SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 17, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11793 Miller Tabak + Co., LLC, Index 651935/10
Plaintiff-Respondent,

-against-

Senetek PLC,
Defendant-Appellant.

_____

Schlam Stone & Dolan LLP, New York (Bradley J. Nash of counsel), for appellant.

Kaye Scholer LLP, New York (John S. Cahalan of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered November 20, 2012, awarding plaintiff damages, and bringing up for review an order, same court and Justice, entered September 24, 2012, which denied defendant's motion to dismiss the complaint pursuant to CPLR 3211, and granted plaintiff's cross motion for summary judgment, reversed, on the law, with costs, the judgment vacated, plaintiff's cross motion denied, and defendant's motion granted. The Clerk is directed to enter judgment in defendant's favor dismissing the complaint.

The parties entered into a letter agreement on or about October 21, 2009, whereby defendant engaged plaintiff as its

exclusive financial advisor "in connection with a review of strategic options and development of a business plan to evaluate and make recommendations for maximizing the assets of [defendant]." The agreement contemplated that the engagement "may potentially result in a sale, transfer or other disposition . . . [of] a portion of the assets, businesses or securities of [defendant]," therein defined as a "transaction." The agreement further provided that in the event of a transaction, as defined, plaintiff was entitled to a "transaction fee."

Plaintiff seeks to recover a "transaction fee" in connection with defendant's unsuccessful effort to acquire a gold mine in Nevada. As an initial step toward that goal, defendant entered into a participation agreement with nonparty Platinum Long Term Growth LLC, a New York hedge fund, whereby defendant purchased for $5 million a participation interest in certain notes issued to Platinum by Firstgold, a company in Chapter 11 bankruptcy proceedings. The collateral for the notes was the aforementioned gold mine. Defendant's ability to acquire the mine was contingent on, among other things, obtaining the necessary financing. The participation agreement contained a mechanism whereby the parties could unwind the deal. As the dissent notes, the acquisition was never completed because defendant failed to obtain the necessary financing, and exercised its right to unwind

the deal.

In our view, the motion court unreasonably construed the parties' agreement in arriving at the conclusion that plaintiff was entitled to a "transaction fee" in connection with defendant's aborted acquisition of a participation interest in the notes. The letter agreement provides that plaintiff is entitled to a "transaction fee" following the consummation or closing of a "transaction," which it defines as the "sale, transfer or other disposition . . . [of] a portion of the assets, businesses or securities of [defendant]." The acquisition in question was admittedly not a "sale" or "transfer." Nor can it be considered a "disposition," as plaintiff contends. The term "disposition" does not appear in isolation in the agreement, but as a catch-all at the end of the phrase "sale, transfer or other disposition." Thus, under the principle of ejusdem generis, the general language "or other disposition" must be construed as limited in scope by the more specific words "sale" and "transfer" that preceded it (*see 242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 103-104 [1st Dept 2006]).

Other provisions of the engagement letter confirm that plaintiff was retained to assist defendant with potential sales of its assets, businesses or securities. In describing the "advice and assistance" plaintiff might provide, the agreement

makes specific reference to the possible "sale of [defendant's] biotech or other businesses," and the "private placement of [defendant's] securities." The agreement also anticipates that plaintiff might render "assist[ance] . . . in the preparation of a memorandum describing the Company and its business operations for distribution to potential parties to a Transaction," i.e., materials prepared for potential investors in defendant. The agreement also authorizes plaintiff to place "customary tombstone announcements or advertisements in financial newspapers and journals," i.e., announcements apprising potential investors of a securities offering.

The more general language in the description of the scope of the "engagement," i.e., "a review of strategic options and development of a business plan to evaluate and make recommendations for maximizing the assets of [defendant]" does not illuminate the question of what constitutes a "disposition." In any event, assuming a conflict, the more specific provision concerning the definition of "transaction" would control over the general provisions in the agreement.

Further, as noted by the dissent, the acquisition of the gold mine was never completed or consummated, and the deal was unwound. Thus, the deal lacked the finality necessary to constitute a "disposition," as that term is commonly understood.

Accordingly, defendant's motion to dismiss should have been granted, and plaintiff's cross motion for summary judgment should have been denied.

All concur except Saxe, J. who dissents in part in a memorandum as follows:

SAXE, J. (dissenting in part)

While I concur with the majority to the extent it reverses the grant of summary judgment to plaintiff, I disagree with the grant of defendant's motion to dismiss the complaint pursuant to CPLR 3211.

Plaintiff is an institutional equity research and trading firm. Defendant is a technology and development company. In October 2009, the parties entered into a letter agreement pursuant to which plaintiff was to act as financial advisor to defendant, assisting defendant in business strategy and potential mergers or other transactions. The agreement provides that defendant would pay plaintiff a fee if defendant entered into a "sale, transfer or other disposition, ... [of] a portion of the assets, businesses or securities of the Company, whether by merger, consolidation or other business combination, negotiated purchase, tender or exchange offer, option, leveraged buyout, restucturing or otherwise" during, and for twelve months after, the expiration of the agreement. Plaintiff proceeded to advise defendant with regard to various opportunities in the mining industry.

In the transaction at issue, defendant purchased, from an entity called Platinum, notes in another entity, called Firstgold, with a face value of $7 million, for a purchase price

of $5 million. The purchase of the notes was in contemplation of defendant's acquisition from Firstgold of a gold mine in Nevada. When defendant failed to obtain the contemplated additional financing for the purchase of the mine, it sold back the notes to Platinum, pursuant to the terms of the purchase agreement with Platinum. Plaintiff claims that it is entitled to a fee for that transaction.

The initial question is whether defendant's purchase of the Firstgold notes constituted the contemplated type of "sale, transfer or other disposition" of defendant's assets, businesses or securities, as that term is defined by the parties' agreement. While the motion court found that defendant's purchase of those notes unquestionably constituted such a "sale, transfer or other disposition," the majority finds to the contrary, and therefore dismisses the complaint.

In my view, questions of fact preclude determination of this issue as a matter of law. I reject the majority's reasoning that the term "disposition" in the contract's phrase "sale, transfer *or other disposition*" must be interpreted as limited in scope by the words "sale" and "transfer," so as to refer only to a transaction by which defendant divests itself of assets. The phrase may equally well be understood to incorporate a transaction in which defendant's funds are used to purchase other

assets. This is particularly so since the agreement provides that plaintiff would assist defendant in potential mergers or other transactions, not just transactions in which defendant *sold* rather than *purchased* assets.

The principle of ejusdem generis, as useful as it may sometimes be in, for example, interpreting insurance policy terms (*see 242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 103-104 [1st Dept 2006]), or statutes (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 239[a] ["words employed in a statute are construed in connection with, and their meaning is ascertained by reference to the words and phrases with which they are associated"]), is not helpful in interpreting the relevant phrase of the parties' letter agreement. Since the proper interpretation of the agreement in this regard is unclear, I would deny summary judgment and leave the intent of the parties to be determined at trial.

Further, I find potential merit to defendant's contention that the purchase of the Firstgold notes was not the type of "disposition" contemplated by the agreement because it was conditional rather than final, and the purchase was ultimately rescinded. I believe that the agreement is unclear on this point as well, and thus, that neither party has yet established entitlement to judgment as a matter of law on the question of

whether plaintiff is entitled to a fee based on the particular transaction at issue.

I also perceive ambiguity as to whether the agreement required plaintiff to have brought about, or taken part in, the transaction, to be entitled to a fee. Section 2 of the agreement states that "The Engagement may potentially result in a sale, transfer or other disposition." The use of "result" may be understood to indicate that the engagement for which a fee is earned is one which resulted from the engagement. Since it cannot be said with certainty what the parties intended in this regard, this aspect of the contract's interpretation also requires a trial.

Moreover, a question of fact is presented as to whether plaintiff, in fact, played such a part in the transaction. The employee's affidavit submitted by plaintiff does not conclusively establish that the transaction here resulted from plaintiff's efforts, and therefore plaintiff's entitlement to judgment is not established as a matter of law. The employee's stated "awareness" of the possibility of such a purchase transaction does not suffice, and the "fyi" emails sent to him the day before the purchase closed do not indicate or refer to any efforts by plaintiff in connection with the deal.

For all the foregoing reasons, I would deny both plaintiff's motion for summary judgment and defendant's motion to dismiss the complaint.

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12123 Francisco Soriano, Index 106667/11
Plaintiff-Appellant,

-against-

St. Mary's Indian Orthodox
Church of Rockland, Inc.,
Defendant-Respondent.
- - - - -
[And a Third-Party Action].

_____

Della Mura & Ciacci, LLP, New York (Walter F. Ciacci and Joshua Annenberg of counsel), for appellant.

Harris, King & Fodera, New York (Laura Cohen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 27, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1), and granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, plaintiff's motion granted, and defendant's motion denied.

Plaintiff is a glazier with approximately 43 years of experience (24 years in the United States and 19 years in the Dominican Republic). He and three coworkers were sent by his employer to replace cracked glass panels in the skylight of

defendant church's steeple. To access the steeple, plaintiff and his coworkers placed a 12 or 14 foot extension ladder belonging to their employer on top of the roof of the church and leaned it up against the steeple. Plaintiff had used the ladder on three prior occasions and found it to be in good condition. As plaintiff climbed the ladder, the bottom kicked out, moving away from the steeple wall. Both the ladder and plaintiff fell approximately 20 feet straight to the roof below, causing plaintiff to sustain injuries.

Plaintiff commenced this action alleging, inter alia, that defendant violated Labor Law § 240(1) by failing to provide him with an adequate ladder and by failing to provide any safety harnesses or belts that would have prevented his fall.

Upon completion of discovery, plaintiff moved for partial summary judgment on the issue of defendant's § 240(1) liability. Defendant moved in a separate motion for summary judgment dismissing the complaint on the grounds that plaintiff's work was not covered by § 240(1) as a matter of law, since at the time of the accident plaintiff was not "altering" or "repairing" the premises, but rather was performing routine maintenance on the building. Defendant's motion was supported only by an attorney affirmation analogizing plaintiff's work to replacing window screens.

In opposition to defendant's motion and in further support of his motion, plaintiff submitted his own affidavit asserting that, based on his many years of experience as a glazier, skylight panels such as the ones he was replacing do not "crack" or "wear out" over time and "could have remained in place without repair or replacement indefinitely" unless some unusual event caused them to crack or break. Plaintiff further asserted that the three cracked panels made the skylight useless, as "water and other elements" could pass through the cracks, causing further damage to the panels as well as the interior of the steeple.

Labor Law § 240(1) provides protection to workers who are exposed to gravity-related risks arising from working at a height without being provided with adequate safety devices (*see e.g. Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586, 588 [1st Dept 2013]). The statute is "to be construed as liberally as may be for the accomplishment of the purpose for which it was . . . framed" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). All contractors, owners and their agents are required to provide proper protection to persons employed in the repairing or altering of a building who are exposed to elevation related hazards (*id.* at 268; *see also Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

A plaintiff moving for partial summary judgment must

establish that § 240(1) was violated and that the violation was a proximate cause of his or her injuries (*Robinson v East Med. Ctr, LP*, 6 NY3d 550, 554 [2006]; *Williams v 520 Madison Partnership*, 38 AD3d 464, 464-465 [1st Dept 2007]). "The plaintiff need not demonstrate that the [safety device] was defective or failed to comply with applicable safety regulations," but only that it "proved inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person" (*Williams*, 38 AD3d at 465 [internal quotation marks and emphasis omitted]; *see also Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 [2011]). The inexplicable shifting of an unsecured ladder may alone support a § 240(1) claim if a worker is caused to fall due to such shifting (*see e.g. Picano v Rockefeller Ctr. No., Inc.*, 68 AD3d 425 [1st Dept 2009]; *Carchipulla v 6661 Broadway Partners, LLC*, 95 AD3d 573, 574 [1st Dept 2012]). A worker's prima facie entitlement to partial summary judgment on his or her § 240(1) claim may be established by proof that the ladder provided collapsed under the worker while he or she was engaged in an enumerated task (*Carchipulla*, 95 AD3d at 573-574; *Harrison v V.R.H. Constr. Corp.*, 72 AD3d 547, 547 [1st Dept 2010); *Hamill v Mutual of Am. Inv. Corp.*, 79 AD3d 478, 478 [1st Dept 2010]).

The crux of this case involves the question of whether

plaintiff was involved in repair or maintenance work. "Essentially, routine maintenance for purposes of the statute is work that does not rise to the level of an enumerated term such as repairing or altering" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). In distinguishing between what constitutes repair as opposed to routine maintenance, courts will consider such factors as "whether the work in question was occasioned by an isolated event as opposed to a recurring condition" (*Dos Santos v Consolidated Edison of N.Y.*, 104 AD3d 606, 607 [1st Dept 2013]); whether the object being replaced was "a worn-out component" in something that was otherwise "operable" (*Gonzalez v Woodbourne Arboretum, Inc.*, 100 AD3d 694, 697 [2d Dept 2012]); and whether the device or component that was being fixed or replaced was intended to have a limited life span or to require periodic adjustment or replacement (*Picaro v New York Convention Ctr. Dev. Corp.*, 97 AD3d 511, 512 [1st Dept 2012]).

