CORRECTED ORDER - JULY 17, 2014

Acosta, J.P., Renwick, Andrias, Saxe, Manzanet-Daniels, JJ.

11031 Errol McDonald, Index 150975/12
Plaintiff-Respondent-Appellant,

-against-

Edelman & Edelman, P.C., et al.,
Defendants-Appellants-Respondents.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Scott E. Kossove of counsel), for appellants-respondents.

The Berkman Law Office, LLC, Brooklyn (Robert J. Tolchin of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 19, 2012, which granted so much of defendants' motion as sought to dismiss the first, third and fourth causes of action and denied so much of the motion as sought to dismiss the second cause of action, unanimously affirmed, with costs against defendants.

Defendants argue that the second cause of action, which seeks an accounting, is based on breach of fiduciary duty, in light of the attorney-client relationship, and seeks money damages, and is therefore barred by the three-year statute of limitations set forth in CPLR 214(6). They improperly raised this argument for the first time in reply on their motion (*see Caribbean Direct, Inc. v Dubset LLC*, 100 AD3d 510 (1st Dept 2012]). In any event, the argument is unavailing. Plaintiff's claim for an accounting so that he can recoup disbursements

allegedly improperly charged against his jury award has little to do with whether defendants performed their legal services in a non-negligent manner (*see Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co.]*, 3 AD3d 143 [1st Dept 2004], *affd* 3 NY3d 538 [2004]). It has to do with whether defendants owe plaintiff a fiduciary duty to account for money or property allegedly belonging to him, and is therefore governed by the "residual" six-year statute of limitations set forth in CPLR 213(1) (*see Hartnett v New York City Tr. Auth.*, 86 NY2d 438, 443 [1995]; *Bouley v Bouley*, 19 AD3d 1049, 1051 [4th Dept 2005]).

The first cause of action, alleging legal malpractice, accrued at the time that plaintiff's appeal of the order that granted summary judgment dismissing his underlying Labor Law claims was dismissed for want of prosecution, in July 2006, notwithstanding his lack of knowledge of the dismissal (*see McCoy v Feinman*, 99 NY2d 295, 301 [2002]). Plaintiff then had three years to commence a malpractice action against defendants (*see* CPLR 214[6]), absent an applicable ground for tolling the limitations period. He did not commence this action until March 2012.

Plaintiff relies on the continuous representation doctrine. However, in June 2008, defendants sent him a letter enclosing the Second Department's affirmance of the underlying judgment and formally closing their representation of him. The letter, which

plaintiff did not object to, demonstrates that the parties lacked "a mutual understanding of the need for further representation on the specific subject underlying the malpractice claim" (*see Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 9-10 [2007] [internal quotation marks omitted]). Even accepting that defendants concealed from plaintiff the fact that his appeal was dismissed as abandoned, their letter placed him on notice that his attorney-client relationship with them had ended.

Plaintiff also relies on the doctrine of equitable estoppel to preclude defendants from pleading the statute of limitations defense. However, application of that doctrine would be inappropriate, since, despite his notice of the conclusion of defendants' representation of him in the underlying action, plaintiff failed to exercise reasonable diligence to ascertain whether his appeal from the dismissal of his Labor Law claims was still viable (*see Pahlad v Brustman*, 8 NY3d 901 [2007]). In any event, defendants' alleged mere silence as to the abandonment of the appeal is insufficient to invoke the doctrine of equitable estoppel (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491-492 [2007]).

We note that the complaint also fails to state a cause of action for malpractice, since it does not plead that but for defendants' alleged negligence in failing to prosecute the appeal from the dismissal of the Labor Law claims plaintiff would have

prevailed on the claims (*see e.g. Waggoner v Caruso*, 14 NY3d 874 [2010]; *Lieblich v Pruzan*, 104 AD3d 462 [1st Dept 2013]).

The fourth cause of action, which alleges a violation of Judiciary Law § 487, is **timely** because it was asserted within six years of plaintiff's receipt of defendants' June 2008 letter (*see* CPLR 214[2]; *Melcher v Greenberg Traurig, LLP*, 102 AD3d 497 [1st Dept 2013]). However, the complaint nevertheless fails to state a cause of action under the statute, since it does not allege that plaintiff suffered any injury proximately caused by any deceit or collusion on counsel's part, and no such injury can reasonably be inferred from the allegations (*see Bohn v 176 W. 87th St. Owners Corp.*, 106 AD3d 598, 600 [1st Dept 2013], *lv dismissed in part, denied in part* 22 NY3d 909 [2013]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

The Decision and Order of this Court entered herein on November 12, 2013 is hereby recalled and vacated (*see* M-1819 decided simultaneously herewith).

