and a motion to dismiss does not constitute a responsive pleading under CPLR 3217(a)(1). Finally, BDO argued that, even if the notice were untimely, the proper relief would be to deem the notice ineffective and to proceed with the action, not to discontinue the action with prejudice.

The motion court ruled on defendants' motions, deeming Phoenix's motion to dismiss withdrawn and the action discontinued "per attached stipulation." Similarly, the court deemed defendants' motion and cross motion to discontinue the action with prejudice withdrawn and the action discontinued per the court's decision on Phoenix's motion to dismiss. The "attached stipulation," however, was not a stipulation but rather BDO's notice of voluntary discontinuance. This appeal ensued.[2]

The motion court erred in deeming defendants' motions withdrawn. Indeed, the parties never "stipulated" to discontinue

[2] Based on its reasoning in deciding Phoenix's motion to dismiss, the court also deemed SRC's motion to dismiss withdrawn. SRC filed a notice of appeal from that order but has reserved its right to perfect the appeal.

BDO's action. Rather, BDO unilaterally filed a notice of voluntary discontinuance. This notice was untimely because BDO served it after defendants filed their motions to dismiss (*see* CPLR 3217[a][1]; *Polgar v Focacci*, 2 Misc 3d 836, 839-840 [Sup Ct, NY County 2003]; David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3217:8 ["[t]he defendant who has moved to dismiss under CPLR 3211 has already done as much in the litigation (and more) than if she had merely answered the complaint"]). Indeed, if a motion to dismiss is not a "responsive pleading" within the meaning of CPLR 3217(a)(1), a plaintiff would be able to freely discontinue its action without prejudice solely to avoid a potentially adverse decision on a pending dismissal motion. This Court has made clear that such conduct is improper (*see Rosenfeld v Renika Pty. Ltd.*, 84 AD3d 703 [1st Dept 2011]; *McMahan v McMahan*, 62 AD3d 619, 620 [1st Dept 2009]). Thus, BDO's notice was ineffective and a nullity, and the motion court should not have deemed defendants' motions withdrawn (*see Citidress II Corp. v Hinshaw & Culbertson LLP*, 59 AD3d 210, 211 [1st Dept 2009]; *Tutt v Tutt*, 61 AD3d 967 [2d Dept 2009]).

That BDO served its notice of discontinuance in an attempt to circumvent the Administrative Judge's order denying its

request to have its action assigned to the Commercial Division may be a valid basis for granting a discontinuance with prejudice (*see e.g. Rosenfeld*, 84 AD3d at 703; *McMahan*, 62 AD3d at 619; *NBN Broadcasting v Sheridan Broadcasting Networks*, 240 AD2d 319 [1st Dept 1997]; *Hirschfeld v Stahl*, 242 AD2d 214 [1st Dept 1997]). However, given the unusual procedural history that led to the commencement of this action, we decline to discontinue the action with prejudice. Specifically, this action arose from defendant SRC's failure to properly notify this Court of the settlement the parties had reached in the contribution action before the mediator. Indeed, although the parties had reached a settlement, and the mediator specifically directed the parties to inform this Court of the settlement, SRC unilaterally took the position that the settlement was not effective and that the appeal should continue. As a result, this Court dismissed the contribution action before the parties finalized a written agreement, thus precluding BDO from enforcing the oral agreement (*see BDO Seidman LLP*, 92 AD3d 426; *BDO Seidman LLP*, 70 AD3d 556).

Because the motion court deemed Phoenix's motion to dismiss withdrawn without having considered its merit, we remand the action for further proceedings, including consideration of the motion.

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

ENTERED: JANUARY 23, 2014

CLERK

Friedman, J.P., Sweeny, DeGrasse, Richter, Feinman, JJ.

10512 Jakaria Kebbeh, Index 250161/08
Plaintiff-Respondent,

-against-

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

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Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Debra A. Adler of counsel), for appellants.

Edelman, Krasin & Jaye, PLLC, Carle Place (Jarad L. Siegel of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered April 3, 2012, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 claims and certain § 241(6) claims, unanimously modified, on the law, to grant defendants' motion insofar as it sought summary judgment dismissing plaintiff's Labor Law § 241(6) claim alleging violations of 12 NYCRR 23-1.7(g) and 12 NYCRR 12-1.2 through 1.7, and otherwise affirmed, without costs.

It is well settled that the "drastic remedy" of summary judgment can be "granted only where the moving party has 'tendered sufficient evidence to demonstrate the absence of any

material issues of fact'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). When, as here, the movant fails to make this prima facie showing, the motion must be denied, "regardless of the sufficiency of the opposing papers" (*id.*, italics omitted).

In this Labor Law action, plaintiff alleges that he suffered injuries due to exposure to airborne contaminants on a construction project on which he worked as a painter. To obtain summary judgment dismissing this complaint, defendants were required to demonstrate that there was no causal link between plaintiff's alleged injuries and his exposure, eliminating any triable issues of fact (*see Cabral v 570 W. Realty, LLC*, 73 AD3d 674, 675 [2d Dept 2010]; *see generally Parker v Mobil Oil Corp.*, 7 NY3d 434, 448-449 [2006]).

Defendants did not satisfy this burden. One of the contested issues in this case is whether plaintiff was using acrylic water-based paint or an epoxy oil-based paint. If in fact plaintiff was using a water-based paint, his claims that he was required to use paint containing harmful toxins would be undermined. Defendants did not establish that the paint used was a water-based paint even though, as the motion court properly stated, defendants had drafted the paint specifications in their

contract with plaintiff's employer. Thus, defendants were in a unique position to know what paint was actually used and could have met their burden. Because defendants have not eliminated the triable issue of material fact as to whether plaintiff's injuries were caused by his exposure to paint fumes on the project, the motion court was correct in denying their motion to dismiss the complaint. In light of this holding, we need not address plaintiff's claimed belated discovery of the paint can labels.

The motion court also correctly denied defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim alleging violations of 12 NYCRR 23-1.8(b) and 12 NYCRR 23-2.8(a) and (d). While defendants contend that plaintiff did not work in a "confined space" within the meaning of 12 NYCRR 23-2.8, they did not demonstrate this as a matter of law. Plaintiff's 50-h testimony, while perhaps lacking precision as to where he worked, does not preclude his later assertion that he worked in a closet.

However, plaintiff's Labor Law § 241(6) claim alleging violations of 12 NYCRR 23-1.7(g) and 12 NYCRR 12-1.2 through 1.7, fails on the merits, as section 1.7(g) is not applicable under

these circumstances (*see Osorio v Kenart Realty, Inc.*, 35 AD3d 561, 562 [2d Dept 2006]).

We need not reach the parties' remaining arguments as they are not dispositive of defendants' motion for summary judgment.

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

ENTERED: JANUARY 23, 2014

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11302 Wells Fargo Bank National Association, et al., Plaintiffs-Respondents, Index 601680/09

-against-

Webster Business Credit Corporation, Defendant-Appellant.

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Zukerman Gore Brandeis & Crossman, LLP, New York (John K. Crossman of counsel), for appellant.

Ruskin Moscou Faltischek, P.C., Uniondale (Jeffrey A. Wurst of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 10, 2012, which granted plaintiffs' motion for summary judgment dismissing defendant's counterclaim for contractual indemnification, and denied defendant's cross motion for partial summary judgment seeking indemnification from plaintiffs for attorneys' fees incurred in this action, unanimously affirmed, with costs.