Here, plaintiff described the panes as being constructed of "heavy plate glass" with wire running through them and stated that they simply "do not crack or wear out over time." Plaintiff showed, without contradiction, that these panes were not being replaced as a result of normal wear and tear, as they were not expected to be regularly replaced. In fact, defendant presented no evidence that the panes ever had to be replaced or repaired

from the time the steeple had been built. As an experienced glazier with over 30 years of experience, plaintiff was more than competent to state that the replacement of these panes constituted repair work, and was not routine maintenance.

As plaintiff made out a prima facie case on the issue of liability, and defendant failed to offer evidence that would raise a triable issue of fact, plaintiff's motion should have been granted, and defendant's motion denied.

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12152 Tower Insurance Company of New York, Plaintiff-Appellant, Index 107314/11

-against-

BCS Construction Services Corp., et al., Defendants,

Devi Leonard, et al., Defendants-Respondents.

_____

Law Offices of Max W. Gershweir, New York (Jennifer Kotlyarsky of counsel), for appellant.

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

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered December 3, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment declaring that it had no obligation to defend or indemnify defendant BCS Construction Services Corp. (BCS) in an underlying personal injury action, affirmed, with costs.

Plaintiff issued a commercial lines insurance policy to BCS. The policy's declarations page stated BCS's "Business Description" as "Carpentry-Painting-Drywall-Plastering-Tile-Contractor." Elsewhere, the work to be covered was separated

into five separate "classifications," namely, "Carpentry-Interior," Painting-Interior-Structures," "Dry wall or wallboard install," "Plastering or stucco work," and "Tile, Stone-Interior construction." Plaintiff issued an endorsement to the policy clarifying that "[n]o coverage is provided for any classification code or operation performed by the Named Insured not specifically listed in the Declaration of this policy." Another endorsement provided that the "policy shall not apply to [claims] arising out of operations performed for any insured by independent contractors or acts or omissions of any insured in connection with his general supervision of such operations."

Defendants Devi and Ramesh Leonard, owners of the premises located at 2241 White Plains Road, Bronx, New York (a one-story, two-unit commercial building), orally hired BCS to serve as the general contractor for a construction project that involved adding a second and third story to the premises and installing the electrical system and plumbing throughout. BCS hired several subcontractors to perform various tasks on the project, including installation of elevators, construction of the roof and steel frame, and installation of a staircase from the basement to the third floor, as well as the electrical and plumbing work. On or about June 10, 2008, the Leonards fired BCS for performing inferior work at the project.

Nearly two years later, defendant John Farley allegedly suffered a personal injury while sitting in a parked car adjacent to the building, when the building partially collapsed, and he was hit by falling debris. Shortly thereafter, the Leonards placed plaintiff on notice of Farley's claim, asserting that "[w]hile insured was performing work on a building, they did not comply with plan and they did not perform the work properly. They left the job without completing it. A wall has collapsed. Five or six vehicles were damaged." Devi Leonard also gave a statement to an investigator hired by plaintiff, which said, inter alia, that BCS's "work was inferior and the columns placed were improper. We do not know if BCS or one of their subcontractors put up the roof, but it was done improperly." Devi Leonard also asserted that after BCS left the project they were unable to replace it, and no further work was performed on the project. Plaintiff then disclaimed coverage under the policy, based on, inter alia, the endorsements discussed above, which, again, excluded coverage "for any classification code or operation performed by the Named Insured not specifically listed in the Declaration of this policy," and for "[claims] arising out of operations performed for any insured by independent contractors or acts or omissions of any insured in connection with his general supervision of such operations."

Farley commenced an action against BCS and the Leonards, among others, alleging, as is relevant here, that BCS was negligent in its construction of the building. Notwithstanding its earlier disclaimer, plaintiff agreed to defend BCS in the action, subject to its right to commence this declaratory judgment action against BCS and interested parties concerning the validity of its disclaimer. In its answer BCS either denied, or denied knowledge and information sufficient to form a belief as to, the allegations that the two endorsements applied. BCS's principal, Eusebio Banks, attached a sworn statement to the answer, in which he gave a timeline of events related to BCS's involvement in the project. Banks stated that after his work permit expired, the Leonards hired a new contractor to continue the project and to make structural and mechanical changes to the building. Banks's statement is garbled and difficult to follow. However, it appears to lay the blame for the collapse on the work of the contractor that Banks claims succeeded him. For example, Banks asserts that "new construction is being with demolition of the existing exterior block wall," and, "If on March 13, 2010 was a big faling of concrete block wall - labors without permit and safeguard was working in alteration of the original structural plan . . . Manual with electrical hammer vibrator can be made demolition affecting and crack the block wall to obtain required

alteration for the new structural plan."

Plaintiff moved for summary judgment against BCS, the Leonards and Farley, arguing that it had no duty to defend or indemnify BCS because the policy excluded coverage for a claim that arose out of an independent contractor's work for an insured or the work out of which the claim arose was not specified in the policy. It pointed to Banks's statement, which it argued showed that BCS acted as the general contractor and project manager and that the work was performed by independent contractors. Farley and the Leonards opposed the motion on the ground that discovery was still ongoing in the underlying personal injury action. The motion court agreed, and denied plaintiff's motion as premature.

Plaintiff would be entitled to summary judgment if it could establish that "there is no possible factual or legal basis upon which [it] may eventually be held obligated to indemnify [BCS] under any policy provision" (*Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 93 [1st Dept 2005] [internal quotation marks omitted]). In other words, the record before us would have to establish, as a matter of law, that the underlying claim did not arise out of any work BCS did in the areas of interior carpentry, interior painting, dry wall installation, plastering or stucco work (interior or exterior), or interior tile and stone construction. Plaintiff would have to demonstrate

conclusively that all of the work out of which the claim arose was performed by an independent contractor.

This record permits no such conclusions, only speculation as to the work BCS did or did not do, and the cause of the accident. Nowhere does Banks, the BCS principal, state that subcontractors performed 100% of the actual work on the project, and that BCS's role was limited to administration and supervision. In any event, Banks's statement is only marginally coherent, and, as it is essentially the sole evidence that could possibly support the drastic remedy of summary judgment in the case, we hesitate to give it great weight. Further, Devi Leonard's statement is insufficient, since it contains the assertion that "we do not know if BCS or one of their subcontractors put up the roof," which contradicts plaintiff's argument that BCS did no work on its own. Leonard's statement does not address the pertinent question whether, if BCS performed work on the roof, any of that work fell under the covered classifications delineated in the policy.

As to the cause of the roof's collapse, the opinions rendered by Banks and Leonard are at best speculative and do nothing to satisfy plaintiff's burden to establish that it was not caused by covered work. Further, they contradict each other, with Banks maintaining that the accident was precipitated by his

successor's work and Leonard denying that BCS was ever replaced after it was terminated. Without a credible opinion as to the cause of the collapse, such as an expert's submission, this Court is not in a position to declare that the collapse could not, under any circumstances, have been caused by work covered by the insurance policy.

Unlike the dissent, we view the submissions by Banks and Leonard, insofar as they fail to state with any definitiveness the work BCS did *not* do, or the cause of the collapse, as insufficient to have shifted plaintiff's burden, as the party moving for summary judgment, to establish as a matter of law that the policy did not cover the claim (*see e.g.* Khuns *v Bay State Ins. Co.*, 78 AD3d 1496, 1497-1498 [4th Dept 2010]). Accordingly, contrary to the dissent's position, defendants were not required to produce evidence sufficient to raise an issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

All concur except Andrias, J. who dissents in a memorandum as follows:

ANDRIAS, J. (dissenting)

The majority affirms the order denying plaintiff's motion for summary judgment declaring that it had no obligation to defend or indemnify defendant BCS in the underlying personal injury action on the ground that plaintiff did not establish, as a matter of law, that the underlying claim did not arise out of work performed by BCS that fell within the classifications covered by the commercial lines insurance policy at issue. Because I find that plaintiff made a prima facie showing of its entitlement to summary judgment and that the opponents of the motion failed to offer a scintilla of evidence demonstrating that the underlying accident could have been caused by covered work performed by BCS, I dissent and would grant the motion.

The policy issued to BCS by plaintiff includes a "Classification Limitation Endorsement," which limits coverage to those classification codes listed in the policy. The policy also contains an "Independent Contractors Exclusion," which excludes coverage for claims "arising out of operations performed for any insured by independent contractors or acts or omissions of any insured in connection with his general supervision of such operations."

In 2007, defendant owners hired BCS to serve as the general contractor for a construction project adding a second and third

story to the subject premises. BCS filed all of the permits for the project and hired several subcontractors. Although there is no written contract, BCS's proposal indicates that the job encompassed, among other things, plumbing, electrical, structural steel, masonry, and roofing work, and the installation of an elevator, none of which fall within the classifications covered by the policy.

On or about June 10, 2008, the owners fired BCS for allegedly performing inferior work. BCS sought to withdraw the permits it obtained for the project, and advised the Department of Buildings of its request to "withdraw as *General Contractor* of Record" (emphasis added).

Two years later, on March 13, 2010, defendant Farley, the plaintiff in the underlying action, was injured when, as the underlying complaint alleges, "a portion of the adjacent building under construction collapsed striking [his] vehicle as did other debris that fell due to the partial collapse of the building under construction, and as [he] was attempting to exit his vehicle." Among other things, Farley alleges that the owners of the building and BCS were negligent in that they "failed to ensure the jobsite was free from falling objects; failed to provide safety nets, catchalls, sidewalk bridge and other safety devices to prevent the general public from being struck by

falling objects; failed to ensure that the building was properly constructed and/or maintained, said failure leading to the partial collapse of the building."

Plaintiff established prima facie its entitlement to a declaration that it had no duty to defend or indemnify BCS with respect to the underlying claim, based on the clear and unambiguous language of the Classification Limitation Endorsement and Independent Contractors Exclusion.

Under the Classification Limitation Endorsement, the policy limits liability protection to those hazards designated in the policy declarations. The policy describes the covered classifications as: "91341 - Carpentry-Interior"; "98305 - Painting-Interior-Structures"; "92388 - Dry wall or wallboard Install"; "98449 - Plastering or stucco work"; and "99746 - Tile, Stone-interior construction". The Independent Contractors Exclusion bars coverage for liability arising out of the work performed by a subcontractor.

In his complaint in the underlying personal injury suit, Farley alleges that "BCS ... was in the business of performing general contracting in construction management and/or masonry work *and performed said work* at the aforesaid premises (emphasis added)." BCS was identified as the general contractor in the work permits issued by the Department of Buildings, and requested

that it be allowed to withdraw as general contractor after it was fired, two years before Farley was injured by the partial building collapse.

Plaintiff also submitted the affidavit of an investigator who took a signed statement from Devi Leonard, an owner of the premises. In her statement, Leonard confirmed that BCS was hired as general contractor and that BCS hired Economy Iron Works as a steel subcontractor and other subcontractors whom Leonard did not know. Leonard stated that "the work was inferior and the columns placed were improper." She also stated that the roof work "was done improperly" and that BCS should have put up a sidewalk bridge. The investigator stated that after interviewing Leonard, he accurately transcribed Leonard's statement, which Leonard reviewed and signed (*see Chubb & Son v Riverside Tower Parking Corp.*, 267 AD2d 128 [1st Dept 1999]). No objection to the admissibility of Leonard's statement was raised below.

BCS's president, Eusebio Banks, also signed a statement, attached to the notice of appearance and verified answer he filed on behalf of BCS. In the statement, Banks indicated that BCS hired subcontractors for the frame steel work, scaffolds, general contracting, plumbing work, electrical work, and metal stair work. BCS also hired laborers, directly supervised the concrete block work, and served as a contract administrator for fully

insured subcontractors while it was on the job. BCS's invoice to the owners requested payment for this electrical, plumbing, masonry and construction work.

These submissions demonstrate that coverage is precluded by the policy because BCS acted as the general contractor, and its liability, if any, is premised on either non-covered work or work performed by its subcontractors (*see Ruiz v State Wide Insulation & Constr. Corp.*, 269 AD2d 518, 518 [2d Dept 2000] [where insured's work was classified as "painting" and a fire broke out due to the insured's repairing a roof, the Classification Limitation Endorsement was applicable and precluded coverage]). Indeed, at no point did Banks state that the wall collapse related to covered work or work that BCS performed itself. Rather, Banks maintained that Department of Buildings records reflected a December 3, 2009 complaint that "CONSTRUCTION WORK IS BEING DONE ON THE ROOF WHICH HAS CAUSE C[R]ACKS IN CALLER WALL/ALONG WITH VIBRATION," and that the concrete block wall fell because of an alteration of the original structural plan and the negligence of the new general contractor and owner in performing demolition work.