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

ENTERED: JUNE 19, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11700 The People of the State of New York, Respondent, Ind. 6860/03

-against-

Quinndale Polk, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered December 9, 2005, convicting defendant, after a jury trial, of four counts of murder in the second degree and two counts of kidnapping in the first degree, and sentencing him to an aggregate term of 50 years to life, unanimously affirmed.

This prosecution stems from the robbery, kidnapping and murder of Juan Martin Del Campo and Gabriel Chantes Rosales (Chantes). The evidence at trial was subject to little dispute and consisted primarily of defendant's written and videotaped confession. On the morning of May 16, 2001, the bodies of Del Campo and Chantes were found in Riverside Park near West 152nd Street in Manhattan. Each victim had been shot in the head. Del Campo and Chantes had last been seen leaving the restaurant where

they worked in Little Falls, New Jersey on May 15, 2001 at about 10:25 p.m. According to defendant's confession, the victims were confronted in the restaurant's parking lot by defendant and Lamar Lee, his accomplice, as they were standing alongside of Del Campo's Jeep. At gunpoint, defendant and Lee stole $60 and a watch from Del Campo and $10 from Chantes. The victims were forced into the Jeep from which defendant removed a cell phone. Defendant and Lee then forcibly drove Del Campo and Chantes from the parking lot, then across the George Washington Bridge to Riverside Park where Lee fatally shot them. After killing the victims, defendant and Lee drove back to New Jersey in the Jeep. Defendant also admitted to using the cell phone following the murders.

With respect to each victim, the jury convicted defendant of one count of kidnapping as well as two felony murder counts that were predicated on kidnapping and robbery, respectively. The jury, however, found that the court lacked territorial jurisdiction with respect to the two robbery counts set forth in the indictment.

The trial court instructed the jury that the prosecution was required to establish the State's territorial jurisdiction by a preponderance of evidence. As the People concede, the charge was

erroneous in this regard.[1] On the contrary, the People were required to establish the State's territorial jurisdiction by proof beyond a reasonable doubt (*see People v McLaughlin*, 80 NY2d at 470). Moreover, territorial jurisdiction is not waivable (*id.* at 471). Our analysis, however, does not end with a citation to *McLaughlin*. The issue before us involves the trial court's charge on jurisdiction as opposed to jurisdiction itself. Although a challenge to a court's territorial jurisdiction cannot be waived, a claim of error in a court's instructions on the subject requires preservation by way of an appropriate objection at the court of first instance. Nonetheless, the requirement of preservation is subject to an exception that exists for "mode of proceedings" errors that consist of the most fundamental flaws implicating jurisdictional matters or constitutional rights that go to the very heart of the criminal justice process (*see People v Hanley*, 20 NY3d 601, 604-605 [2013]). Defendant asserts that the mode of proceedings exception applies here.

People v Carvajal (6 NY3d 305 [2005]), a case involving an interstate drug operation, is illustrative. In *Carvajal*, the

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[1]In order for a court of the State to exercise criminal jurisdiction, "either the alleged conduct or some consequence of it must have occurred within the State" (*People v McLaughlin*, 80 NY2d 466, 471 [1992], citing CPL 20.20).

Court noted that the defendant had "relinquished his opportunity to hold the People to their burden of proof, and did not preserve his current contention that the jury should have decided whether the People proved jurisdiction beyond a reasonable doubt" (*id.* at 311-312). Citing *People v Greenberg* (89 NY2d 553 [1997]), the *Carvajal* Court aptly observed that "a defendant's failure to request a jury charge on territorial jurisdiction amounts to a waiver of a jury charge claim, that failure does not amount to waiver of the fundamental question whether - as a matter of law - this State has the power to hear the case" (*id.* at 312). In this case, it is undisputed that defendant did not object to the trial court's erroneous charge on the burden of proof with respect to territorial jurisdiction. Guided by *Carvajal*, we find that defendant was required, but failed, to preserve his present challenge to the trial court's charge on jurisdiction. We further decline to review defendant's challenge in the interest of justice. As an alternative holding, we find that the error was harmless because the charge on territorial jurisdiction could have only affected the verdict on the dismissed robbery counts.