In this action between lenders to a single borrower, plaintiffs seek to recover damages they allegedly sustained as a result of, among other things, the borrower's inability to pay amounts due under a credit agreement that provided the borrower with a loan and a revolving credit facility. In August 2007,

plaintiffs and defendant, collectively as lenders, entered into a credit agreement with the borrower. The credit agreement not only defined the scope of the lenders' indemnification duties to each other, but also gave plaintiffs the power to appoint defendant, who was a nonsignatory to the credit agreement, as the syndication and administrative agent for the credit facility. As agent, defendant's duties included disbursing advances and receiving repayment of advances from the borrower. Further, the credit agreement designated defendant to serve as the issuer of letters of credit to the borrower. Plaintiff and defendant loaned the borrower around $65 million between August 2007 and March 2009.

In February 2009, the borrower's chief financial officer admitted that he had significantly overstated the company's eligible receivables and inventory. Plaintiffs commenced this action in May 2009, alleging, among other things, that defendant had intentionally failed to disclose material information about the borrower's financial condition and had induced plaintiffs to continue advancing funds to the borrower, even after defendant knew or should have known about the borrower's fraud. Plaintiffs ultimately served an amended complaint asserting a claim for contractual indemnification, including attorneys' fees, under

section 15.7 of the credit agreement. For its part, defendant asserted several counterclaims, including one for indemnification under sections 15.7 and 17.7 of the credit agreement, which define the scope of the borrower's indemnification obligations.

Plaintiffs moved for summary judgment dismissing defendant's counterclaims and defendant moved for summary judgment dismissing plaintiffs' amended complaint. The IAS court eventually granted defendant's motion for summary judgment and dismissed the complaint in December 2011, including plaintiffs' indemnification claim.[3] In response to plaintiffs' motion for summary judgment on defendant's counterclaims, defendant agreed to discontinue, with prejudice, each of its counterclaims against plaintiffs, with the exception of its claim for contractual indemnification.

Plaintiffs then moved for summary judgment dismissing defendant's sole remaining counterclaim for contractual indemnification; defendant cross-moved for partial summary judgment on the issue of plaintiffs' obligation as lenders to indemnify and reimburse defendant for its reasonable attorneys' fees and disbursements in this action.

Sections 15.7 and 17.7 of the credit agreement provide:

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[3] Although plaintiffs filed a notice of appeal from that order, they never perfected that appeal.

"17.7. Indemnity. Each Borrower shall indemnify Agent, each Lender, [and] each other Lender Party . . . from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses and disbursements of any kind or nature whatsoever (including, without limitation, reasonable fees and disbursements of counsel) which may be imposed on, incurred by, or asserted against Agent, or any Lender or any other Lender Party in any litigation, proceeding or investigation instituted or conducted by any governmental agency or instrumentality or any other Person with respect to any aspect of, or any transaction contemplated by, or referred to in, or any matter related to, this Agreement or the Other Documents, whether or not Agent, any Lender or any other Lender Party is a party thereto, except to the extent that any of the foregoing arises out of the willful misconduct or gross negligence of the party being indemnified."

"15.7. Indemnification. To the extent Agent is not reimbursed and indemnified by Borrowers, each Lender will reimburse and indemnify Agent, each Issuer, and each Lender Party in proportion to its respective portion of the Advances (or, if no Advances are outstanding, according to its Commitment Percentage), from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind or nature whatsoever which may be imposed on, incurred by or asserted against Agent, such Issuer and such Lender in performing its duties hereunder, or in any way relating to or arising out of this Agreement or any Other Document; provided, however, that, Lenders shall not be liable for any portion of such liabilities, obligations, losses, damages,

> penalties, actions, judgments, suits, costs, expenses or disbursements resulting from the indemnified party's gross (not mere) negligence or willful misconduct."

Defendant contends that section 17.7 must be read together with section 15.7. However, on its face, section 17.7 expressly contemplates third-party litigation against the lenders, including "any governmental agency or instrumentality or any other Person" without "clearly impl[ying]" that the parties intended the provision to provide for indemnification in litigation against each other (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). This provision is fatal to defendant's claim of inter-party indemnification for attorneys' fees (*see id.*; *Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 206 [1st Dept 2010], *lv denied*, 17 NY3d 713 [2011]).

Even standing alone, section 15.7 does not evince an "unmistakably clear" intention to waive the American Rule against prevailing parties' recovery of attorneys' fees, because it contemplates third-party claims against the lenders, who include defendant (*see Hooper*, 74 NY2d at 492).

Contrary to defendant's argument, plaintiffs' previous assertion of their own claim for contractual indemnification does

not judicially estop them from denying that defendant is entitled to indemnification of attorneys' fees under the agreement. The doctrine of judicial estoppel "'precludes a party who assumed a certain position in a prior legal proceeding *and who secured a judgment in his or her favor* from assuming a contrary position in another action simply because his or her interests have changed'" (*Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 [1st Dept 1998], *lv dismissed* 92 NY2d 962 [1998] [quoting *Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436 [2d Dept 1995]). As plaintiffs did not prevail on their contractual indemnification claim, the doctrine of judicial estoppel does not apply (*see Kvest LLC v Cohen*, 86 AD3d 481, 482 [1st Dept 2011]; *Gale P. Elston, P.C. v Dubois*, 18 AD3d 301, 303 [1st Dept 2005]).

Nor does plaintiffs' prior claim for contractual indemnification, standing alone, constitute a "judicial admission" that attorneys' fees are recoverable in inter-party disputes. On the contrary, plaintiffs' former construction of the agreement was a legal argument, and not a "fact" amenable to treatment as a "formal judicial admission" (*GJF Constr., Inc. v Sirius Am. Ins. Co.*, 89 AD3d 622, 626 [1st Dept 2011]).

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

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

ENTERED: JANUARY 23, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11399 Christopher Tamas, Index 310319/09
Plaintiff-Respondent,

-against-

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

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Michael A. Cardozo, Corporation Counsel, New York (Jeremy Jorgensen of counsel), for appellants.

Hill & Moin LLP, New York (Cheryl Eisberg Moin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 11, 2012, which, in this personal injury action arising from an accident occurring during the course of plaintiff's employment, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants have not submitted any evidence establishing prima facie that the subject 2000 Ford F-350 utility pickup truck assigned to plaintiff was suitable for the intended use as a "lead vehicle," the operator of which is required to frequently exit and enter the vehicle to, among other things, issue summonses and apply stickers to cars parked in violation of street cleaning rules (*cf. Cleary v Dietz Co.*, 222 NY 126, 132-

133 [1917]). In any event, plaintiff raised a triable issue of fact as to whether the truck was suitable for such intended use by submitting his testimony and affidavit showing that the floor of the subject truck was about 28 inches from the ground, that he had to hop up and hoist himself to get into the truck, that he had complained to his supervisor that the subject vehicle was too high to be used as a lead vehicle, that the DOS had in the past welded steps and installed entry handles onto similar trucks, and that a Ford Taurus sedan was normally assigned for his use as a lead vehicle.

Contrary to defendants' contention, the height condition was not "part of or inherent in" plaintiff's work (*Bombero v NAB Constr. Corp.*, 10 AD3d 170, 171 [1st Dept 2004]). The risks associated with frequent alighting and reentering of a high-entry vehicle was not typical of a lead vehicle operator's duties (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 506 [2012]). Nor does the readily observable nature of the height condition (*Bombero*, 10 AD3d at 171) negate liability, as plaintiff's evidence raises a triable issue of fact as to whether he could have boarded the truck in a safer manner (*cf. Bodtman v Living Manor Love, Inc.*, 105 AD3d 434 [1st Dept 2013]; *Abbadessa v Ulrik Holding*, 244 AD2d 517 [2d Dept 1997], *lv denied* 91 NY2d 814 [1998]).