In opposition, defendants failed to produce any admissible evidence sufficient to raise a material issue of fact whether BCS was directly performing operations that could be fairly

characterized as included under the policy. Any suggestion that the activity leading to the structural collapse bore a reasonable relationship to the classifications for which coverage was purchased, i.e. carpentry, painting, drywall, plastering, and interior tile work, is purely speculative (*see Atlantic Cas. Ins. Co. v C.A.L. Constr. Corp.*, 2008 WL 2946060, *5, 2008 US Dist LEXIS 58815, *14-15 [ED NY 2008] ["rooftop renovations, exterior brick work, the construction of a driveway, and the construction of an entrance ramp exceed the scope of what can be classified as interior carpentry and drywall work"]; *see also Mount Vernon Fire Ins. Co. v Chios Constr. Corp.*, 1996 WL 15668, *2, 1996 US Dist LEXIS 414, *7 [SD NY 1996] [coverage precluded by a classification limitation for "Carpentry-Interior" because, although carpentry tasks were being performed on-site, the work at issue was not "remotely related to interior carpentry"]).

Defendants also failed to raise a material issue of fact whether the policy's Independent Contractors Exclusion barred coverage for all liability arising out of work performed for BCS by one its subcontractors. The record demonstrates that BCS engaged various independent contractors to build the second- and third-story additions from which the debris ultimately injuring Farley emanated. Plaintiff did not produce any evidence demonstrating that BCS was acting as anything other than a

general contractor, which was fired two years before Farley's accident, or that it performed any covered work itself that was a proximate cause of the accident (*see Ruiz v State Wide*, 269 AD2d at 519).

The summary judgment motion was not premature. Defendants "have advanced no nonspeculative basis to believe that additional discovery might yield evidence warranting a different disposition" (*Rosario v New York City Tr. Auth.*, 8 AD3d 147, 148 [1st Dept 2004]). While the cause of the wall collapse has not been attested to by experts, there is nothing in the record that remotely suggests that the building collapse was related to interior carpentry, painting, drywall, plastering and tile work performed by BCS. Significantly, defendants are BCS and the owners, who presumably have knowledge of the facts. While there has been no expert testimony, the action was commenced in June 2011, and the motion for summary judgment was not served until July 2012. Thus, defendants had ample time to investigate.

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

ENTERED: JUNE 17, 2014

CLERK

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

12416 In re Henry Conde, Petitioner, Index 103172/12

-against-

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

_____

The Quinn Law Firm, White Plains (Andrew C. Quinn of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Edward F. X. Hart of counsel), for respondents.

_____

Determination of respondent Police Commissioner, dated March 5, 2012, terminating petitioner's employment as a police officer, unanimously modified, on the law, to award petitioner back pay for the period in which he was suspended without pay beyond the 30 days permitted by Civil Service Law § 75(3-a), and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Paul Wooten, J.]), entered February 27, 2013) otherwise disposed of by confirming the remainder of the determination, without costs.

Following a disciplinary hearing, the hearing officer sustained three charges, which alleged respectively that petitioner, while assigned to the Internal Affairs Bureau (IAB): "on or about November 6, 2006, did wrongfully access and subsequently obtain confidential information from the Internal

Affairs Professional Computer System, which was not related to the official business of the Department" (5); "on or about November 6, 200[6], did wrongfully divulge or discuss official Department business without permission or authority to do so" (6); and on or about October 16, 2006, ... with intent to obtain a benefit or deprive another of a benefit, ... obtained confidential information from the Internal Affairs Professional Computer System, which was not related to the official business of the Department and divulged said information to another Member of Service" (7).

Petitioner does not challenge the findings with respect to charges 5 and 6. His argument that the finding with respect to charge 7 is not supported by substantial evidence is without merit. Petitioner improperly accessed a file regarding a pending disciplinary investigation related to a domestic violence incident involving a fellow officer and the officer's girlfriend, and effectively divulged its contents when he told the officer. "[I]t is what you said it is."

We reject petitioner's argument that his actions did not constitute official misconduct because there is no evidence that he acted "with intent to obtain a benefit or deprive another person of a benefit" (Penal Law § 195.00[1]). "'Benefit' means any gain or advantage to the beneficiary and includes any gain or

advantage to a third person pursuant to the desire or consent of the beneficiary" (Penal Law § 10.00[17]). This "includes more than financial gain and can encompass political or other types of advantage" (*People v Feerick*, 93 NY2d 433, 447 [1999]]). On the record before us, it can be reasonably inferred that petitioner intended to obtain a benefit for his fellow officer and friend within the meaning of the statute when he accessed confidential information in the IAB computer system and confirmed for the officer the scope of the allegations of the complainant in the disciplinary investigation against him (*see e.g. People v Barnes*, _ AD3d _, 2014 NY Slip Op 03310, *3 [3d Dept 2014] [while reversing the criminal misconduct conviction on other grounds not applicable in this case, the Court found that "[c]onsidering defendant's statement to the pharmacist, the jury could infer that defendant intended to obtain a benefit — getting Jewett's prescriptions filled more quickly — by flashing her badge and identifying herself as a police officer"]; *People v Lucarelli*, 300 AD2d 1013 [4th Dept 2002] [reinstating the official misconduct count where a police officer was informed of the name of a suspected drug dealer and transmitted the information to the suspect's mother, with the intent to benefit the suspect]).

The penalty of termination is not so disproportionate to the offense as to be shocking to one's sense of fairness (*Matter of*

Kelly v Safir, 96 NY2d 32, 39-40 [2001]). Petitioner betrayed his position of trust as an IAB member, who was privy to very sensitive information, and breached his confidentiality agreement with the police department, which stated that the wrongful disclosure of information would not be tolerated by the department and that divulging or discussing official department business except as authorized, constituted prohibited conduct and might constitute official misconduct under Penal Law § 195.00(1). Among other things, petitioner informed a fellow officer that he was the subject of a "criminal association log" and divulged very sensitive information regarding allegations that the officer was "hanging out" with a drug dealer and that a confidential informant was involved, possibly placing the informant's life in danger.

Respondents concede that petitioner is entitled to back pay for the period of time in which he was suspended in excess of 30 days (Civil Service Law § 75[3-a]).

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

ENTERED: JUNE 17, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12581 In re Irfan Karakus, et al., Index 104071/12
Petitioners-Appellants,

-against-

New York City Department
of Consumer Affairs,
Respondent-Respondent.

_____

Brennan Law Group, New York (Moira C. Brennan of counsel), for appellants.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Nicholas J. Murgolo of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered February 7, 2013, which denied the petition seeking to annul the determination of respondent New York City Department of Consumer Affairs, dated October 26, 2012, finding, inter alia, petitioner Cycle Stone, Inc. guilty of violating Administrative Code § 20-257(b) and imposing a $4,000 fine against it in connection with the unlicensed operation of a pedicab, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, and the petition granted.

Administrative Code § 20-257(b) provides that "[i]t shall be unlawful for a pedicab business to permit the operation of any pedicabs owned by it by a person who does not have a pedicab

driver's license and a motor vehicle driver's license in full force and effect." Petitioner Cycle Stone established that it did not "permit" the unlicensed operation of its pedicab, in violation of the statute, by demonstrating that, prior to leasing the pedicab, it was presented with a facially valid pedicab driver's license and had no knowledge or reason to suspect that the license was not in full force and effect on the date the violation was issued.

The statute, which obligates a pedicab driver to provide a copy of the disposition of any arrest, summons, complaint, or notice of violation to the pedicab business within five days of receipt of such disposition (Administrative Code § 20-259[i]), evinces an intent to provide pedicab business owners with a defense based on a reasonable belief that the driver's license was valid. Such intent is evidenced by, inter alia, the Legislature's provision of lack of knowledge as a defense to forfeiture of the pedicabs (*see* Administrative Code § 20-263[i][4]). In contrast, in other instances, the Legislature created statutory provisions which expressly relieve respondent agency of establishing knowledge of the lack of a valid license in the analogous situation of the unlicensed operation of horse-drawn carriages (Administrative Code § 20-381[e] ["In any prosecution of an owner for a violation of this section, it shall

not be necessary to prove that the owner knew or should have known that the driver was unlicensed, and there shall be a rebuttable presumption that such cab was operated with the permission of the owner"]) and tow trucks (Administrative Law § 20-496[c] [same]). No such statutory provision, however, has been made with respect to Administrative Code § 20-257(b). Had the Legislature intended otherwise, it could have so provided (*see e.g.* Administrative Code §§ 28-212.6, 28-503.3.1).

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

ENTERED: JUNE 17, 2014

CLERK

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

12670N In re La'Quande Thomas, etc., Index 158494/12
Petitioner-Appellant,

-against-

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

_____

Mitchell Dranow, Sea Cliff, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Hanh H. Le of counsel), for respondents.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered April 1, 2013, which denied petitioner's application for leave to file a late notice of claim, unanimously reversed, on the law, without costs, and the motion granted.

General Municipal Law § 50-e(5) confers upon the court "the discretion to determine whether to grant or deny leave to serve a late notice of claim within certain parameters" (*Matter of Porcaro v City of New York*, 20 AD3d 357, 358 [1st Dept 2005]). The statute provides, in pertinent part, that in determining whether to grant an extension of time to serve a notice of claim, a court shall consider, in particular, whether the public corporation acquired actual knowledge of the essential facts constituting the claim within the 90-day period specified in § 50-e(1) "or within a reasonable time thereafter" (§ 50-e[5]).

Further, under the statute, the court must take into account all other relevant facts and circumstances, including, among other things, whether the petitioner offered a reasonable excuse for the late notice and whether the delay substantially prejudiced the respondent's defense on the merits (*see id.*; *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 535 [2006]). The presence or absence of any one factor, however, is not determinative (*see Bertone Commissioning v City of New York*, 27 AD3d 222, 223-224 [1st Dept 2006]). Moreover, while the court has discretion in determining motions to file late notices of claim, the statute is remedial in nature, and therefore should be liberally construed (*Matter of Schiffman v City of New York*, 19 AD3d 206, 207 [1st Dept 2005]; *Camacho v City of New York*, 187 AD2d 262, 263 [1st Dept 1992]).

We find that the motion court improvidently exercised its discretion in denying petitioner's application. To begin, respondents had actual knowledge of the pertinent facts constituting the claim – namely, that a New York City Police Department vehicle had been involved in a traffic accident with petitioner's vehicle. Indeed, respondents' agent, a New York City police officer, was driving the police car involved in the accident (*see Renelique v New York City Hous. Auth.*, 72 AD3d 595, 596 [1st Dept 2010]; *Matter of Schiffman*, 19 AD3d at 207).

In addition, petitioner attempted to serve the notice of claim only 30 days after expiration of the statutory 90-day period for filing a notice of claim against a municipality. This short delay does not prejudice respondents' ability to investigate and defend the claim, as such a short passage of time is unlikely to have affected witnesses' memories of the relevant events. Further, the police report attached to the notice of claim sets forth the name, rank and identity of the officer driving the police car. The brief delay also presents no issue with respect to preserving the condition of physical evidence. Petitioner does not, for example, allege that the traffic light malfunctioned; rather, petitioner simply alleges that the driver of the police vehicle acted negligently.

Finally, even assuming for the sake of argument that petitioner had no reasonable excuse for failing to timely serve

the notice of claim, the absence of a reasonable excuse is not, standing alone, fatal to petitioner's claim (*see Caminero v New York City Health & Hosp. Corp. [Bronx Mun. Hosps. Ctr.]*, 21 AD3d 330, 332-333 [1st Dept 2005]).

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12758 The People of the State of New York, Respondent, Ind. 2497/08

-against-

Jermaine Elston, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Arnold & Porter LLP, New York (Kathleen A. Reilly of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered January 14, 2011, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of 17 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find that the evidence was overwhelming. There is no basis for disturbing the jury's credibility determinations. Defendant inflicted a stab would to the victim's throat that severed the carotid artery, a stab wound to the head that penetrated the skull and brain, and three stab or puncture wounds to the back. Thus, defendant clearly evinced

an intent to cause death rather than serious injury (*see e.g. People v Ross*, 270 AD2d 36 [1st Dept 2000], *lv denied* 95 NY2d 803 [2000]). Medical evidence, police observations, and evidence demonstrating defendant's consciousness of guilt overwhelmingly refuted his implausible justification defense.

The court properly exercised its discretion when it placed reasonable limitations on defendant's testimony concerning his knowledge of the victim's prior violent acts. The court permitted defendant to testify about his knowledge of the victim's gang membership and his involvement in violent incidents, while precluding other such evidence that had little additional probative value (*see People v Miller*, 39 NY2d 543, 552-553 [1976]). To the extent any of the court's restrictions could be viewed as erroneous, we find them to be harmless (*see* (*People v Umali*, 10 NY3d 417, 429 [2008]). Under the circumstances of the case, defendant's justification defense did not turn on the extent of his knowledge of the victim's violent past, and that type of evidence had little bearing on the actual justification issues presented at trial. Defendant did not preserve his claim that the court's limitations deprived him of his constitutional right to present a defense (*see People v Umali*, 10 NY3d at 428-429; *People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice.