Defendant has similarly failed to preserve for our review his contention that the court "diluted the prosecution's burden of proof" by "suggesting" that he was obligated to prove that he

had detached himself from Lee's actions (*see e.g. People v Melendez*, 16 NY3d 869 [2011]) and we decline to review it in the interest of justice.[2] The contention lacks merit, in any event. The court specifically instructed the jury that "[a] defendant is not required to prove he is not guilty or to prove anything" and that "the burden of proof never shifts to the defendant." The jurors are presumed to have followed the court's instructions on the law (*People v Baker*, 14 NY3d 266, 274 [2010]). Accordingly, notwithstanding defendant's interpretation, the charge did not expressly or implicitly shift or reduce the prosecution's burden of proof. We are also not persuaded by defendant's criticism of isolated portions of the court's charge on felony murder and acting in concert. The entire charge, taken as a whole, conveyed the correct standards to the jury (*see e.g. People v Medina*, 18 NY3d 98, 104 [2011]).

Defendant next argues that his conviction of felony murder predicated on robbery is repugnant to the jury's finding that the court lacked territorial jurisdiction under the robbery counts.

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[2]On this point, defendant asserts that with respect to the kidnapping counts and the felony murder counts predicated on kidnapping, he never shared "Lee's intent to prevent the liberation" of Del Campo or Chantes. This claim is refuted by defendant's admission that upon exiting the Jeep in Riverside Park, he held Del Campo while Lee took hold of Chantes.

The argument is unpersuasive. A person commits felony murder when "[a]cting either alone or with one or more persons, he commits or attempts to commit" an enumerated felony, such as robbery, "and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants" (Penal Law § 125.25 [3]). Pursuant to CPL 20.20 (1)(a), a person may be prosecuted in New York for an offense when an element of the offense occurred within the State. Accordingly, an element of felony murder occurs in New York when a homicide is committed in the State in immediate flight from a robbery or another designated felony even if it is committed in another state (*see People v Stokes*, 88 NY2d 618, 625 [1996]). In this case, the jury heard evidence that defendant and Lee held the victims captive during the entire time that intervened between the robberies in New Jersey and the murders in New York. There was also proof that defendant and Lee could have driven the victims from the restaurant's parking lot to the site of the murders within as little as 25 to 40 minutes. Although distance and time are factors to be considered, they are not determinative of the issue of "immediate flight" (*see People v Donovan*, 53 AD2d 27, 33-34 [3rd Dept 1976]). Accordingly, there is no repugnancy

between defendant's conviction of felony murder predicated on robbery and the finding of no jurisdiction with respect to the underlying robbery counts. As set forth in his brief, defendant makes no claim that his conviction of kidnapping-based felony murder count was repugnant.

We reject defendant's claim that his sentence is excessive. 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 19, 2014

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Freedman, Kapnick, JJ.

12270 The People of the State of New York, Ind. 3743/06
Respondent,

-against-

Roger Silvestre,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered January 26, 2010, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 25 years, unanimously affirmed.

The evidence at trial established that defendant participated in the attack that resulted in the decedent's death and the wounding of another victim. The other victim, Randolph Harrell, testified that he saw defendant swing a knife at the decedent in a "vicious" manner. Detectives followed a trail of blood from the crime scene to an apartment where defendant lived with his brother, the codefendant. They first encountered defendant in a hospital, where he had been treated for wounds,

including cuts to his head, leg and hands. The detectives vouchered a hospital bag containing defendant's blood-soaked shirt, jeans, and other clothing, and a forensic biologist from the Office of the Chief Medical Examiner (OCME) testified that blood samples taken from this clothing matched the DNA of both defendant and the decedent. Further, a physician at the OCME who conducted the autopsy of decedent testified that the decedent's death was caused by stab wounds, as well as gunshot wounds, which were fatal either separately or in conjunction with each other. The physician also explained that, based on a photograph of one of defendant's hands taken shortly after the subject incident, he had sustained a cut to the side of his index finger closer to the thumb. The physician testified that this injury was in "the classic location for a person holding a knife and then the knife sliding and cutting the finger."