We have reviewed defendants' remaining contentions and find them unavailing.

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

ENTERED: JANUARY 23, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11530 In re Michael B.,
Petitioner-Respondent,

-against-

Dolores C.,
Respondent-Appellant.

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Joseph V. Moliterno, Scarsdale, for appellant.

Fersch Petitti LLC, New York (Danielle R. Petitti of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Melanie T. West of counsel), attorney for the child.

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Order, Family Court, Bronx County (Annette Louise Guarino, Referee), entered on or about August 24, 2012, which, after a hearing, granted respondent father's petition for modification of custody and awarded him sole legal and physical custody of the child with visitation to appellant mother, unanimously modified, on the law, to the extent of remanding the matter for further proceedings to determine a visitation schedule, and otherwise affirmed, without costs.

The Referee's determination that it is in the child's best interest to modify the prior joint custody order and award respondent sole legal and physical custody has a sound and

substantial basis in the record (*see Lubit v Lubit*, 65 AD3d 954, 955 [1st Dept 2009], *lv denied*, 13 NY3d 716, *cert denied*, 560 US 940 [2010]. The parties' are unable to reach a consensus on issues related to the child (*see Trapp v Trapp*, 136 AD2d 178, 181-182 [1st Dept 1988]), and appellant ignored the March 11, 2009 custody order's directive that she keep respondent informed of "all major issues regarding [the child's] health, education and welfare," making joint custody inappropriate (*see Matter of Blerim M. v Racquel M.*, 94 AD3d 562, 563 [1st Dept 2012]; *Bliss v Ach*, 56 NY2d 995, 998-999 [1982]). Among other things, appellant removed the child from the school in which he was enrolled without consulting respondent.

The record demonstrates that when the child was in appellant's custody, he did not regularly attend school, was not picked up from school on time, and did not receive proper medical care. In addition, appellant refused to cooperate with respondent on matters concerning their son (*see Matter of Hugh L. v Fhara L.*, 44 AD3d 192 [1st Dept 2007], *lv denied* 9 NY3d 814 [2007]). Respondent, however, has expressed his intention to allow appellant to have meaningful interaction and regular visitation with the child, has provided a stable and supportive home for the child, and has met the child's academic and medical

needs. The fact that the child expressed a desire to live with appellant is not determinative (*see Matter of Hildebrandt v St. Elmo Lee*, 110 AD3d 491, 492 [1st Dept 2013]).

The referee's directive that appellant and respondent arrange their own visitation schedule is untenable given their inability to communicate with each other. The Family Court must establish a visitation schedule for the noncustodial parent (*see Matter of William BB. v Susan DD.*, 31 AD3d 907, 908 [3d Dept 2006]).

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

ENTERED: JANUARY 23, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11531 In re Alicia Fantauzzi, Index 402893/11
Petitioner,

-against-

New York State Division of
Human Rights, et al.,
Respondents.

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Mayer Brown LLP, New York (Justin M. Dillon of counsel), for petitioner.

Todd Rothenberg, New Rochelle, for Beach Lane Management, Inc. and 634 Nick Partner, LP, respondents.

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Determination of respondent New York State Division of Human Rights (SDHR), dated June 14, 2011, which dismissed petitioner's complaint alleging discrimination in housing based on disability, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Manuel J. Mendez, J.], entered on or about July 17, 2012), dismissed, without costs.

Contrary to respondents Beach Lane Management, Inc. and 634 Nick Partner, LP's contention, the instant proceeding was timely commenced. Even assuming, in the absence of an indication in the record, that the order of the commissioner of SDHR was served on

the parties on the same date as it was issued (June 14, 2011), the 60 days' time for commencing the proceeding would have expired on August 13, 2011, a Saturday, and would have been extended to the next business day, Monday, August 15, 2011 (*see* Executive Law § 298; General Construction Law § 25-a), the day on which petitioner filed the notice of petition and petition.

Petitioner's filing of an amended petition including a verification on August 16, 2011 does not render the proceeding untimely. We note that SDHR did not raise the statute of limitations as an affirmative defense in its answer, and, as indicated, the record does not show the date of service of its order. Hence, the precise date of the expiration of the limitations period cannot be determined. In any event, the proceeding was commenced upon the filing of the original petition; Executive Law § 298 does not require that an initiatory petition be verified; and, even in the context of an article 78 proceeding, the absence of a verification would not be fatal (*see* CPLR 304, 3022, 3026; *Matter of City of Rensselaer v Duncan*, 266 AD2d 657, 659 [3rd Dept 1999]).

Substantial evidence supports SDHR's determination that Beach Lane Management and 634 Nick Partner's offer of a first-floor apartment in their apartment building during the three-week

period when the building's lone elevator would be out of commission for repairs was a reasonable accommodation to petitioner's disability (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). Although it was necessary to ascend two steps from the lobby to reach the hallway leading to the first-floor apartment, petitioner, who used a walker after surgery made it difficult for her to walk and bend her knee, also had to ascend one step from the street to enter the building lobby, and she has never asserted that her disability prevented her from doing that. Moreover, petitioner rejected the proposed accommodation and elected to stay in her sixth-floor apartment, necessitating that she ascend and descend six flights of stairs.

Petitioner testified that she was told that only her bed would be brought down to the first-floor apartment. However, a property manager for Beach Lane Management testified that she told both petitioner and the building superintendent that whatever petitioner needed would be brought down for her. The administrative law judge credited the manager's account over petitioner's, and this finding is entitled to deference (see *Matter of Berenhaus v Ward*, 70 NY2d 436, 443-44 [1987]).

Moreover, in view of the foregoing, we cannot conclude that SDHR's determination was irrational.

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

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

ENTERED: JANUARY 23, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11532 Zvi Herschman, Index 100348/11
Plaintiff-Appellant,

-against-

Kern, Augustine, Conroy & Schoppman, et al.,
Defendants-Respondents.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

Kern, Augustine, Conroy & Schoppman, PC, Westbury (David L. Adelson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about July 27, 2012, which, inter alia, granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

In this legal malpractice action, plaintiff, a physician, alleges that defendants failed, inter alia, to represent him properly in connection with investigations by Medicare and the Office of Professional Conduct into the licensure of his employee, Jerrold Levoritz, and his billing practices, and that these failures resulted in his arrest for grand larceny and insurance fraud.

The documentary evidence submitted by defendants on their

CPLR 3211 motion refutes plaintiff's allegations, by showing that any purported negligence on their part in connection with the administrative proceedings or any advice with respect to plaintiff's method of billing Medicare for Levoritz's services did not proximately cause plaintiff's arrest. The indictment for grand larceny in the second degree charged that plaintiff billed for services that were not rendered, and the record of his criminal conviction for grand larceny plainly contradicts the allegations in the complaint (*see Bishop v Maurer*, 33 AD3d 497 [1st Dept 2006], *affd* 9 NY3d 910 [2007]). Since plaintiff's own actions resulted in his arrest, he failed to show that any alleged malpractice on defendants' part proximately caused his damages, i.e., his arrest (*see Minkow v Sanders*, 82 AD3d 597 [1st Dept 2011]). This failure mandates the dismissal of his legal malpractice action regardless of whether defendants were negligent (*Leder v Spiegel*, 31 AD3d 266, 267-268 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]).

In pleading his Judiciary Law § 487 claim, plaintiff failed to allege that defendants acted "with intent to deceive the court

or any party" (*id.*) or "'a chronic and extreme pattern of legal delinquency'" (*Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009]).