As an alternate holding, we reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

Defendant's challenges to the prosecutor's summation are unpreserved (*see People v Romero*, 7 NY3d 911 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). The court took appropriate curative actions where applicable, and properly exercised its discretion in denying defendant's postsummations mistrial motion. Any improprieties in the summation constituted harmless error in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975].

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12759 Ivonne Torres, Index 113038/09
Plaintiff-Appellant,

-against-

The New York City Housing Authority,
Defendant-Respondent.

_____

Melcer Newman PLLC, New York (Jeffrey B. Melcer of counsel), for appellant.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Christine Gasser of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 5, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that she slipped on a greasy liquid leaking from garbage bags placed on the public sidewalk by defendant's workers. Pursuant to Administrative Code of the City of New York § 7-210(b), the owner of property abutting a public sidewalk has a duty to maintain the sidewalk in a reasonably safe condition and is liable for failure to do so (*see Early v Hilton Hotels Corp.*, 73 AD3d 559 [1st Dept 2010]).

Plaintiff's testimony that she saw defendant's workers placing garbage bags on the sidewalk in the morning raises issues

of fact as to whether defendant is responsible for creating the alleged slippery condition (*see Yuk Ping Cheng Chan v Young T. Lee & Son Realty Corp.*, 110 AD3d 637 [1st Dept 2013]; *Klein v Sujin Food Corp.*, 30 AD3d 331 [1st Dept 2006]).

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12760-
12761 Peter Bock,
Plaintiff-Appellant,

-against-

Loumarita Realty Corporation,
etc., et al.,
Defendants-Respondents.

Index 103221/11

Fillmore K. Peltz, Massapequa, for appellant.

Morris Duffy Alonso & Faley, LLP, New York (Iryna S. Krauchanka of counsel), for respondents.

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 27, 2013, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered January 27, 2014, which, to the extent appealable, denied plaintiff's motion to renew the prior motion, unanimously dismissed, without costs, as abandoned.

Defendants made a prima facie showing of entitlement to summary judgment based upon plaintiff's testimony that he fell on a sidewalk that was slippery when wet, during a period of heavy rain, defendants' lack of prior notice of a dangerous condition, and an expert opinion that there was no defect in the area of the fall. In opposition, plaintiff failed to raise a triable issue

of fact (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

The mere fact that a sidewalk is "inherently slippery" by reason of its smoothness or becomes more slippery when wet does not constitute an actionable defect (*see Waiters v Northern Trust Co. of N.Y.*, 29 AD3d 325 [1st Dept 2006]; *Wasserstrom v New York City Tr. Auth.*, 267 AD2d 36 [1st Dept 1999], *lv denied* 94 NY2d 761 [2000]; *Phillips v 630 McKinley Sq. Corp.*, 285 App Div 18 [1st Dept 1954]). Plaintiff's expert's finding lacked probative force and failed to raise a triable issue of fact as to the existence of a defective or dangerous condition in the absence of any assertion of a violation of a specific, applicable industry standard which contributed to the accident (*see Scivoletti v New York Mercantile Exch., Inc.*, 38 AD3d 326 [1st Dept 2007], *lv denied* 9 NY3d 802 [2007]).

Plaintiff's conclusory claim that a violation of 6 RCNY § 2-55(a)'s provision, concerning the maximum height for removable railings separating unenclosed sidewalk cafés contributed to his injuries fails to raise a triable issue of fact (*cf. D'Amico v Archdiocese of N.Y.*, 95 AD3d 601 [1st Dept 2012]). Likewise, plaintiff's claim, even if preserved, that the condition of the sidewalk violated Administrative Code of City of NY § 19-152(a), is unavailing. He failed to establish a causal relationship between the condition of the concrete patchwork, adjacent to the

location of the fall, and the accident, and his claim that granite constituted an "unapproved non-concrete material" is unsupported.

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12762 The People of the State of New York, Respondent, Ind. 1605/12

-against-

Curtis Barthrop, 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 September 21, 2012, as amended October 19, 2012, 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 [1st Dept 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: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12763-
12764 Index 152754/13

Rita Cusimano,
Plaintiff-Appellant,

-against-

Wilson, Elser, Moskowitz,
Edelman & Dicker LLP, et al.,
Defendants-Respondents.

_____

Law Offices of Mario Biaggi, Jr., New York (Mario Biaggi, Jr. of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 24, 2013, dismissing the complaint pursuant to an order, same court and Justice, entered on or about September 10, 2013, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff failed to allege facts that would satisfy the proximate cause element, namely, that "but-for" defendants' alleged inadequate and ineffective representation of her in the underlying arbitration, she would have succeeded in demonstrating that her parents lacked an ownership interest in a contested family asset (*see Lieblich v Pruzan*, 104 AD3d 462 [1st Dept

2013]). Plaintiff stated that if defendants had introduced her parents' personal income tax returns in the underlying arbitration proceeding, the arbitration panel would have had no choice but to consider them, credit their contents, and hold that the information contained therein (i.e., that the parents allegedly made no claim of an ownership interest in the contested family asset) was binding against the parents in accordance with the tax estoppel doctrine. The contention that mere submission of the parents' personal income tax filings in the arbitration proceeding would necessarily have altered the arbitration panel's determination regarding the parents' ownership interest in the subject asset is grounded in speculation, and thus, insufficient to sustain a claim for legal malpractice (*see e.g. AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 435 [2007]; *Pellegrino v File*, 291 AD2d 60, 64 [1st Dept 2002]).

Furthermore, even if the parents' personal tax returns had been offered as evidence in the underlying arbitration, there was no basis to assume they would have been credited by the panel,

in view of evidence suggesting the tax returns were prepared by accountants who relied upon information supplied by Bernadette Strianese who had interests which conflicted with the parents' ownership interests in the assets in dispute.

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12765-
12766-
12766A

Index 650146/12

112 West 34th Street Associates L.L.C.,
Plaintiff-Respondent,

-against-

112-1400 Trade Properties LLC,
Defendant-Appellant.

Edwards Wildman Palmer LLP, New York (Anthony J. Viola of counsel), for appellant.

Stern Tannenbaum & Bell LLC, New York (David S. Tannenbaum of counsel), for respondent.

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 19, 2013, which, to the extent appealed from as limited by the briefs, granted so much of plaintiff's motion for summary judgment as sought a declaration on the first cause of action in the amended and supplemental complaint, and declared that plaintiff effectively renewed the lease between the parties through noon on June 10, 2077, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered June 4, 2013, and from the corresponding so-ordered transcript, entered June 20, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In 1963, plaintiff's predecessors-in-interest, as lessee, and defendant's predecessor-in-interest, as lessor, entered into

a lease of certain property with an initial term of 30 years and, at the lessee's option, eight renewal terms of 10 or 11 years each, through June 10, 2077. The lease provided that at any time, lessee could renew for one or more of the renewal terms so long as lessee provided written notice to lessor at least two years before expiration of the then-current term.

Section 20.03 of the lease further provided that, "[i]n the event that any default shall have occurred of which Lessor shall have given notice to Lessee, which shall not have been cured and which shall not then be in the process of being cured with due diligence and in good faith by Lessee . . . within the time or times permitted by this Lease, the attempted exercise by Lessee . . . of any option to renew this Lease shall not become effective, nor shall any such renewal term be created, if any such default shall exist on the purported commencement date of any such renewal term."

The second clause of section 20.03 states that a renewal term will not be created if there exists at the commencement of the renewal term "any such default," which refers back to the previously specified default in the first clause (i.e., any default that has occurred and of which lessor has given notice, which is still outstanding and not in the process of being cured at the time lessee exercises its renewal option) (*see Patrolmen's*

Benevolent Assn. of City of N.Y., Inc. v City of New York, 46 AD3d 378, 380 [1st Dept 2007]; *Merchants Bank of N.Y. v Kluger*, 221 AD2d 289, 290 [1st Dept 1995], *lv denied* 88 NY2d 807 [1996]).

Plaintiff was not in default when it exercised its renewal option for all remaining renewal terms. Therefore, its renewal is valid, regardless of whether a subsequent default is present at the commencement of any renewal term. Contrary to defendant's assertion that this interpretation of section 20.03 permits each renewal term to commence even if plaintiff is in default, article 19 of the lease provides for remedies if plaintiff is in default, including termination of the lease upon 15 days' notice.

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

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12767 Sherry Herrington, Index 159328/12
Plaintiff-Appellant,

-against-

Metro-North Commuter Railroad Company,
Defendant-Respondent.

_____

David M. Fish, New York, for appellant.

Littler Mendelson P.C., New York (Eric D. Witkin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 10, 2013, which granted defendant's motion to dismiss the first amended complaint, unanimously affirmed, without costs.

Plaintiff failed to state a claim for discrimination based on sexual orientation under the New York City Human Rights Law (City HRL), because she failed to sufficiently allege that she was treated differently because of her sexual orientation (*see Askin v Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The only direct factual allegation in the first amended complaint of discrimination based on sexual orientation is plaintiff's allegation that in "late 2008," two "high-level Metro-North employees . . . made inappropriate and offensive comments about her sexual orientation." The statute of

limitations for claims under the City HRL, however, is three years (*see* Administrative Code of City of NY § 8-502[d]). Since plaintiff did not file her complaint in this action until four years later, these remarks are too remote in time to support her discrimination claim (*see Stembridge v New York City Dept. of Educ.*, 88 AD3d 611, 611 [1st Dept 2011], *lv denied* 19 NY3d 802 [2012]). Nor may the court consider these remarks pursuant to the continuing-violation doctrine, as plaintiff has not alleged facts comprising "a single continuing pattern of unlawful conduct extending into the [limitations] period immediately preceding the filing of the complaint" (*Ferraro v New York City Dept. of Educ.*, 115 AD3d 497, 497-498 [1st Dept 2014]; *see Van Zant v KLM Royal Dutch Airlines*, 80 F3d 708, 713 [2d Cir 1996]).

Plaintiff's claim for gender discrimination based on disparate pay from 2003 to 2009 is time-barred. To the extent plaintiff, who was herself an assistant vice president, alleges that she was paid $5,000 more than two male assistant vice presidents who retired by 2012, but was paid $5,000 less than the man who replaced one of the retired men, she failed to state a cause of action. Since all four individuals, including plaintiff, were assistant vice presidents, and plaintiff has not otherwise distinguished among their responsibilities, she has failed to allege that she was paid less than similarly-situated

male counterparts, as two of the three male assistant vice presidents were paid less than she was (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 114 n 2 [1st Dept 2012]; *Shah v Wilco Sys., Inc.*, 27 AD3d 169, 176 [1st Dept 2005], *lv dismissed in part, denied in part* 7 NY3d 859 [2005]).

Plaintiff also failed to state a claim for retaliation under the City HRL (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]). The initial protected activity alleged by plaintiff — her late-2008 complaint about offensive comments by two "high-level" coworkers — is far too removed from defendant's alleged post-2009 (non-time-barred) actions to establish the requisite causal nexus between the protected activity and the adverse action (*see Matter of Parris v New York City Dept. of Educ.*, 111 AD3d 528, 529 [1st Dept 2013], *lv denied* 2014 NY Slip Op 71978 [2014]). Further, plaintiff's contention that her April 2011 request for a salary review and increase constituted a protected activity lacks merit, as she makes no allegation that she

informed defendant that she was being underpaid because of her gender (*see Fletcher*, 99 AD3d at 54).

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

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12768-
12769-
12770-
12771 In re Tiara J., etc.,

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

Anthony Lamont A., et al.,
Respondents-Appellants,

Catholic Guardian Society
and Home Bureau,
Petitioner-Respondent.

_____

Bruce A. Young, New York, for Anthony Lamont A., appellant.

Geoffrey P. Berman, Larchmont, for Tamika J., appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about August 5, 2013, which, upon a finding that respondent father's consent was not required for the adoption of the subject child and that respondent mother had permanently neglected the child, terminated the mother's parental rights to the child, and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about June 4, 2013, unanimously

dismissed, without costs, as subsumed in the appeal from the foregoing order of disposition.

The father's consent for the adoption of the child is not required, as the record shows that the father did not provide any financial support for the child, although he was able to purchase drugs (Domestic Relations Law § 111[1][d]; *see Matter of Phajja Jada S. [Toenor Ann S.]*, 86 AD3d 438, 439 [1st Dept 2011], *lv denied* 17 NY3d 716 [2011]). The father acknowledged that he did not seek employment because of his chronic marijuana use (*see Matter of Brianna L. [Brandon L.]*, 83 AD3d 501 [1st Dept 2011]). His testimony that he occasionally gave the child gifts or brought food to visits did not demonstrate that he provided financial support according to his means (*id.*). Further, the agency had no obligation to inform him of his parental obligations (*see Matter of Marc Jaleel G. [Marc E.G.]*, 74 AD3d 689, 690 [1st Dept 2010]). His constitutional challenges to the statute are unpreserved for appellate review (*see Matter of Jayden C. [Michelle R.]*, 82 AD3d 674, 675 [1st Dept 2011]).