Prior to summations, the court held a conference during which it sought to elicit from the People which counts they intended to submit to the jury. The court asked about the charge of fourth-degree criminal possession of a weapon, which, according to the indictment, related to the allegation that "the defendants, acting in concert with each other . . . did possess a knife with intent to use the same unlawfully against another."

The prosecutor responded, "Out." The court asked defense counsel if he was "asking for [the charge]" and he responded, "Yes, I request it." The court then stated that "I don't think there is anything that would stop the People from dismissing that count, and I don't believe it's a lesser included of any existing count, counsel." Addressing itself to defendant's attorney, the court stated that "I don't think the law prevents the People from dismissing it at this stage, counsel . . . . Again . . . if you think the law is to the contrary, I'll take a look at it. That's my understanding, the People can dismiss it any time prior to the submission unless it could be supported as a lesser included offense of a charge, then it doesn't get to be dismissed."

Defendant argues on appeal that the court improperly deferred to the People's desire to withdraw the fourth-degree possession charge, relying on *People v Extale* (18 NY3d 690 [2012]). In *Extale*, the defendant was indicted for, inter alia, first-degree assault and first-degree vehicular assault, in connection with his having intentionally driven a pickup truck into a police officer. Before the trial of those charges, the prosecutor announced the People's intention to withdraw the vehicular assault count, and the court agreed with the prosecutor that the People had "the authority" to do so. The Court of

Appeals disagreed, holding that "the issue was one for the trial court's discretion, not the prosecutor's" (18 NY3d at 695).

As a preliminary matter, we reject the People's argument that defendant failed to preserve the *Extale* issue for appeal. By requesting that the weapons possession count be submitted to the jury immediately after the prosecutor requested that it be dismissed, defense counsel implicitly urged the court to exercise its discretion to submit the count to the jury. Defense counsel was not required to press the point after the court expressly agreed with the People's position that they had the ultimate authority on whether the count would be submitted.

On the merits, we agree with defendant that the court's position with respect to the count was no different from that of the trial court in *Extale*, which was found by the Court of Appeals to be erroneous. No fair reading of the trial record supports the People's argument that the trial court exercised its discretion in dismissing the charge. Indeed, its comment that "the People can dismiss [the count]" was equivalent to the *Extale* trial court's comment that the prosecutor "ha[d] the authority" to dismiss the vehicular assault count (18 NY3d at 693). Nevertheless, we agree with the People that the court's actions amounted to harmless error. In *Extale*, the Court of Appeals

intimated that harmless error analysis applies to a trial court's failure to exercise discretion in permitting withdrawal of a count of an indictment, by stating, "Nor can we be sure that the dismissal of the vehicular assault count did not affect the jury's verdict" (*id.* at 696). There, the Court noted that the jury may have opted to convict on the vehicular assault charge, which would have benefitted the defendant because it, unlike the assault charge, is not classified as a violent felony.

Here, there is no reasonable possibility that the jury, had it been presented with the misdemeanor weapons possession charge, would have chosen to convict defendant on that count, instead of on the first-degree manslaughter charge. As detailed above, there was significant evidence tying defendant to the stabbing of the decedent, including a large amount of blood on defendant's clothes. DNA from that blood matched defendant's DNA and the decedent's, and injuries to defendant's hand were consistent with use of a knife. In light of this, there simply is no reasonable basis for concluding that the jury would have opted to forego convicting defendant on a manslaughter charge in favor of convicting him on a weapons possession charge which only alleged intent to use a knife, but not actual use of it.

Moreover, there is no evidence in the record linking the

knife which forms the basis of the possession charge at issue to the decedent's death. The detective who recovered that knife, across the street from the building lobby where the decedent was killed, testified that he could retrieve no fingerprint evidence from the knife. In addition, although he stated that he swabbed the knife for DNA, there was no testimony from the DNA expert or anyone else that defendant's DNA was found on the knife. Finally, Harrell, having been shown the knife, could not identify it as the one used during the attack, and defendant's counsel stated during the charge conference that he "[did not] see how the People could argue that was the knife." Based on the foregoing, there was simply no basis for the jury to vote to convict on the weapons possession charge in lieu of the manslaughter charge, as some sort of compromise verdict. This contrasts with *Extale*, where, as the Court of Appeals found, the jury could quite reasonably have voted to convict the defendant of first-degree vehicular assault, as opposed to first-degree assault.