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

ENTERED: JANUARY 23, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11533 Cellular Mann, Inc., Index 652254/13
Plaintiff-Appellant,

-against-

JC 1008 LLC., et al.,
Defendants-Respondents.

_____

Kucker & Bruh, LLP, New York (Nativ Winiarsky of counsel), for appellant.

LaRocca Hornik Rosen Greenberg & Blaha, LLP, New York (Amy D. Carlin of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about September 16, 2013, which, in an action for, inter alia, declaratory relief, granted defendants' motion to dismiss the complaint, unanimously modified, on the law, to declare in defendants' favor that the lease amendment renewal option was not properly exercised, and otherwise affirmed, without costs.

The motion court properly found the lease amendment unambiguous, and therefore correctly refused to consider extrinsic evidence of a prior agreement or the parties' post-amendment course of performance (*see Chelsea Piers, L.P. v Hudson River Park Trust*, 106 AD3d 410, 412 [1st Dept 2013]) and correctly declined to construe the amendment against the drafter

(*see Schron v Troutman Saunders*, 97 AD3d 87, 93 [1st Dept 2012], *affd* 20 NY3d 430 [2013]). The tenant's "limited" right to renew its lease was properly understood as an alternative to the landlord's right to reject the renewal notice if, at the expiration of the lease, the landlord decided to combine the tenant's premises with the adjacent vacant space.

We have considered plaintiff's additional arguments, including those raised for the first time in its appellate reply brief, and find them unavailing.

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

ENTERED: JANUARY 23, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11534 The People of the State of New York, Ind. 3209/11
Respondent,

-against-

German Torres, also known as Mouse,
Defendant-Appellant.

_____

Paul J. Angioletti, Staten Island, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda 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 March 6, 2012,

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 23, 2014

CLERK

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

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11535 Risk Control Associates Index 113735/11
Insurance Group,
Plaintiff-Appellant,

-against-

Maloof, Lebowitz, Connahan
& Oleske, P.C., et al.,
Defendants-Respondents.

_____

Behman Hambelton, LLP, New York (Crystal E. Nagy of counsel), for appellant.

Schenck, Price, Smith & King, LLP, New York (John P. Campbell of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered October 16, 2012, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff, a claims administrator for an insurer, commenced this action alleging legal malpractice against defendants, who were retained to represent the insurer in a personal injury action. Acknowledging that it is not in privity with defendants, plaintiff contends that it may bring the cause of action by virtue of its relationship of near privity with them (*see Federal Ins. Co. v North Am. Specialty Ins. Co.*, 47 AD3d 52, 59, 60-61 [1st Dept 2007]). However, plaintiff does not allege that it had a contractual obligation to pay for the loss in the personal

injury action (*compare Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172 [1st Dept 2004] [excess insurer alleged relationship of near privity with counsel hired by primary carrier to represent defendant in underlying action]). Nor does it allege that it sustained actual damages because of this obligation (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). Similarly, plaintiff's factual allegations do not suffice to state an equitable subrogation cause of action against defendants (*see Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 581 [1995]).

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

ENTERED: JANUARY 23, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11536 The People of the State of New York, Ind. 3672/10
Respondent,

-against-

Orlando Guzman,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello 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 (A. Kirke Bartley, Jr., J.), rendered on or about July 27, 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 23, 2014

CLERK

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

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11538 Agustin Paez, Index 117172/09
Plaintiff,

-against-

1610 Saint Nicholas Avenue L.P., et al.,
Defendants.

- - - - -

1610 Saint Nicholas Avenue L.P., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Javier and David Restaurant Corp.,
Third-Party Defendant-Respondent.

_____

White & McSpedon, P.C., New York (Joseph W. Sands of counsel), for appellants.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Bryan Goldstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 16, 2013, which granted third-party defendant Javier and David Restaurant Corp.'s motion for summary judgment dismissing the third-party complaint, unanimously affirmed, without costs.

In this action for personal injuries allegedly sustained by plaintiff on October 23, 2008, while he was working for third-party defendant at a restaurant located on premises owned and/or managed by defendants, this Court reinstated a default judgment

entered against defendants on a prior appeal (103 AD3d 553 [2013]). By virtue of this default, defendants are "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003] [citation omitted]). Thus, as between plaintiff and defendants, the issue of liability has been determined as a matter of law, and defendants may not "introduce evidence tending to defeat the plaintiff's cause of action" (*Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]). Defendants' default does not preclude their pursuit of claims against third-parties for purposes of apportionment of fault (*see Parra v Ardmore Mgt. Co.*, 258 AD2d 267 [1st Dept 1999], *lv denied* 93 NY2d 805 [1999]).

Third-party defendant is nonetheless entitled to dismissal of defendants' claim for contractual indemnification. In moving for summary judgment, third-party defendant met its burden of showing the absence of a binding indemnification agreement at the time of the accident by submitting the leases and related documents that were exchanged, and relied upon, by defendants. In opposition, defendants failed to establish the existence of a triable issue of fact and defense counsel's claim that the lease

at issue was extended to December 31, 2009, lacks evidentiary value (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

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

ENTERED: JANUARY 23, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11540-
11541 In re Kevin N.,

A Child Under Eighteen
Years of Age, etc.,

Richard D.,
Respondent-Appellant,

Jane N.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondent.

Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), attorney for the child.

_____

Order of disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about January 3, 2013, which, upon a fact-finding determination of neglect, ordered respondent-appellant to comply with the terms and conditions specified in a one-year order of protection that had been issued on April 16, 2012, unanimously affirmed, insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise dismissed, without costs, as moot. Appeal from the

fact-finding order, same court and Judge, entered on or about September 20, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The evidence supports the court's findings that appellant, who had a seven-year relationship with the child's mother, was a person legally responsible for the subject child within the meaning of Family Court Act § 1012(g). There was evidence that appellant had described himself as the child's stepfather, picked the child up from school and engaged in activities with him. Although he only admitted to staying overnight on three to four occasions and claimed to have another primary residence, there was evidence that he actually lived in the apartment with the mother and child, at least on a part-time basis, and other evidence permitting "'an inference of substantial familiarity' between the child[] and respondent" (*Matter of Keoni Daquan A. [Brandon W.-April A.]*, 91 AD3d 414, 415 [1st Dept 2012]; *Matter of Christopher W.*, 299 AD2d 268 [1st Dept 2002]; *see also Matter of Mikayla U.*, 266 AD2d 747 [3d Dept 1999]). We find no reason to set aside the court's credibility determinations, and its findings must be accorded deference (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *see also Matter of Nasir J.*, 35 AD3d 299 [1st Dept 2006]).

A preponderance of the evidence supports the court's finding that appellant neglected the child by illegally keeping a loaded semi-automatic gun, which he explained was already in the one-room apartment when "they" moved in, in a plastic bin near where the child slept (*see Matter of Leah M. [Anthony M.]*, 81 AD3d 434 [1st Dept 2011]).

Appellant's argument that the court's assistance in the instant matter was unnecessary under all the circumstances, has not been preserved for review. Were we to consider his claim, we would reject it on the merits since the court's assistance was necessary in light of the child's desire to continue seeing the appellant and the need to continue monitoring his compliance with an order of protection issued in connection with resolution of the neglect case against the mother (*see Matter of Mary Kate VV.*, 59 AD3d 873, 874-875 [3d Dept 2009], *lv denied* 12 NY3d 711 [2009]).