The finding that the mother permanently neglected the child is supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368, 373 [1984]). The evidence shows that the agency made diligent efforts to strengthen the mother's relationship with the child

by, among other things, scheduling regular visitation and referring her to multiple programs (*see* Social Services Law § 384-b[7][f]; *Matter of Julian Raul S. [Oscar S.]*, 111 AD3d 456, 457 [1st Dept 2013]). The evidence also shows that, despite these efforts, the mother failed to comply with the agency's referrals for services, complete necessary programs, attend mental health therapy regularly, and gain insight into the reasons for the child's placement into foster care (*see Matter of Dina Loraine P.* [*Ana C.*], 107 AD3d 634, 635 [1st Dept 2013]). In addition, the mother refused to separate from the father, notwithstanding her awareness of his drug abuse and that such use would impede the return of the child. The mother also failed to maintain suitable housing and was often tardy or absent for supervised visits with the child.

A preponderance of the evidence supports the finding that termination of the mother's parental rights is in the child's best interests (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child was placed into foster care shortly after birth, and has never resided with the mother or father. The child has bonded with the foster mother, and is doing well under her care. By contrast, the evidence shows that the mother and father's apartment is disorderly, dirty and unsanitary, and lacks

sufficient furniture and food.

We have considered appellants' remaining arguments and find them unavailing.

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12772 Coventry Real Estate Advisors, L.L.C., et al., Plaintiffs-Appellants-Respondents, -against- DDR Corp., formerly known as Developers Diversified Realty Corporation, et al., Defendants-Respondents-Appellants. Index 115559/09

Gallagher, Harnett & Lagalante LLP, New York (Brian K. Gallagher of counsel), for appellants-respondents.

Jones Day, New York (Robert C. Micheletto of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 19, 2013, which, to the extent appealed from as limited by the briefs, granted, among other things, summary judgment dismissing the third, sixth and seventh causes of action in their entirety, and the fourth cause of action in part, unanimously modified, on the law, to reinstate that part of plaintiffs' fourth cause of action based on claims for breach of the management agreements for failure to provide proper narrative leasing reports, and otherwise affirmed, without costs.

The sixth and seventh causes of action for fraudulent

inducement and negligent misrepresentation were properly dismissed. As in the related Ohio action, plaintiffs' evidence as to defendants' conduct can support, at most, claims for breach of contract and not claims based in fraud (*see Albemarle Theatre v Bayberry Realty Corp.*, 27 AD2d 172, 176 [1st Dept 1967]).

The court properly rejected defendants' argument that the breach of contract claims should be dismissed in their entirety based on the indemnification provision in the parties' agreement. Defendants did not establish that the indemnification provision satisfied the exacting standard of language "exclusively or unequivocally referable to claims between the parties themselves" as opposed to third-party claims only (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]; *Gate Five, LLC v Knowles-Carter*, 100 AD3d 416 [1st Dept 2012]).

The court properly dismissed the third cause of action for breach of development agreements and some parts of the fourth cause of action for breach of management and leasing agreements based on the finding that they were supported by conclusory allegations and lacked record support to show a material issue of fact. The court, however, erred to the extent it dismissed the fourth cause of action insofar as it alleged defendants' breach of their duty to provide proper narrative leasing reports, since defendants failed to make a prima facie case that the reports

they provided were sufficient pursuant to the agreements.

Finally, the breach of contract claims against defendants with respect to the Bloomfield Park Property were properly dismissed based on the rulings in the related Michigan action, which rejected a derivative claim alleging such breaches that was brought on behalf of the property owner plaintiff who is the real party in interest for the contract claims in this action.

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12773 The People of the State of New York, Respondent, Ind. 2176/08

-against-

Jonathan Almonte, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bryan D. Kreykes of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered December 9, 2010, as amended January 12, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of four years, unanimously affirmed.

The challenged evidence presented regarding other crimes and bad acts, and the related arguments in the prosecutor's summation, were generally relevant for purposes other than criminal propensity *(see generally People v Cass*, 18 NY3d 553, 559-560 [2012]). Some portions of the proof at issue were relevant to consciousness of guilt and others tended to complete a coherent narrative. To the extent that some elements of the challenged evidence did not have a legitimate nonpropensity

purpose or had the potential for undue prejudice, and to the extent any portions of the prosecutor's summation were inappropriate, the court's curative actions minimized any prejudice, and any error was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12774 Dionne Gorbea, et al., Index 110753/07
Plaintiffs-Appellants,

-against-

Garthe E. DeCohen, et al.,
Defendants-Respondents.

_____

Gregory G. Smith, New York, for appellants.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol E. Huff, J.), entered April 9, 2013, which, after a jury trial, denied plaintiffs' motion to set aside the jury verdict and for a new trial under CPLR 4404(a), unanimously affirmed, without costs.

The court properly denied the motion as defective due to plaintiffs' failure to annex the trial transcript to their motion. Given the nature of the issues raised on this particular motion, the absence of a transcript, or relevant portions thereof, precluded a meaningful review (*see e.g*, *Tesciuba v Cataldo*, 189 AD2d 655, 655 [1st Dept 1993]; *Blechman v The New York City Tr. Auth.*, 2014 NY Slip Op. 30716[U] [Sup Ct, NY County 2014]; *McCarthy v 390 Tower Assocs.*, 9 Misc 3d 219, 221 [Sup Ct NY County 2005]; *but see Miller v City of New York*, 2013 NY Slip Op 30343[U] [Sup Ct, NY County 2013]).

In any event, notwithstanding the claimed evidentiary errors, the two competing versions of the accident were clearly before the jury, and whether viewed singly or cumulatively, the errors claimed, if any, were harmless.

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12775 The People of the State of New York, Respondent, Ind. 5654/09

-against-

Gerardo Sanchez, Defendant-Appellant.

_____

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

Gerardo Sanchez, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered October 8, 2011, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 25 years, unanimously affirmed.

Defendant's waiver of his right to appeal was knowing and voluntary, as the plea minutes demonstrate that he understood that his right to appeal was separate and distinct from the other rights automatically forfeited upon his guilty plea (*see People v Lopez*, 6 NY3d 248, 256 [2006]). Moreover, the court expressly advised defendant that he was relinquishing a right that would otherwise survive a guilty plea. In any event, regardless of whether defendant made a valid waiver of his right to appeal, we perceive no basis for reducing the sentence.

Defendant's pro se claims are unpreserved, or are unreviewable because they are based on matters outside the record, and we decline to review them in the interest of justice. Although defendant raised some of these issues in a CPL 440.10 motion to vacate the judgment, the submissions on that motion are not properly before this Court because defendant did not obtain leave to appeal from the denial of the motion (*see* 450.15 [1]; 460.15; *People v Dukes*, 284 AD2d 236 [2001], *lv denied* 97 NY2d 681 [2001]). As an alternate holding, we reject defendant's claims on the merits.

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12776 In re ACE Inspection & Testing, Inc., Petitioner-Appellant, Index 104401/12

-against-

The New York City Department of Buildings, et al., Respondents-Respondents.

Law Offices of Stuart A. Klein, New York (Christopher M. Slowik of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kathy Chang Park of counsel), for respondents.

Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered February 26, 2013, denying the petition to annul the determination of respondent Department of Buildings, dated August 8, 2012, which denied petitioner's application for a concrete testing license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination that petitioner lacked the requisite moral character for a concrete testing license (Administrative Code of City of NY § 28-401.6), was rationally based (*see generally Matter of Peckham v Calogero*, 12 NY3d 424, 430-431 [2009]). The record shows that petitioner failed to initially disclose that it employed the former owner of a corporation that had previously been denied a concrete testing license upon the same ground, and

who had pleaded guilty to criminal violations for performing concrete testing without a license. Thus, respondent's conclusion that the failure to disclose the information was intentional was not irrational, nor was its determination that this failure to disclose demonstrated poor character on petitioner's part (*see e.g. Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 277 [1st Dept 2010]).

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12777-
12777A

Wells Fargo Bank, N.A., etc.,
Plaintiff-Respondent,

-against-

Chukchansi Economic Development Authority, et al.,
Defendants-Appellants,

Chukchansi Economic Development Authority et al.,
Defendants-Respondents,

Rabobank, N.A., et al.,
Defendants.

Index 652140/13

_____

Schindler Cohen & Hochman LLP, New York (Jonathan L. Hochman of counsel), for appellants.

Latham & Watkins LLP, New York (Craig A. Batchelor of counsel), for Wells Fargo Bank, N.A., respondent.

Rapport and Marston, Ukiah, CA (Lester J. Marston, of the bar of the State of California, admitted pro hac vice, of counsel), for Chukchansi Economic Development Authority, The Board of The Chukchansi Economic Development Authority, The Tribe of Picayune Rancheria of The Chukchansi Indians, The Tribal Council of The Tribe of Picayune Rancheria of The Chukchansi Indians, Nancy Ayala, Tracey Brechbuehl, Karen Wynn and Charles Sargosa, respondents.

_____

Orders, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered December 12, 2013, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion to dismiss appellants' counterclaim, granted defendants-respondents' motion to dismiss appellants' cross claims, and

denied appellants' motions to modify the court's July 2, 2013 preliminary injunction, unanimously affirmed, with costs.

Appellants may not attack the underlying preliminary injunction because they did not appeal from it; however, they properly appealed from the motion court's refusal to modify the injunction (*see Matter of Xander Corp. v Haberman*, 41 AD3d 489 [2d Dept 2007]).

One of the orders appealed from explicitly denied appellants' second motion to modify the injunction on the ground that the court lacked jurisdiction to decide an internal tribal dispute. Based on the transcript of the September 11, 2013 oral argument, it appears that the court denied appellants' first motion to modify for the same reason. The court expressly dismissed appellants' counterclaim and cross claims for lack of subject matter jurisdiction. These determinations were correct.

"New York courts do not have subject matter jurisdiction over the internal affairs of Indian tribes" (*Seneca v Seneca*, 293 AD2d 56, 58 [4th Dept 2002]; *see also e.g. In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F3d 749, 763 [8th Cir 2003]). "[A]n election dispute concerning competing tribal councils" is a "non-justiciable intra-tribal matter" (*Sac & Fox*, 340 F3d at 764; *see also Bowen v Doyle*, 880 F Supp 99, 115 [WD NY 1995] [determination of composition of tribal council is internal

affair], *superseded on other grounds by statute as stated in Peters v Noonan*, 871 F Supp 2d 218, 226 [WD NY 2012]). Appellants seek a declaration that defendant Chukchansi Economic Development Authority (CEDA) is lawfully governed by a board composed of seven named individuals; however, appellants themselves allege in their counterclaim and cross claims that the members of the CEDA Board are the same as the members of defendant Tribal Council of the Tribe of Picayune Rancheria of the Chukchansi Indians.

Appellants rely on the "all claims" language in section 13.1(c) of the indenture (the consent-to-jurisdiction section). However, that section is explicitly made subject to the limitations on each Tribal Party's waiver of sovereign immunity in section 13.1(b). "[W]aivers of sovereignty are to be strictly construed in favor of the Tribe" (*Matter of Ransom v St. Regis Mohawk Educ. & Community Fund*, 86 NY2d 553, 561 [1995] [internal quotation marks omitted]). Moreover, although an Indian tribe can waive sovereign immunity, it cannot confer subject matter jurisdiction where none exists (*see generally Matter of Newham v Chile Exploration Co.*, 232 NY 37, 42 [1921]; *Matter of Brenner v Great Cove Realty Co.*, 6 NY2d 435, 442 [1959]).

The jurisdiction conferred on the New York courts by 25 USC § 233 "does not extend beyond the borders of this State" (*Pyke v*

Cuomo, 209 FRD 33, 39 [ND NY 2002]). The tribe in the instant action is located in California, not New York. Furthermore, 25 USC § 233 "does not authorize courts of the State of New York to become embroiled in internal political disputes amongst officials of [an Indian tribe]'s government" (*Bowen*, 880 F Supp at 118; *see also id.* at 116, 120, 122-123).

Appellants contend that defendants-respondents Nancy Ayala, Karen Wynn, Charles Sargosa, and Tracy Brechbuehl (the Ayala faction or the individual Ayala defendants) do not enjoy sovereign immunity because their actions were illegal and not performed in an official capacity. However, to decide whether the Ayala faction's actions were illegal, a court would have to determine whether the Ayala faction was the legitimate Tribal Council; this it may not do (*see Sac & Fox*, 340 F3d at 767).