We further find that the verdict comported with the weight of the evidence. The evidence outlined above amply demonstrated that defendant was directly involved in the stabbing of the decedent. While there were several inconsistencies between

Harrell's account of the incident before the grand jury and at trial, they do not provide a basis for disturbing the jury's determination crediting his testimony (*see People v Sanchez*, 278 AD2d 174 [1st Dept 2000], *lv denied* 96 NY2d 834 [2001]). Indeed, the inconsistencies related to incidental matters such as whether the stabbing started shortly before the shooting or vice versa, and had no bearing on the question of defendant's guilt. Likewise, Harrell's oft-repeated response that he could not recall the answer to a question was not an impediment to the jury's decision to convict, because those responses primarily went to his criminal past and the benefits he had been offered to testify, but not to the actual events that led to decedent's death. The issue concerning Harrell's initial reluctance to cooperate and the subsequent offer by the People to withdraw certain charges against him was thoroughly explored at trial and the jury was entitled to credit Harrell's testimony notwithstanding it. Similarly, Harrell's criminal history was also the subject of extensive cross-examination, and the jury's weighing of his background and deciding to credit his testimony is entitled to deference (*see People v Reyes*, 17 AD3d 205 [1st Dept 2005], *lv denied* 5 NY3d 768 [2005]).

Defendant maintains that Harrell's entire testimony should

have been stricken because of his lack of credibility and volatile behavior on the witness stand. However, this argument is unpreserved and we decline to review it in the interests of justice, since counsel never made such a request. In any event, under the circumstances due process did not require the court to take the drastic measure of striking the entire testimony of the only testifying eyewitness. Defendant's argument that he was denied the right to a fair trial because Harrell testified about what defendant characterizes as uncharged prior bad acts, is similarly unpreserved, and we decline to review it in the interests of justice. This argument also lacks merit. The testimony that defendant was "dusted" at the time of the accident cannot be said to have been prejudicial, since there is no basis to conclude that the jury understood this to be a drug reference, and since the court sustained a general objection to the testimony.

We similarly reject defendant's position that his trial was corrupted by Harrell's description of a threat allegedly made by the codefendant toward the decedent and an outburst Harrell made on the witness stand immediately thereafter, apparently addressed towards the jury. Defendant only objected generally to the testimony about the threat, and did not join in the codefendant's

motion for a mistrial after Harrell allegedly made hostile statements to the jury. We likewise decline to review this unpreserved claim in the interest of justice. In any event, the court instructed the jury to disregard the testimony concerning a threat. Further, the court polled the jurors concerning that testimony and also about the outburst, and each juror responded that he or she could remain impartial.

Defendant's argument that his right to a fair trial was also violated because of Harrell's repeated invocation of the Fifth Amendment when asked about a material witness hearing at which he also engaged in several outbursts, is also unpreserved and we decline to review it in the interest of justice. Defense counsel was equivocal about whether Harrell was truly not entitled to exercise that right. In any event, Harrell properly invoked the Fifth Amendment because he had "reasonable cause to apprehend danger from a direct answer" to questions about his outbursts at the material witness hearing (*Ohio v Reiner*, 532 US 17, 21 [2001] [internal quotation marks omitted]). We also reject defendant's claim that he should have been permitted to introduce evidence that the decedent had been suspected of murder and had written rap songs which boasted of violent acts, including homicide. The statements made by the prosecutor which such evidence would have

been designed to counter were not intended to vouch for the decedent's good character (*see People v Ruine*, 258 AD2d 278, 279 [1st Dept 1999], *lv denied* 93 NY2d 929 [1999]).

Finally, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 19, 2014

CLERK

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12371-
12372 Allen B. Roberts,
Plaintiff-Respondent,

-against-

Leslie D. Corwin, et al.,
Defendants-Appellants.