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

ENTERED: JANUARY 23, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11542 Alf Naman Real Estate Advisors, LLC, Plaintiff-Appellant, Index 100867/12

-against-

Cape Sag Developers, LLC, et al., Defendants-Respondents.

_____

Ira D. Tokayer, New York, for appellant.

Pryor Cashman LLP, New York (Philip R. Hoffman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered October 11, 2012, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The November 2, 2007 Amended and Restated Limited Company Agreement of Capnam Sag Management, LLC (Capnam Sag) prohibited defendant Cape Sag Developers, as managing member of Capnam Sag, from involving Capnam Sag in a merger except in a "Controlled Transaction" where the surviving entity is an "Affiliate" of Capnam Sag. As relevant to this appeal, an "Affiliate" of Capnam Sag is an entity which is "under common ownership or control" with Capnam Sag. On July 15, 2011, Cape Sag Developers entered into a limited liability company agreement as the sole owner and

managing member of defendant Capsag Harbor, Management, LLC (Capsag Harbor), and effective July 18, 2011, Cape Sag Developers merged Capnam Sag into Capsag Harbor, with Capsag Harbor as the surviving entity.

The court properly found that the merger was permissible because Capsag Harbor was the "Affiliate" of Capnam Sag in that both companies were under the "common ownership or control" of Cap Sag Developers, which was the managing member in control of both companies. In making this finding, the court properly enforced the amended limited liability agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document (*see South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272 [2005]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

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

ENTERED: JANUARY 23, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11543 The People of the State of New York, Ind. 1732/10
Respondent,

-against-

Jonathan Mata,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered on or about August 4, 2011, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JANUARY 23, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11544N Danielle Pecile, et al., Index 110490/10
Plaintiffs-Respondents,

-against-

Titan Capital Group, LLC, et al.,
Defendants-Appellants.

_____

Gordon & Rees, LLP, New York (Christopher A. Seacord of counsel), for appellants.

Thompson Wigdor LLP, New York (David E. Gottlieb of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 19, 2013, which, to the extent appealed from, granted plaintiffs' motion to compel production of a computer CD of photographs, and denied, in part, defendants' motion to compel discovery, unanimously modified, on the law and the facts, to permit defendants limited discovery of plaintiffs' wage and job title history, and plaintiff Culicea's educational history, and otherwise affirmed, without costs.

In this sexual harassment action, plaintiffs allege, inter alia, being tricked into viewing naked pictures by defendant Russell Abrams. Thus, the motion court properly directed the exchange of the CD containing those alleged photographs, since they are material and necessary to the prosecution of this action

(CPLR 3101; *see also Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Anonymous v High School for Envtl. Studies*, 32 AD3d 353 [1st Dept 2006]). Given the personal nature of the photographs, we direct that the CD not be disseminated to anyone unconnected to the litigation.

However, defendants' demands for authorizations to obtain plaintiffs' entire cell phone and text message records, educational histories post-high school and complete employment files are overbroad (*see Manley v New York City Hous. Auth.*, 190 AD2d 600 [1st Dept 1993]). Since Culicea's resignation letter arguably placed her academic status in issue, defendants should be permitted an authorization directing disclosure of her law school enrollment dates, beginning with her employment at defendants' hedge fund. Defendants' demands for plaintiffs' employment histories should be granted to the limited extent of providing plaintiffs' past wage histories and names of positions held, since plaintiffs have only placed their work histories at issue in the context of their financial worth as employees.

Regarding defendants' demand for access to plaintiffs' social media sites, they have failed to offer any proper basis for the disclosure, relying only on vague and generalized assertions that the information might contradict or conflict with

plaintiffs' claims of emotional distress. Thus, the postings are not discoverable (*see Tapp v New York State Urban Dev. Corp.*, 102 AD3d 620 [1st Dept 2013]).

Lastly, defendants correctly assert that prior criminal convictions and pleas of guilty are relevant and discoverable (CPLR 4513; *see also Sansevere v United Parcel Serv.*, 181 AD2d 521 [1st Dept 1992]). However, "[a] youthful offender adjudication is not a judgment of conviction for a crime or any other offense" (Criminal Procedure Law § 720.35[1]). Thus, defendants cannot compel disclosure of the details of a youthful offense, since that would "contravene[] the goals envisioned by the youthful offender policy" (*State Farm Fire & Cas. Co. v Bongiorno*, 237 AD2d 31, 36, [2d Dept 1997]; *see also Auto Collection, Inc. v C.P.*, 93 AD3d 621, 622 [2d Dept 2012]). Nothing in the record suggests that the evidence sought would

serve as collateral estoppel to the claim, or is relevant in some other manner that would serve as an exception to that general rule (*see Green v Montgomery*, 95 NY2d 693 [2001]).

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

ENTERED: JANUARY 23, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11545 The People of the State of New York, Dkt. 15403C/11
Respondent,

-against-

Albin Almanzar,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Joseph Ferdenzi of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert A. Sackett, J.), rendered March 9, 2012, convicting defendant, upon his plea of guilty, of operating a motor vehicle while under the influence of alcohol, and sentencing him to a conditional discharge for a period of one year and a $300 fine, unanimously affirmed.

The information was not jurisdictionally defective. Allegations that defendant was behind the steering wheel of a car

with its motor running satisfied the operation element of the offense charged (*see People v Alamo*, 34 NY2d 453 [1974]).

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

ENTERED: JANUARY 23, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11546 Pilar Rivera Lorenzo, Index 306753/08
Plaintiff,

-against-

Ortiz Funeral Home Corporation, et al.,
Defendants-Respondents,

E.S.D. Corp., et al.,
Defendants,

Electro Concourse Associates, et al.,
Defendants-Appellants.

_____

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellants.

Safranek, Cohen & Krolian, White Plains (James G. Kelly of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered June 27, 2013, which denied the motion of defendants-appellants Electro Concourse Associates and Stellar Management, LLC for summary judgment dismissing the complaint and cross claims as against them, unanimously reversed, on the law, without costs, the motion granted and, upon a search of the record, the cross motion of defendants-appellants E.S.D. Corp. and Corky's Restaurant for summary judgment dismissing the complaint and cross claims as against them granted as well. The Clerk is directed to enter judgment in favor of said defendants

accordingly. Appeal from so much of the same order as denied the cross motion, unanimously dismissed, without costs, as abandoned.

Plaintiff and her daughter testified at their depositions that plaintiff was injured when she tripped and fell over the raised or elevated portion of a public sidewalk located near a diner and a funeral home. Defendants Electro Concourse Associates and Stellar Management (Electro/Stellar) own and manage, respectively, a mixed use building next door to a building owned by defendants-respondents, who run a funeral home there. Defendants E.S.D. Corp. and Corky's Restaurant operate a small diner in a storefront they rent from Electro/Stellar.

In support of their motion for summary judgment, Electro/Stellar met their prima facie burden by submitting the affidavit of an engineer who opined that the concrete slab in front of the funeral home had become raised as a result of tree roots pushing up, and that Electro/Stellar had not contributed to the defect, and the affidavit of a land surveyor who opined that the raised slab was located entirely in front of the property owned by the funeral home, and not in front of the property owned by Electro/Stellar. Since the sidewalk defect that caused the accident was located in front of the neighboring property and was not caused or created by Electro/Stellar, they did not have any

obligation to repair the defect (*see Mitchell v Icolari*, 108 AD3d 600, 601-602 [2d Dept 2013]; Administrative Code of the City of New York § 7-210; *see also Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]). Defendants E.S.D. Corp. and Corky's Restaurant cross-moved for summary judgment relying on the same arguments and evidence.