Because we find that New York courts lack subject matter

jurisdiction over the cross claims, we need not reach appellants' argument that New York courts have personal jurisdiction over the individual Ayala defendants.

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12778 The People of the State of New York, Respondent, Ind. 4282/11

-against-

Joseph Rivera, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered July 25, 2012, convicting defendant, after a jury trial, of grand larceny in the fourth degree (seven counts), criminal possession of stolen property in the fourth degree (seven counts) and auto stripping in the third degree, and sentencing him, as a second felony offender, to concurrent terms of two to four years on each of the grand larceny and possession of stolen property convictions, to run consecutively with a term of one year on the auto stripping conviction, unanimously modified, on the law, to extent of directing that all sentences be served concurrently, and otherwise affirmed.

Defendant did not preserve his claim that the larceny and stolen properly convictions were based on legally insufficient evidence, and we decline to review it in the interest of justice.

As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the conclusion that the victim's wallet was one of the items that defendant took from the victim's car and discarded while fleeing, and defendant's alternative explanations are implausible and unsupported by any evidence (*cf. People v Washington*, 21 AD3d 253 [1st Dept 2005], *lv denied* 5 NY3d 834 [2005], *cert denied* 546 US 1104 [2006]).

The court properly exercised its discretion in determining that counsel's concern about a possibly sleeping juror did not warrant any inquiry. The court properly relied on its own observations, which established that the juror was not sleeping (*see People v Sanabria*, 266 AD2d 41, 42 [1st Dept 1999], *lv denied* 94 NY2d 884 [2000]).

As the People concede, the definite sentence on the auto

stripping conviction should run concurrently with the indeterminate sentences on the other convictions because of the merger provisions of Penal Law § 70.35.

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12783N Cenpark Realty LLC, Index 105170/11
Plaintiff-Respondent,

-against-

Ellie Gurin,
Defendant,

Adina Marmelstein
Defendant-Appellant.

_____

Samuel A. Ehrenfeld, New York, for appellant.

The Abramson Law Group, PLLC, New York (Jeffrey Bodoff of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 21, 2012, which, to the extent appealed from, granted plaintiff's motion for summary judgment dismissing defendant Marmelstein's ninth affirmative defense asserting succession rights to a rent-stabilized lease, and denied Marmelstein's cross motion to amend the ninth affirmative defense, unanimously reversed, on the law, without costs plaintiff's motion denied, and Marmelstein's cross motion granted.

In this action for eviction and other relief, plaintiff failed to meet its burden of showing that Marmelstein's ninth affirmative defense is barred by the statute of limitations. Marmelstein's sister, defendant Gurin, entered into a lease in

December 1989 that was renewed through February 1998. Marmelstein asserted her claim to succession rights pursuant to Rent Stabilization Code (RSC) [9 NYCRR] § 2523.5(b)(1), in the context of a holdover proceeding commenced in 1998, that was subsequently abandoned by plaintiff's predecessor in interest. Plaintiff unsuccessfully sought back rent in a proceeding commenced in 2007, and then commenced this action seeking, inter alia, ejectment of Marmelstein and a declaration that she is not entitled to succession rights. Marmelstein's affirmative defense that she is entitled to succession rights may be raised defensively, notwithstanding that an action for declaratory relief may be time-barred (CPLR 203[d]; *see Mintz & Fraade, P.C. v Docuport, Inc.*, 110 AD3d 496 [1st Dept 2013]; *Rosenblatt v Ackoff-Ortega*, 300 AD2d 137 [1st Dept 2002]).

The record presents issues of fact, including whether Marmelstein was residing in the apartment from the "inception of the tenancy" and when she asserted her claim for succession rights, that cannot be resolved on summary judgment (*see* RSC 2523.5[b][1]; *see generally 245 Realty Assoc. v Sussis*, 243 AD2d 29, 32 [1st Dept 1998]). Since there is an issue of fact as to whether Marmelstein is entitled to succession rights, and her defense is not "palpably insufficient or patently devoid of

merit," the court should have granted her cross motion to amend (*MBIA Ins. Corp. v Greystone & Co.*, Inc., 74 AD3d 499, 499 [1st Dept 2010]; CPLR 3025[b]).

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

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

ENTERED: JUNE 17, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, Gische, JJ.

12784 In re Kenneth Minor Ind. 3651/09
[M-1913] Petitioner, 36/14

-against-

Hon. Laura Ward, etc., et al.,
Respondents.

_____

Gotlin & Jaffe, New York (Daniel J. Gotlin of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Susan Anspach of counsel), for Hon. Laura Ward, respondent.

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

_____

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

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

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

ENTERED: JUNE 17, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Richter, Kapnick, JJ.

12786 Patrick Lyons, et al., Index 305883/09
Plaintiffs-Appellants,

-against-

Richard DeNise, etc., et al.,
Defendants-Respondents,

Jonathan Gordon, etc., et al.,
Defendants.

_____

Mark M. Basichas & Associates, P.C., New York (Aleksey Feygin of counsel), for appellants.

Dopf, P.C., New York (Martin B. Adams of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered February 25, 2013, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' (defendants) motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants made a prima facie showing of their entitlement to judgment as a matter of law by submitting their expert radiologist's affirmation, which explained that defendant radiologist's interpretation of a July 2008 Doppler study was within good and accepted medical practice and was not a proximate cause of the delay in plaintiff Patrick Lyons's cancer diagnosis (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]).

Further, defendants' expert showed that since the study encompassed Patrick's upper leg, defendant radiologist could not have detected the cancer later diagnosed in the calf (*see Foster-Sturrup v Long*, 95 AD3d 726, 728 [1st Dept 2012]).

In opposition, plaintiffs failed to raise a triable issue of fact that any abnormality their expert radiologist found in the Doppler study was related to the cancer in Patrick's lower left leg. Indeed, plaintiffs' expert radiologist failed to indicate where the alleged abnormality appeared on Patrick's left leg (*see Carlton v St. Barnabas Hosp.*, 91 AD3d 561, 562 [1st Dept 2012]). Furthermore, the record contains no evidence that defendant radiologist's alleged misreading of the Doppler study of Patrick's upper left leg was a substantial factor in the delay in the cancer diagnosis of the lower left leg (*see Dockery v Sprecher*, 68 AD3d 1043, 1046 [2d Dept 2009], *lv denied* 17 NY3d 704 [2011]).

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

ENTERED: JUNE 17, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Richter, Kapnick, JJ.

12787-
12787A

In re Malachi I. L., and Others,

Shaquana M-L.,
Petitioner-Appellant,

Leake & Watts Services, Inc.,
Respondent-Respondent.

_____

Israel P. Inyama, New York, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Ava G. Gutfriend, New York, attorney for the children Malachi I. L., Shamel D. L. and Mariah A. L.

Elizabeth Posse, Bronx, attorney for the child Cashmere A. L.

_____

Orders, Family Court, Bronx County (Linda Tally, J.), entered on or about May 28, 2013, which denied petitioner's motion to vacate conditional surrenders she executed pursuant to Social Services Law § 383-c with respect to the four subject children, and dismissed the petitions, unanimously affirmed, without costs.

The motion to vacate the surrenders was properly denied. Petitioner failed to allege that her execution of the agreements was the product of fraud, duress or coercion (*see Matter of Amanda B.*, 206 AD2d 636 [3d Dept 1994]; Social Services Law § 383-c), and contrary to petitioner's argument, she was not deprived of due process on the basis that the matter was disposed

of without a hearing (*see e.g. Matter of Baby Boy Joseph*, 214 AD2d 1049 [4th Dept 1995]).

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

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

ENTERED: JUNE 17, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Richter, Kapnick, JJ.

12788-
12789 The People of the State of New York,
Respondent,

-against-

Mark Green,
Defendant-Appellant.

Ind. 9252/98

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

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered July 6, 2009, as amended June 26, 2012, resentencing defendant to an aggregate term of 32 years, with 5 years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: JUNE 17, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Richter, Kapnick, JJ.

12790 Merrill Lynch Mortgage Investors Trust, etc., et al., Plaintiffs-Respondents, Index 654403/12

-against-

Merrill Lynch Mortgage Lending, Inc., et al., Defendants-Appellants.

_____

Munger, Tolles & Olson LLP, Los Angeles, CA (Fred A. Rowley, Jr. of the bar of the State of California, admitted pro hac vice, of counsel), for appellants.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Philippe Z. Selendy of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered September 28, 2013, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the breach of contract claims as against Merrill Lynch Mortgage Lending, Inc., unanimously affirmed, without costs.

We affirm, for reasons different from those given by the motion court. The contract provision at issue is ambiguous, and

therefore its meaning cannot be determined without reference to extrinsic evidence (*see Chimart Assoc. v Paul*, 66 NY2d 570, 572-573 [1986]).

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

ENTERED: JUNE 17, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Richter, Kapnick, JJ.

12791- 12791A — The People of the State of New York, Respondent, — Ind. 2304/10, SCI 5525/12

-against-

Jose Hernandez,
Defendant-Appellant.

_____

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

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

_____

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about August 9, 2012,

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

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

ENTERED: JUNE 17, 2014

CLERK

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

Sweeny, J.P., Renwick, Andrias, Richter, Kapnick, JJ.

12794 Pedro Silva, Index 305910/09
Plaintiff-Appellant,

-against-

Patricia D. Lakins,
Defendant-Respondent.

_____

Sacco & Filas, LLP, Astoria (Jeremy S. Ribakove of counsel), for appellant.

Kay & Gray, Westbury (Marisa Villeda of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered July 1, 2013, which granted defendant's motion to dismiss the complaint and denied plaintiff's cross motion to vacate a prior conditional preclusion order, unanimously affirmed, without costs.

Defendant moved for dismissal of the complaint on the ground that plaintiff was unable to make out a prima facie case, having been precluded from offering any testimony at trial based on his violation of a prior conditional preclusion order. The conditional preclusion order gave plaintiff 30 days from service of the order to submit to a deposition and provide all outstanding discovery. It is uncontested that plaintiff did not comply with the order. Upon failing to comply, the self-executing order automatically became effective on or about

November 25, 2011, and plaintiff was barred from offering any testimony at trial (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 79-80 [2010]; *Casas v Consol. Edison Co. of New York, Inc.*, __AD3d__, 2014 NY Slip Op 02887, *1 [1st Dept 2014]). Thereafter, defendant moved to dismiss plaintiff's complaint on the ground that, having been precluded from testifying at trial, plaintiff could not make out a prima facie case. The court properly granted the motion and denied plaintiff's cross motion to vacate the conditional order, as plaintiff failed to demonstrate a meritorious claim or a reasonable excuse for not complying with the order (*see Gibbs*, 16 NY3d at 80).

Plaintiff's prior counsel's suspension was not effective until after plaintiff defaulted under the conditional preclusion order. Moreover, in opposition to defendant's motion to dismiss, plaintiff did not submit an affidavit attesting to, among other things, whether he himself was aware of the conditional order or its import, and his own lack of willfulness in failing to comply with the order.

The lack of any affidavit from plaintiff also precludes the finding of a meritorious cause of action. Plaintiff's present counsel's affirmation, reciting the purported facts of the accident, is insufficient, as counsel had no personal knowledge of these facts (*see Trawally v East Clarke Realty Corp.*, 92 AD3d

471 [1st Dept 2012]). Moreover, the uncertified police report attached to counsel's affirmation constitutes inadmissible hearsay (*see Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525, 526 [1st Dept 2010]). Nor does plaintiff's generalized verified complaint or bill of particulars warrant a finding of merit.

To the extent plaintiff argues that he was denied an automatic stay pursuant to CPLR 321(c) upon the suspension of his former counsel because defendant moved to dismiss the complaint before serving a notice on plaintiff to appoint new counsel, the argument is unavailing. Defendant did not move to dismiss the complaint until after plaintiff's present counsel filed an appearance.

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

ENTERED: JUNE 17, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Richter, Kapnick, JJ.

12795 The People of the State of New York, Ind. 5033/09
Respondent,

-against-

Chris Grant,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about March 15, 2010, 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 [1st Dept 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: JUNE 17, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Richter, Kapnick, JJ.

12798 The People of the State of New York, Respondent, Ind. 6351/09

-against-

Andre English, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Jill Konviser, J. at jury trial and sentencing), rendered May 9, 2011, as amended June 3, 2011, convicting defendant of robbery in the second degree (two counts) and assault in the second degree, and sentencing him to concurrent terms of five years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. The victim and an eyewitness made reliable identifications within minutes of the robbery. In addition, one of the items taken in the robbery was a $100 bill, and before any questioning, and under circumstances from which the jury could infer consciousness

of guilt, defendant volunteered to the police that he did not have $100.

The evidence also established physical injury and use of a dangerous instrument, which were elements of certain counts (*see* Penal Law §§ 120.05[2], 160.10[2][a]). The jury could have reasonably inferred that the victim sustained an injury to his ear, as well as other injuries, each of which caused substantial pain (*see* Penal Law § 10.00[9]; *People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]; *People v Rojas*, 61 NY2d 726 [1984]), and that some of these injuries were caused by means of a dangerous instrument, namely, the boots worn by defendant and two of his codefendants when they kicked the fallen victim.