Plaintiff did not oppose the motion or cross motion. The funeral home defendants opposed, submitting only photographs taken by Electro/Stellar's engineering expert, which were insufficient to raise an issue of fact as to the location of the raised sidewalk that plaintiff testified caused her accident. Since the funeral home defendants failed to raise an issue of fact, the motion for summary judgment dismissing all claims and cross claims against Electro-Stellar was warranted. Upon a search of the record, summary judgment is also granted to defendants E.S.D. Corp. and Corky's Restaurant since the issue of

duty to repair the defect is identical as it relates to them, notwithstanding their failure to pursue their appeal (*see Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2007]; CPLR 3212[b]).

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

ENTERED: JANUARY 23, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11547 In re Kritzia B.,
Petitioner-Respondent,

-against-

Onasis P.,
Respondent-Appellant.

_____

Neal D. Futerfas, White Plains, for appellant.

Law Offices of Olu Jaiyebo, New York (Olu Jaiyebo of counsel), for respondent.

_____

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about August 14, 2012, which, after a hearing, found that respondent committed the family offense of harassment in the first or second degree, and granted an order of protection directing respondent to observe certain conditions of behavior for a period not in excess of two years, unanimously modified, on the law, to vacate the finding of harassment in the first degree, and otherwise affirmed, without costs.

Petitioner established by a fair preponderance of the evidence that respondent committed acts warranting an order of protection in her favor (*see* Family Court Act § 832). She established that respondent engaged in a course of conduct alleged in the petition, involving calling, texting and following

petitioner over a period of time and appearing outside her house in the early morning hours, that constituted harassment in the second degree (Penal Law § 240.26[3]). The sheer number of calls respondent made provides a reasonable basis on which to infer that he intended to annoy or alarm petitioner (*see People v Tiffany*, 186 Misc 2d 917, 919 [Crim Ct, NY County 2001]) and that the calls did not serve a legitimate purpose other than to hound her (*see People v Stuart*, 100 NY2d 412, 428 [2003]).

However, the record does not support the alternate finding of first-degree harassment, since there is no evidence that respondent engaged in a course of conduct or repeatedly committed acts that placed petitioner "in reasonable fear of physical injury" (Penal Law § 240.25; *see People v Demisse*, 24 AD3d 118 [1st Dept 2005], *lv denied* 6 NY3d 833 [2006]). Indeed, the court did not find that respondent's acts placed petitioner in fear of physical injury.

In the absence of a clear abuse of discretion, we defer to the trial court's determination of the permissible scope of cross

examination of petitioner (*see People v Aska*, 91 NY2d 979 [1998]).

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

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

ENTERED: JANUARY 23, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11548 The United States Life Insurance Company in the City of New York, Plaintiff-Appellant, Index 601212/08

-against-

Rebeka Blumenfeld, et al., Defendants-Respondents.

_____

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Michelle M. Arbitrio of counsel), for appellant.

Lipsius-Benhaim Law LLP, Kew Gardens (Ira S. Lipsius of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May 4, 2012, which dismissed the amended complaint pursuant to a prior order of this Court, unanimously affirmed, with costs.

In this action for a declaratory judgment, defendants moved for summary judgment dismissing the amended complaint. After the lower court denied the motion, this Court reversed, granted the motion, and declared that the life insurance policy at issue is valid (92 AD3d 487 [2012]). Plaintiff did not move to reargue or for leave to appeal to the Court of Appeals.

After this Court issued its decision, the motion court dismissed the amended complaint in its entirety in accordance

with our order. Plaintiff appeals, arguing that the complaint should not have been dismissed in its entirety because, on the prior appeal, this Court analyzed only the issue of whether its acceptance of premium payments after learning of grounds to rescind the subject policy operated as a waiver of its right to rescind, but did not reach the remaining claims for fraud/misrepresentation, negligent misrepresentation, and breach of the duty of good faith and fair dealing, or the request for attorneys' fees, costs, and punitive damages. Plaintiff's argument is unavailing.

The tort claims and the rescission claim are based on the same allegations, i.e., that plaintiff was harmed by issuing a policy that it would not have issued had defendants not made false representations and/or omissions in the insurance application, and merely seek different relief. Notably, this Court specifically found that plaintiff's acceptance of the premium payments after it "had sufficient knowledge of potential

material misrepresentations warranting rescission of the policy" and after it commenced this action, "constituted a ratification of the policy and a waiver of its right to rescind" (92 AD3d at 489-490). Accordingly, we dismissed the entire complaint.

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

ENTERED: JANUARY 23, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11549 In re Jacqueline Ploss, etc., Index 101211/12
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

_____

Jeffrey L. Goldberg, P.C., Port Washington (Jeffrey L. Goldberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Keith M. Snow of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Geoffrey D.S. Wright, J.), entered July 25, 2012, denying the petition to annul respondents' denial of accidental disability retirement (ADR) benefits, dated October 12, 2011, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated, the petition to annul the determination granted, and the matter remanded to respondents for further proceedings.

Respondents failed to overcome the presumption of causation of *General Municipal Law § 207*-k by failing to cite objective medical evidence to support the finding that decedent's ventricular arrhythmia and tachycardia induced cardiomyopathy were not caused by job-related stress. Decedent's cardiologist

attributed decedent's increased catecholamines to job stress, which impacted his heart condition. The Medical Board, which noted other possible causes of decedent's heart ailment, failed to cite competent and credible evidence which rebutted the conclusion of decedent's cardiologist, and merely pointed to gaps in petitioner's evidence, which is insufficient *(see Matter of Ginther v Kelly,* 109 Ad3d 738, 739 [1st Dept 2013]).

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

ENTERED: JANUARY 23, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11551 The People of the State of New York, Ind. 370/01
Respondent,

-against-

Miguel Valderas,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered July 13, 2012, resentencing defendant to an aggregate term of 25 years to life, including an aggregate term of 2½ years' postrelease supervision as to certain convictions, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: JANUARY 23, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11552 Anthony Branham, Sr., etc., Index 302427/09
Plaintiff-Appellant,

-against-

R.V. Ambulette, Inc., et al.,
Defendants-Respondents.

_____

Fitzgerald & Fitzgerald, P.C., Yonkers (John M. Daly of counsel), for appellant.

Cobert, Haber & Haber, LLP, Garden City (David C. Haber of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered June 18, 2012, which denied plaintiff's motion to renew an order granting defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying renewal (*see Lee v Ogden Allied Maintenance Corp.*, 226 AD2d 226, 227 [1st Dept], *lv dismissed* 89 NY2d 916 [1996]; *Leonard Fuchs, Inc. v Laser Processing Corp.*, 222 AD2d 280, 280 [1st Dept 1995]). Plaintiff failed to offer any reasonable

excuse for his failure to have the affidavit of a nonparty eyewitness (who was deposed more than 16 months prior to the adjourned return date of defendants' summary judgment motion) available in time to submit in opposition to the summary judgment motion (*see Lee*, 222 AD2d at 227).

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

ENTERED: JANUARY 23, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11554-
11555 In re Salimata T., and Another,

Children Under Eighteen
Years of Age, etc.,

Elima T.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Anne Reiniger, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the children.

_____

Order of disposition, Family Court, New York County (Susan Knipps, J.), entered on or about May 10, 2013, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding determination that respondent mother neglected the subject children, unanimously affirmed, without costs.

The Family Court's neglect finding, based upon allegations of the mother's infliction of excessive corporal punishment, was

supported by a preponderance of the evidence (*see Matter of Deivi R. [Marcos R.]*, 68 AD3d 498 [1st Dept 2009]). The daughter's out-of-court statements describing various instances of excessive corporal punishment were properly admitted into evidence, since they were corroborated by her brother's statements, as well as the daughter's teacher, guidance counselor, and the ACS caseworker's observations of her injuries (*see Matter of Naomi J. [Damon R.]*, 84 AD3d 594 [1st Dept 2011]).

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

ENTERED: JANUARY 23, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11556 The People of the State of New York, Ind. 2799/10
Respondent,

-against-

Jason White,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (William Mogulescu, J.), rendered August 10, 2012, convicting defendant, upon his plea of guilty, of two counts of criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of four years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The totality of the information available to the police justified the police actions, even though certain pieces of the information, viewed in isolation, may have had an innocent explanation (*see e.g. People v Rodriguez*, 71 AD3d 436 [2010], *lv denied* 15 NY3d 756 [2010]).

The police lawfully stopped a car in which defendant was a front-seat passenger. The car was being driven by a codefendant, and another codefendant was sitting in the back seat. An officer saw the back-seat passenger looking back at the police car and then ducking down, lifting his arm up and down in an attempt to stuff something under the seat of the car, suggesting the possibility of a weapon being present. The driver's suspicious disclaimer of having a firearm raised the level of suspicion. When the police lawfully ordered the three men out of the car, they noticed that defendant was nervous and breathing very heavily. When an officer then agreed to defendant's request to put his cell phone down, defendant reached down towards his right side, outside of the officer's view, rather than his left side where there was a cell phone clip. This gesture, viewed in context of all the preceding factors, strongly indicated a threat to the officer's safety (*see People v Nelson*, 67 AD3d 486 [1st Dept 2009]). Therefore, the officer lawfully grabbed defendant's hand as a self-protective measure (*see People v Campbell*, 293 AD2d 396 [1st Dept 2002], *lv denied* 98 NY2d 695 [2002]), and lawfully patted the part of defendant's waistband that defendant had reached for (*see People v Allen*, 42 AD3d 331 [1st Dept 2007], *affd* 9 NY3d 1013 [2008]). Upon feeling the handle of a revolver,

the officer properly removed it and frisked defendant's other side, where he found a second revolver.

Since defendant's frisk and arrest were lawful, and the police had reason to believe that evidence relevant to the crime might be found in the car, particularly in light of the codefendant's attempt to hide something under the back seat, the police lawfully searched the car and recovered additional handguns and ammunition (*see e.g. Arizona v Gant*, 556 US 332 [2009]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 23, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11559 The People of the State of New York, Ind. 5507/01
Respondent,

-against-

Pedrito Mendez,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered on or about July 15, 2009, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JANUARY 23, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11563N Diana Joy Ingham derivatively on behalf of Cobalt Asset Management, L.P., Plaintiff-Appellant, Index 6511454/10

-against-

Charles R. Thompson, et al., Defendants-Respondents,

Mark M. Thompson, et al., Defendants,

Cobalt Asset Management, L.P., Nominal Defendant.

_____

Law Offices of Joseph M. Heppt, New York (Joseph M. Heppt of counsel), for appellant.

Kornstein Veisz Wexler & Pollard, LLP, New York (Daniel J. Kornstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 11, 2013, which denied plaintiff's motion to confirm an arbitration award dated February 25, 2013 that awarded $4 million to plaintiff, derivatively on behalf of Cobalt Asset Management, L.P., and granted the cross motion of defendants-respondents Charles R. Thompson and Cobalt Holding Co., Inc. to vacate the award, unanimously reversed, on the law, without costs, the cross motion denied, the motion granted, and the award confirmed.

CPLR 7511 provides the exclusive grounds for vacatur of an arbitration award, and none of those grounds have been presented here (*see Frankel v Sardis*, 76 AD3d 136, 139 [1st Dept 2010]; *Matter of New York State Nurses Assn. [Nyack Hosp.]*, 258 AD2d 303 [1st Dept], *lv denied* 93 NY2d 810 [1999]). Hence, the Supreme Court should have granted plaintiff's motion to confirm the arbitration award, and denied respondents' cross motion to vacate it.

Respondents' arguments that plaintiff should have been disqualified from maintaining the arbitration proceeding alleging, inter alia, breach of fiduciary duty, fraud, negligent mismanagement, and waste of assets, because she initially asserted individual claims alongside the derivative claims on behalf of the limited partnership, and settled with one of the defendants on behalf of herself and the limited partnership, are unavailing. Arbitrators are not bound by the principles of substantive law and, short of complete irrationality, they may craft an award to reach a just result (*see Matter of Raisler Corp. [New York City Hous. Auth.]*, 32 NY2d 274, 282-283 [1973]; *Lentine v Fundaro*, 29 NY2d 382, 385-386 [1972]). Even mistakes of fact and law do not warrant vacatur of an otherwise rational

award (*see Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 154-155 [1995]). Here, the parties extensively briefed and argued the issue of whether plaintiff could maintain the proceeding before the three-member panel, which unanimously ruled that plaintiff had cured any defect by withdrawing her individual claims, which the panel also dismissed. Moreover, the panel approved the settlement, and conditioned the award on plaintiff's turning over the settlement funds to the limited partnership. It cannot be said that the panel's determination concerning plaintiff's purported conflict of interest evinced complete or total irrationality, and hence, the award should be confirmed (*see Matter of Roffler v Spear Leeds & Kellogg*, 13 AD3d 308 [1st Dept 2004]).

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

ENTERED: JANUARY 23, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10979 A. Bernard Frechtman, etc., Index 157028/12
Plaintiff-Appellant,

-against-

Allen Gutterman, et al.,
Defendants-Respondents.

_____

Diane Kaplan, Briarcliff Manor, for appellant.

Brian H. Bluver, New York, for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 6, 2013, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Rosalyn H. Richter
Paul G. Feinman, JJ.

10979
Index 157028/12

_____x

A. Bernard Frechtman, etc.,
Plaintiff-Appellant,

-against-

Allen Gutterman, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered June 6, 2013, which granted defendants' motion to dismiss the complaint.

Diane Kaplan, Briarcliff Manor, for appellant.

A. Bernard Frechtman, New York, appellant pro se.

Brian H. Bluver, New York, for respondents.

SAXE, J.

Where a client sends a letter to its attorney terminating the representation and complaining that the attorney's representation was inadequate or constituted misconduct or malpractice, may the attorney sue the client for defamation?

Plaintiff, A. Bernard Frechtman, a practicing attorney for more than 60 years, brought this action against his former clients for defamation, alleging that three letters signed by defendant Allen Gutterman, each of which terminated Frechtman's employment as attorney in a particular named matter, contained defamatory statements. The relied-on statements include: "We do not believe you adequately represented our interest," "We believe your failure to act in our best interest in reference to certain matters upon first engaging in the matter may equate to misconduct, malpractice, and negligence," "We believe that your future representation on this matter only became necessary, as a result of mistakes and oversights made by you acting as counsel," and "[W]e believe that we should not pay for the value of services for which any misconduct or counsel oversight relates to the representation for which fees are sought."

Defendants moved to dismiss the complaint, and the motion court granted the motion. For the reasons that follow, we affirm.

Defamation is the making of a false statement about a person that "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977], *cert denied* 434 US 969 [1977]). "The elements are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). A statement is defamatory on its face when it suggests improper performance of one's professional duties or unprofessional conduct (*Chiavarelli v Williams*, 256 AD2d 111, 113 [1st Dept 1998]).