The court properly denied defendant's motion to suppress his statement about not having $100. At about 4:00 a.m., roughly one minute after receiving a broadcast of a robbery in progress, officers arrived on the scene and found a man who could not communicate in English frantically pointing to a building. When defendant and a codefendant came out of the building a moment later, the police had, at least, a founded suspicion of criminality justifying a common-law inquiry to determine whether these men were involved in the crime. A nonverbal communication may be "a significant factor justifying police action" (*People v*

Rosa, 67 AD3d 440, 440 [1st Dept 2009], *lv denied* 14 NY3d 773 [2010]), and here, under the totality of the circumstances, there was at least enough for a level-two inquiry. At the time defendant made the statement at issue, he had not been subjected to any police intrusion beyond a direction to stop, which did not constitute a seizure (*see People v Bora*, 83 NY2d 531, 531-535 [1994]; *People v Francois*, 61 AD3d 524, 525 [1st Dept 2009], *affd* 14 NY3d 732 [2010]).

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

ENTERED: JUNE 17, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Richter, Kapnick, JJ.

12809 The People of the State of New York, Respondent, SCI 2758/10

-against-

Donell Dinkins,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Rebekah J. Pazmiño of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered July 6, 2010, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree and bail jumping in the second degree and sentencing him, as a second felony offender, to concurrent terms of 2 to 4 years and 1½ to 3 years, respectively, unanimously modified, on the law, to the extent of vacating the grand larceny conviction and remanded for further proceedings on that charge only, and otherwise affirmed.

Defendant's plea agreement provided that he would receive sentences of 2 to 4 years for grand larceny and 1½ to 3 years for bail jumping that would run concurrently with each other, but with the larceny sentence running concurrently with another sentence of 2 to 4 years imposed on a separate indictment, and the bail jumping sentence running consecutively to the sentence

imposed on that indictment. We note that since the bail jumping conviction was based on defendant's failure to appear on the other indictment, the sentences for bail jumping and the underlying indictment were required to run consecutively absent certain mitigating circumstances (Penal Law § 70.25[2-c]).

The court sentenced defendant in accordance with this promise. However, defendant's conviction under the indictment was reversed by this Court (104 AD3d 413 [1st Dept 2013], *app withdrawn* 21 NY3d 911 [2013]).

Where, as here, "a guilty plea is induced by the court's explicit promise that defendant will receive a lesser sentence to run concurrently with a sentence in another case, and that conviction is overturned, the defendant may withdraw his plea and face the indictment, since the promise cannot be kept" (*People v Pichardo*, 1 NY3d 126, 129 [2003]). However, this principle does not apply to consecutive sentences (*see People v Olivero*, 272 AD2d 174 [1st Dept 2000], *lv denied* 95 NY2d 937 [2000]; *People v Privitere*, 156 AD2d 971 [4th Dept 1989]). Here, the reversal nullified a benefit that had been an inducement to the plea, but only as to the concurrent sentence, not the consecutive sentence.

Defendant argues that, because of the interrelatedness of the concurrent and consecutive sentences, the pleas to both counts should be vacated. Conversely, the People argue, for

similar reasons, that neither plea should be vacated.

We reject both arguments. Even though this was a global disposition, the pleas are severable, and each should be treated in accordance with its own legal status.

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

ENTERED: JUNE 17, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Richter, Kapnick, JJ.

12811-
12812N 1050 Tenants Corp., Index 108653/05
109702/01
Plaintiff-Appellant,

-against-

Steven R. Lapidus, et al.,
Defendants-Respondents.

- - - - -

Arthur M. Handler,
Plaintiff,

-against-

Steven R. Lapidus, et al.,
Defendants-Respondents,

1050 Tenants Corp.,
Defendant-Appellant.

_____

Gallet Dreyer & Berkey, LLP, New York (David L. Berkey of counsel), for appellant.

Law Office of Theodore P. Kaplan, New York (Theodore P. Kaplan of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered May 23, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff cooperative's motion to restore the action and for additional attorneys' fees incurred after entry of the judgment, unanimously affirmed, with costs. Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 25, 2013, which, to the extent appealed from as limited by the briefs, denied defendant cooperative's motion to

restore the action and for additional attorneys' fees incurred after entry of the judgment, unanimously affirmed, with costs.

The cooperative's applications for additional attorneys' fees are not precluded by res judicata, collateral estoppel or law of the case because such later-incurred fees were not and could not have been sought in the orders and judgments awarding attorneys' fees, and the cooperative's right to such fees had not been necessarily decided (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]; *Jumax Assoc. v 350 Cabrini Owners Corp.*, 110 AD3d 622 [1st Dept 2013]; *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]; *Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 92-93 [1st Dept 2013]; *Ferolito v Vultaggio*, 115 AD3d 541 [1st Dept 2014]). Contrary to defendants Steven R. Lapidus and Iris R. Lapidus's contention, the language in the order granting attorneys' fees until the date of eviction was not a limitation. Similarly, the additional attorneys' fees are not precluded by the prohibition against splitting causes of action, because the claims for supplemental fees did not exist when the attorneys' fees were awarded in the judgments, were distinct claims, and were being sought in a single action (*see Sannon-Stamm Assoc., Inc. v Keefe, Bruyette & Woods, Inc.*, 68 AD3d 678 [1st Dept 2009]; *Murray, Hollander, Sullivan & Bass v HEM Research*, 111 AD2d 63, 66 [1st Dept 1985]; *Landmark Props. v Olivo*, 62 AD3d

959, 961 [2nd Dept 2009]).

However, the motion courts correctly perceived that pending legal issues in Supreme Court, Suffolk County, regarding the cooperative's claimed entitlement to supplemental attorneys' fees and its claimed right to deduct them from the proceeds of the sale of the Lapiduses' unit warranted the determination of related issues in that forum.

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

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

ENTERED: JUNE 17, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Richter, Kapnick, JJ.

12813N Mark Crane, Index 156265/13
Petitioner-Appellant,

-against-

New York City Transit Authority,
Respondent-Respondent.

_____

Mark Crane, appellant pro se.

Martin B. Schnabel, Brooklyn (Mitchell J. Paluszek of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered June 10, 2013, which denied the petition seeking to vacate an arbitration award, dated February 12, 2012, imposing a thirty day suspension, and an arbitration award, dated May 23, 2013, terminating petitioner's employment for misconduct, and for a rehearing of a grievance submitted by petitioner on June 7, 2006, and dismissed the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

Petitioner has failed to argue, let alone set forth, any of the grounds for setting aside an arbitration award. He does not allege corruption, fraud or misconduct in procuring the award or partiality of the arbitrators. Nor does he allege that the arbitrators exceeded their power, failed to follow the procedure

set forth in CPLR article 75, or that the award is irrational or violates public policy (*see* CPLR 7511[b][1]; *Matter of Campbell v New York City Tr. Auth.*, 32 AD3d 350 [1st Dept 2006]). Petitioners' allegations amount to nothing more than a claim that the arbitrators made errors of fact or law which, even if true, does not warrant vacatur of the awards (*see New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]).

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

ENTERED: JUNE 17, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12218-
12219 In re Edna Shannon, etc.

- - - - -

Family Service Society of Yonkers,
Petitioner,

-against-

Westchester County Department of Social Services,
Respondent-Respondent,

Eastchester Rehabilitation & Health Care Center,
Respondent-Appellant.

Index 92560/08

_____

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP, Lake Success (Sarah C. Lichtenstein of counsel), for appellant.

Robert F. Meehan, White Plains (Eileen Campbell O'Brian of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about February 7, 2013, reversed, on the law, without costs, and petitioner is directed to turn over DSS's share of the balance of the guardianship account to respondent Eastchester Rehabilitation and Health Care Center, LLC. Appeal from order, same court and Justice, entered on or about May 30, 2013, dismissed, without costs, as taken from a nonappealable paper.

Opinion by Acosta, J. All concur except Freedman, J. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta,
Helen E. Freedman,
Barbara R. Kapnick, JJ.

12218-
12219
Index 92560/08

_____x

In re Edna Shannon, etc.

- - - - -

Family Service Society of Yonkers,
Petitioner,

-against-

Westchester County Department of Social Services,
Respondent-Respondent,

Eastchester Rehabilitation & Health Care Center,
Respondent-Appellant.

_____x

Respondent Eastchester Rehabilitation & Health Care Center appeals from the order of the Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about February 7, 2013, which, to the extent appealed from, directed petitioner to turn over to respondent Westchester County Department of Social Services (DSS) the balance of the funds remaining in the guardianship estate of Edna Shannon, an incapacitated person now deceased, and from the order, same court and Justice, entered on or about May 30, 2013, which denied Eastchester's motion to reargue, denominated a motion to reargue and/or renew.

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP, Lake Success (Sarah C. Lichtenstein of counsel), for appellant.

Robert F. Meehan, White Plains (Eileen Campbell O'Brian and James Castro-Blanco of counsel), for respondent.

ACOSTA, J.

On this appeal we are called upon to decide whether Eastchester Rehabilitation & Health Care Center (Eastchester) was entitled to be paid, after Edna Shannon's death, for services rendered to her during her life, from assets controlled by her guardian pursuant to Mental Hygiene Law (MHL) § 81.44(d). Westchester County Department of Social Services (DSS) maintained that it was a preferred creditor and therefore that its claim had priority over Eastchester's claim. We hold that since Eastchester's claim arose before Shannon's death, and section 81.44(d) allows the guardian to retain assets to secure known claims, Eastchester's claim has priority over that of DSS, which arose after Shannon's death.

Eastchester, a skilled nursing facility, admitted Edna Shannon into its care in 2005. In 2008, due to Shannon's need for assistance, and concerns about the proper handling of her finances by third parties, Eastchester commenced a proceeding pursuant to Mental Hygiene Law article 81 to have a guardian appointed for her person and property. It also filed an application for medical assistance for Shannon's nursing home costs. In 2009, DSS determined that Shannon was eligible for Medicaid, effective September 1, 2008. By order and judgment entered April 24, 2009, Supreme Court appointed Family Service

Society of Yonkers as her guardian. Among other things, the court conferred on Family Service Society the authority to pay Shannon's nursing home expenses and to pay bills after her death. Shannon died in December 2011 at age 87.

On June 2, 2010, approximately a year and a half before Shannon died, Eastchester filed a claim with Family Service Society seeking $164,208.00 for services that Eastchester had provided that were not covered by Medicaid. By letter dated June 2, 2010, Eastchester also submitted the claim for filing with Supreme Court, Bronx County.

By order entered November 17, 2010, the court granted Family Service Society's motion for an order authorizing the sale of Shannon's home in New Rochelle for approximately $300,000. The court stated that there was no likelihood that Shannon would be able to return to living independently in her home, and that "the sale of this house is warranted so that the proceeds from the sale can be used to pay for her long term care."

The sale closed in November 2010, and the net proceeds, $297,882.20, were deposited into Family Service Society's guardianship account for Shannon. By order entered February 28, 2011, the court confirmed the sale.

By letter dated September 8, 2010, DSS had advised Family Service Society that Shannon owed DSS $166,005.63 in medical

assistance payments, and by letter dated January 28, 2011, it had advised that she owed $192,352.47. DSS did not request payment at that time.

After Shannon's death, by letter dated July 5, 2012, DSS informed Family Service Society that it was asserting a preferred claim pursuant to Social Services Law (SSL) § 104, and that the "updated lien amount" was $271,661.62. DSS requested that when the "estate is ready for distribution," Family Service Society issue a check to DSS for that amount.

By order to show cause dated August 6, 2012, Family Service Society commenced a proceeding to settle its final account as guardian of Shannon's person and property. Family Service Society listed Eastchester as a claimant for $164,208, and DSS as a claimant for $166,005.63.

Eastchester opposed Family Service Society's petition and argued that it had priority over DSS because its claim of $222,650 for the period of care from September 1, 2006 through August 31, 2008 accrued before DSS's claim against the estate began to accrue. Eastchester argued that DSS had no statutory lien against Shannon's home (the source of the remaining funds in the estate) when it was sold, and that DSS should not receive any preferred creditor status.

DSS also opposed the petition, as well as Eastchester's

position, and argued that Shannon was a Medicaid recipient from approximately September 1, 2008 until her death on December 10, 2011. DSS stated that it had provided assistance to Shannon in the amount of $271,661.62. DSS argued that it was a preferred creditor pursuant to SSL § 104, and that because Eastchester had failed to reduce its claim to a judgment, Eastchester was a general creditor over which DSS had priority.

The court agreed with DSS and determined that, after $14,400 was paid to Family Service Society for fees incurred as Shannon's guardian, $188,599.27 remained in the estate, of which $9,000 would be paid in legal and court fees, and the balance would be turned over to DSS in satisfaction of its Medicaid lien. We now reverse.

As Eastchester was to be paid out of the guardianship account before any funds passed to the estate, its claim had priority over DSS's claim. MHL § 81.44(d) provides that, within 150 days of the death of an incapacitated person, the guardian must serve on the personal representative of the decedent's estate, or if none, the public administrator or chief fiscal officer, a statement of assets and notice of claim, and "*except for property retained to secure any known claim*, lien or administrative costs of the guardianship," deliver all guardianship property to the personal representative, public

administrator, or chief fiscal officer (emphasis added).

Indeed, consistent with § 81.44(d), the Order and Judgment Appointing Guardian authorized Family Service Society to "[a]pply [Shannon's] resources and income, if any, toward her outstanding and accruing nursing home expenses," and to "[p]ay bills after [Shannon's] death . . . if incurred prior to said death, if authority to pay any such bills would otherwise have existed." In addition, the court order that authorized the sale of Shannon's home stated that the sale was warranted "so that the proceeds from the sale can be used to pay for her long term care." Although the court did not specifically refer to Eastchester, as opposed to DSS, DSS concedes that it did not assert a claim during Shannon's lifetime but asserted a claim against the estate only.

Thus, while Eastchester filed a notice of claim against the guardianship account on June 2, 2010, DSS did not send a claim letter to Family Service Society until July 5, 2012, after Shannon's death, asserting a claim against the estate pursuant to SSL § 104.

Unlike the claims in *Matter of Swingearn* (59 AD3d 556 [2d Dept 2009]), which were competing claims during the decedent's lifetime for benefits incorrectly paid (*see* SSL § 369[2][a][i]), and the claims in Matter of Pierce (106 AD2d 892, 892 [4th Dept

1984], *lv denied* 64 NY2d 609 [1985]), which were competing claims against the estate, Eastchester's claim accrued during the decedent's lifetime, against the guardianship account, with no competing creditors. Thus, Eastchester should have been paid before any funds passed to the estate. DSS, as a preferred creditor pursuant to SSL § 104, had a priority claim only against the estate. Contrary to the court's conclusion, it was irrelevant that Eastchester had not reduced its lien to a judgment, which would have given it priority over competing creditors, because DSS had no viable competing claim against Shannon's guardianship account.

Contrary to the dissent, nothing in MHL § 81.44(d) and (e) "limit[s] the guardian's right to retain property equal in value only to the expenses connected with the administration of the guardianship, such as those itemized in the guardian's petition for a final accounting." Had the Legislature intended that result, it would have clearly stated that the guardian could retain assets to secure any known claim or lien only insofar as it was associated with administrative expenses. Instead, consistent with its stated justification "to facilitate the transition between a guardianship for an incapacitated person and an estate after the death of such incapacitated person" (Sponsor's Mem, L 2008, ch 175, 2008 NY Legis Ann at 127), the

Legislature gave the guardian broader rights to pay off "*any known claim*, lien or administrative costs of the guardianship pursuant to subdivision (e) of this section" (MHL § 81.44[d] [emphasis added]). In other words, in addition to serving upon the personal representative of the estate "a statement of assets and notice of claim" within 150 days of the incapacitated person's death, section 81.44(d) authorizes the guardian to pay off any known claims. This broader construction is consistent with MHL § 81.44(a)(4), which defines "[s]tatement of assets and notice of claim." Specifically, in detailing the information to be included in a statement of assets and notice of claim, section 81.44(a)(4) provides that, in addition to some identifying information (such as a caption and index number), the statement must contain

> "a description of the nature and approximate value of guardianship property at the time of the incapacitated person's death; with the approximate amount of any claims, debts or liens against the guardianship property, including *but not limited to* medicaid liens, tax liens and *administrative costs*, with an itemization and approximate amount of such costs and claims or liens" (emphasis added)."

Thus, section 81.44, read as a whole, does not limit "any claims" to administrative costs. In fact, it does just the opposite; it lists administrative costs as a type of claim that the guardian can pay off. Section 81.44(e), which states in relevant part, "the guardian may retain, pending the settlement of the

guardian's final account, guardianship property equal in value to the claim for administrative costs, liens and debts," does not limit the guardian's authority pursuant to section 81.44(d) to retain property to pay off any known claims or liens in addition to administrative costs.

In light of our conclusion, we need not reach Eastchester's remaining contentions.

Accordingly, the order of the Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about February 7, 2013, which, to the extent appealed from, directed petitioner to turn over to respondent Westchester County Department of Social Services (DSS) the balance of the funds remaining in the guardianship estate of Edna Shannon, an incapacitated person now deceased, should be reversed, on the law, without costs, and petitioner is directed to turn over DSS's share of the balance of the guardianship account to respondent Eastchester Rehabilitation and Health Care Center, LLC. The appeal from the order, same court and Justice, entered on or about May 30, 2013, which denied Eastchester's motion to reargue, denominated a motion to reargue and/or renew, should be dismissed, without costs, as taken from a nonappealable paper.

All concur except Freedman, J.
who dissents in an Opinion.

FREEDMAN, J. (dissenting)

I respectfully dissent, and would affirm Supreme Court's determination that the Medicaid lien imposed by Social Services Law § 104(1) takes precedence over a claim by the general creditor, respondent Eastchester Rehabilitation & Health Care Center. Once Edna Shannon died, all funds other than those reserved for the administration of her guardianship in accordance with Mental Hygiene Law § 81.44 passed to her estate (SCPA 103[19]). Accordingly, Supreme Court properly directed that the decedent's guardian turn over to respondent Westchester County Department of Social Services (DSS) all of the remaining funds in the guardianship estate after paying administrative fees, as expressly provided for by Mental Hygiene Law § 81.44.

This dispute over which of two creditors has the superior claim to the assets of the decedent's estate arises from this proceeding to settle the final account of her guardianship. The relevant facts are as follows: On December 13, 2005, the decedent, then 81 years old, moved from her home in New Rochelle, New York, to Eastchester Rehabilitation & Health Care Center. She resided at Eastchester until November 2008, when the facility commenced a proceeding under Mental Hygiene Law article 81 for the appointment of a guardian of her person and property because she suffered from dementia.

In January 2009, Supreme Court adjudged the decedent an incapacitated person, and in an April 2009 order appointed petitioner, Family Service Society of Yonkers, her guardian. The order authorized the guardian, among other things, to "[a]pply the [decedent's] resources and income . . . toward her outstanding and accruing nursing home expenses" and "[p]ay bills after the death of the [decedent] if incurred prior to said death, if authority to pay any such bills would otherwise have existed." The order also authorized the guardian to sell the decedent's house, subject to court approval.

In December 2008, Eastchester, on the decedent's behalf, applied for and was granted Medicaid benefits to cover the decedent's care. DSS agreed to pay Eastchester $764 per month for September through December 2008 and $816 per month for January through August 2009. These amounts were less than Eastchester's full charge.

In September 2010, DSS notified the guardian that the decedent owed the agency about $164,000 for its Medicaid assistance. On November 25, 2009, Eastchester discharged the decedent to another nursing facility in Somers, NY, and in June 2010, Eastchester filed a Notice of Appearance and Proof of Claim in the guardianship proceeding seeking about $164,000 for the balance due for the decedent's care that Medicaid had not

covered.

In October 2010, the guardian sought, on notice to both DSS and Eastchester, and obtained court approval to sell the decedent's house to pay for her ongoing long-term care. The guardian deposited the net proceeds of the sale, about $298,000, into a separate guardianship account. Shortly thereafter, DSS notified the guardian that the amount the decedent owed Medicaid had increased to about $192,000.

The decedent died on December 10, 2011, at age 87. In a July 2012 letter to the guardian, DSS stated that Medicaid assistance to the decedent totaled about $272,000 and that the agency was asserting a preferred lien against the estate assets under Social Services Law § 104.

In August 2012, the guardian moved for an order approving and settling the guardianship's final account. In its petition, the guardian itemized fees and disbursements connected with the administration of the guardianship, which totaled about $82,000.[1]

[1]Those costs included court-approved fees for the guardian, its attorneys, and the court examiner, related expenses in connection with the administration of the guardianship, the maintainance costs for the decedent's home before its sale, legal and other fees and expenses connected with the sale, court-ordered fees in connection with the guardianship proceeding, the Net Available Monthly Income charge to the decedent in connection with Medicaid, and miscellaneous expenses for the decedent's personal needs.

The final account stated that about $189,000 remained in the decedent's estate, most of which derived from the proceeds of the house sale.

The guardian stated that it had advised both DSS and Eastchester that their total claims exceeded the remaining amount and that it would not pay either unless they agreed to an apportionment. Each respondent contended that its claim had priority over the other's, and the guardian asked the court to apportion between respondents the assets remaining after the administrative costs of the guardianship were paid.

The majority finds that either the guardian should have paid Eastchester from the guardianship account while the decedent was still alive or, in accordance with Mental Hygiene Law § 81.44, the guardian should have retained the funds to pay Eastchester in the guardianship account instead of transferring them to the decedent's estate.

However, while the decedent was still living, both respondents had presented the guardian with claims against her assets to cover her care. The appointment order had authorized but not directed the guardian to pay the decedent's debts during her life. A guardian's authority terminates with the incapacitated person's death (Mental Hygiene Law § 81.36[a][3]). Upon the decedent's death, any funds in the guardianship account

that remained after administrative fees of the guardianship were paid automatically passed into the decedent's estate (SCPA 103[19]).

Social Services Law § 104(1) specifically states:

> "A public welfare official may bring action or proceeding against a person discovered to have real or personal property, or against the estate or the executors [or] administrators...of a person who dies leaving real or personal property, if such person...received assistance and care during the preceding ten years... In all claims of the public welfare official made under this section the public welfare official shall be deemed a preferred creditor."

Thus, DSS's claim for Medicaid reimbursement took priority over Eastchester's claim because Eastchester was relegated to the status of a general creditor.

Mental Hygiene Law § 81.44, enacted in 2008, is designed for the limited purpose of paying expenses incurred in administration of the guardianship. As the Sponsor's Memorandum notes, the statute "is designed to facilitate the transition between a guardianship for an incapacitated person and an estate after the death of such incapacitated person. It [clarifies] the rights of the personal representative of the estate to marshal guardianship funds and codifies the right of the guardian to retain a reserve to cover reasonably anticipated administrative expenses of the guardianship" (Sponsor's Mem, L 2008, ch 175, 2008 NY Legis Ann at 127).

In relevant part, subdivision (d) of Mental Hygiene Law § 81.44 provides that, within 150 days after the incapacitated person's death, the guardian must deliver the guardianship assets to the appointed representative of the decedent's estate,[2] with the exception of assets retained "to secure any known claim, lien or administrative costs of the guardianship *pursuant to* [*Mental Hygiene Law § 81.44(e)*]" (emphasis supplied).

Subdivision (e) of MHL § 81.44, referred to in subdivision (d), provides that, unless the court orders otherwise, when the incapacitated person dies "the guardian may retain, pending the settlement of the guardian's final account, guardianship property equal in value to the claim for administrative costs, liens and debts." The majority interprets subdivision (e) to mean that the guardian should have retained the funds to pay Eastchester's bill because it was a "known claim . . . of the guardianship" as set forth in subdivision (d). But subdivisions (d) and (e), when read together, as they must be, limit the guardian's right to retain property equal in value only to the expenses connected with the administration of the guardianship, such as those itemized in the guardian's petition for a final accounting. Inasmuch as Eastchester's claim for services was unrelated to the

[2]Or, if no representative has been appointed, the public official notified of the death.

administration of the decedent's guardianship, the guardian could not retain the funds to pay the claim under Mental Hygiene Law § 81.44(d); rather, the guardian was required to turn the funds remaining after covering administrative expenses over to the personal representative of the decedent's estate.

As Supreme Court pointed out, if Eastchester had reduced its claim against the decedent to a judgment while she lived, the outcome of this proceeding might have been different, because DSS's statutory claim did not arise until her death, and earlier judgment creditors may have preferred rights against the estate (*see Matter of Pierce*, 106 AD2d 892 [4th Dept 1984], *lv denied* 64 NY2d 609 [1985]). However, as to the decedent's estate, Eastchester merely stands as a general creditor whose claim is subordinate to that of DSS (*see Matter of Swingearn*, 59 AD3d 556 [2d Dept 2009] [holding that right of DSS to recover payment of Medicaid benefits was conferred by statute and DSS became a preferred creditor having priority over nursing home, which had not reduced its claim to judgment]).

Despite the court's directive in the appointment order that after the decedent's death, the guardian could pay bills incurred while the decedent was still living, the guardian could not be given more authority than provided under section 81.44. The decedent's death terminated the guardian's authority to pay her

debts to Eastchester and use the proceeds of the home sale to pay for her nursing home expenses.

Accordingly, after payment of administrative expenses, the remaining funds must be turned over to the estate representative for payment to DSS.

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

ENTERED: JUNE 17, 2014

CLERK