Defendants contend that the complained-of statements are not actionable because they amount to opinion rather than fact, and because they are, in any event, protected by both absolute and qualified privileges. Plaintiff contends that the contents of the letters include false and malicious statements of facts, or expressions of opinion that imply they are supported by undisclosed facts, that constitute defamation per se because they disparage him in his profession. He contends further that based

on his allegation that the letters were typed at Gutterman's direction by a person or persons employed by defendants, the requirement of publication of the defamatory statements to a third party is satisfied.

It is true that the complained-of statements disparage plaintiff in his profession. They may therefore constitute defamation if they amount to false statements of fact, rather than opinion, if they were published to a third party, and if they are not protected by a privilege.

Initially, the complaint cannot be dismissed on the strength of the publication requirement. While it would seem reasonable to conclude that a company employee assigned to prepare such a letter would not constitute a third party for purposes of the publication requirement, Court of Appeals precedent supports plaintiff's position asserting that, in the context of a dismissal motion, the publication requirement may be satisfied by the allegation that the document's contents were revealed to such a company employee. In particular, in *Ostrowe v Lee* (256 NY 36 [1931]), Chief Judge Cardozo explained that where it is alleged that the defendant dictated a defamatory letter to his stenographer, who transcribed the notes, and the letter was then sent to the plaintiff, publication to a third party is

sufficiently pleaded (*see Hirschfeld v Institutional Inv.*, 208 AD2d 380 [1st Dept 1994]).

The motion court correctly concluded that the complained-of statements are non-actionable expressions of opinion, rather than assertions of fact (*see Guerrero v Carva*, 10 AD3d 105, 111-112 [1st Dept 2004]). To determine whether the challenged statements are non-actionable opinion or assertions of fact,

> "[t]he factors to be considered are (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to 'signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact'" (*see Brian v Richardson*, 87 NY2d 46, 51 [1995], quoting *Gross v New York Times Co.*, 82 NY2d 146, 153 [1993]).

Of course, words that sound like an opinion may be actionable where the statement "implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it" (*Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]). "The actionable element of a 'mixed opinion' is not the false opinion itself — it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking" (*id.* at 290).

It is most important to "look[] at the content of the whole

communication, its tone and apparent purpose," rather than "first examin[ing] the challenged statements for express and implied factual assertions, and find[ing] them actionable unless couched in loose, figurative or hyperbolic language in charged circumstances" (*Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 254 [1991], *cert denied* 500 US 954 [1991]).

Considering the full content of the statements at issue here, including their "tone and . . . apparent purpose" (*Steinhilber*, 68 NY2d at 293), their broader context and their surrounding circumstances, the challenged statements are better understood as opinion than as fact. We come to this conclusion not because the statements are preceded by the phrase "We believe," but because of the context in which they were made. "[E]ven apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole" (*Steinhilber*, 68 NY2d at 294 [internal quotation marks omitted]; *see also Thomas H. v Paul B.*, 18 NY3d 580, 584-585 [2012]; *Immuno AG.*, 77 NY2d at 254). While the use of words such as "misconduct" and "malpractice" may, viewed in isolation, seem to be assertions of provable fact, or claims supported by unstated facts, viewed in their context, these

statements amount to the opinions and beliefs of dissatisfied clients about their attorney's work.

Even assuming the letters contain defamatory statements of fact, they are protected by both absolute and qualified privilege. An absolute privilege applies when the challenged communication was made by an individual participating in a public function, such as executive, legislative, judicial or quasi-judicial proceedings (*Rosenberg v Metlife, Inc.*, 8 NY3d 359, 365 [2007]). Defendants, in claiming the right to an absolute privilege, rely on the rule that "[i]n the context of a legal proceeding, statements made by parties and their attorneys in the context of litigation are absolutely privileged if, by any view or under any circumstances, they are pertinent to the litigation" (*Grasso v Mathew*, 164 AD2d 476, 479 [3d Dept 1991], *lv dismissed* 77 NY2d 940 [1991], *lv denied* 78 NY2d 855 [1991]). Although the rule refers to "proceeding[s] in court or . . . before an officer having attributes similar to a court" (*Toker v Pollak*, 44 NY2d 211, 219 [1978] [internal quotation marks omitted]), the concept of statements in the course of judicial proceedings has been treated as embracing letters between litigating parties and their attorneys, relating to litigation (*see Silverman v Clark*, 35 AD3d 1, 12 [1st Dept 2006]; *Grasso v Mathew*, 164 AD2d at 479).

Indeed, this Court has explained that a letter sent by a client to his or her attorney discharging the attorney is absolutely privileged:

> "The absolute privilege is not limited to statements made on the record during oral testimony or argument, or set forth in formal litigation documents, such as pleadings, affidavits, and briefs. In the interest of 'encourag[ing] parties to litigation to communicate freely in the course of judicial proceedings' (*Grasso*, 164 AD2d at 480), the privilege is extended to all pertinent communications among the parties, counsel, witnesses, and the court. Whether a statement was made in or out of court, was on or off the record, or was made orally or in writing, the rule is the same--the statement, if pertinent to the litigation, is absolutely privileged" (*Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 174 [1st Dept 2007].

Keeping in mind "the public policy to permit persons involved in a judicial proceeding to write and speak about it freely among themselves" (*id.* at 172), this Court in *Sexter & Warmflash* determined that a letter sent by a client to his attorney, discharging the attorney as counsel, is absolutely privileged as "a letter among parties and counsel on the subject of pending or prospective litigation" (*id.* at 174). That ruling is equally applicable here. Although releasing such a letter or its contents to unrelated third parties could affect the availability of the privilege, here, as in *Sexter & Warmflash*, there is no claim that either the letter or its contents was released or published to any unrelated third party.

Even if the absolute privilege were inapplicable, the statements contained in defendants' letters would be subject to a qualified privilege as communications upon a subject matter in which both parties had an interest (*see Shapiro v Health Ins. Plan of Greater N.Y.*, 7 NY2d 56, 60 [1959]). "The shield provided by a qualified privilege may be dissolved if plaintiff can demonstrate that defendant [made the statement] with 'malice,'" which may mean either spite or ill will, or knowledge that the statement was false or made in reckless disregard of its truth or falsity (*Liberman v Gelstein*, 80 NY2d 429, 437-438 [1992]). The statement must have been made with a proper purpose, and publication must be in a proper manner and to proper parties only (*Blackman v Stagno*, 35 AD3d 776, 778 [2d Dept 2006], *lv dismissed* 8 NY3d 938 [2007]; *see also* 43A NY Jur 2d Defamation and Privacy § 120).

A client's letter to an attorney terminating the attorney's services and explaining the client's perceived grounds for the termination qualifies as a communication on a subject in which sender and recipient have a shared interest. Where the letter is sent only to the attorney, and access to its contents is limited to the recipient and the defendant (which includes any of defendant's employees who assisted in its preparation), proper publication is established as a matter of law. Plaintiff's bare

allegations of malice are insufficient to prevent dismissal on this ground.

"The threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself" (*Washington Post Co. v Keogh*, 365 F2d 965, 968 [DC Cir 1966], *cert denied* 385 US 1011 [1967]). As a matter of public policy, which should protect open and honest communication between attorneys and their clients, clients must be permitted to make such claims, or complaints, directly to their attorneys, and to their attorneys alone, without threat of a lawsuit.

Accordingly, the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered June 6, 2013, which granted defendants' motion to dismiss the complaint, should be affirmed, without costs.

All concur.

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

ENTERED: JANUARY 23, 2014

CLERK