Index 115370/09

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

Epstein Becker & Green, P.C., New York (John Houston Pope of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 4, 2013, which denied defendants' motion to dismiss the complaint or, in the alternative, to disqualify plaintiff's counsel, and for discovery sanctions, unanimously affirmed, without costs. Order, same court and Justice, entered on or about November 21, 2013, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants represented plaintiff, an attorney, at an arbitration hearing against his former law firm. On May 11, 2006, the arbitration panel issued an interim award, finding that plaintiff had failed to prove any damages, based in large part on

the absence of expert testimony regarding the value of the law firm. Following the unfavorable interim award, plaintiff, with defendants' knowledge and agreement, hired a partner at his current law firm, Epstein Becker & Green (EBG), to assist in obtaining relief from the interim award, including trying to negotiate a settlement with plaintiff's former partners. While these negotiations proceeded, defendants were still actively representing plaintiff. Defendants characterize their relationship with EBG at the time as being co-counsels. The effort at settlement failed and on July 13, 2006, the arbitration panel issued a final award against plaintiff which incorporated in major part the unfavorable interim award. As a result, plaintiff was directed to pay hundreds of thousands of dollars in legal and other fees to his former law firm.

Defendants then filed a petition on plaintiff's behalf, seeking to vacate the arbitration award. In April 2007, the Supreme Court denied plaintiff's petition and the final award was confirmed. After the unfavorable interim award and as early as May 2006, plaintiff was also seeking advice from John Sachs, another attorney at EBG, about a potential malpractice action against defendants. A demand letter asserting a claim for malpractice based upon defendants' failure to disclose an expert

witness, was sent by EBG to defendants in October 2007. In November 2009, EBG, acting as plaintiff's counsel, commenced the instant malpractice action against defendants.

Defendants' motion for sanctions, including dismissal of the complaint or the disqualification of EBG from continuing to represent plaintiff was denied, as was defendants' separate motion for summary judgment.

On appeal, defendants argue that EBG's undisclosed dual role in representing plaintiff as co-counsel with defendants in the underlying arbitration matter, while at the same time providing plaintiff with advice regarding the commencement of a legal malpractice claim against defendants, is unethical. They claim that because EBG surreptitiously developed a record against them while simultaneously acting as co-counsel in the arbitration, their rights in this malpractice action were substantially prejudiced. Defendants further claim that if they had known after the unfavorable interim arbitration award that plaintiff intended to bring a malpractice action against them, they would have been ethically obligated to cease their representation of plaintiff in the arbitration.

There is no disciplinary rule that expressly prohibited EBG from giving plaintiff legal advice about the feasibility of a

malpractice action while at the same time working with defendants to obtain a better result for plaintiff in the arbitration matter, especially when it was clear to defendants that EBG was representing plaintiff's interests. While we share the motion court's concerns about EBG's failure to disclose that a malpractice action was being considered, those concerns do not support the sweeping remedies sought by defendants of either dismissing this action or disqualifying plaintiff's chosen counsel.

Dismissal of a complaint as a sanction is a penalty aimed to punish misconduct by a party to a litigation (*Lipin v Bender*, 84 NY2d 562, 572-573 [1994]). As with any sanction, however, dismissal of a complaint must be "commensurate with the particular disobedience it is designed to punish" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877 [2013][internal quotation marks omitted]). It follows that dismissal of a complaint, which deprives a litigant of a determination on the merits of a claim, is a severe sanction generally warranted only in the most egregious of circumstances (*see e.g. Lipin v Bender*, 84 NY2d 562 [plaintiff's surreptitious removal of privileged and confidential defense documents from counsel's table during hearing before court referee warranted

dismissal of her complaint]).

While disqualifying counsel is a lesser penalty than dismissal of a complaint, it carries with it the serious consequence that a party is deprived of the right to be represented by its choice of counsel, warranting a broader inquiry about whether it is an appropriate sanction for the offending conduct (*see Solow v Grace & Co.*, 83 NY2d 303, 309-310 [1994]; *S & S Hotel Ventures Partnership Ltd. v 777 S.H. Corp.*, 69 NY2d 437, 443 [1987]). Although "[t]he right to counsel of choice is not absolute and may be overridden where necessary, it is a valued right and any restrictions must be carefully scrutinized" (id.). Disqualification often turns on whether the conduct complained of results in actual, or a reasonable probability of unauthorized disclosure of confidential information (*see Tekni-Plex, Inc. v Meyner and Landis*, 89 NY2d 123 [1996]; *Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 98 [1st Dept 2008]).

Defendants have not identified any particular information or confidence EBG gained after being brought into the arbitration following the interim award. Moreover all confidential information or work product knowable in the arbitration matter belonged to plaintiff, not defendants. Plaintiff was free to

disclose that information to EBG or any other attorney he might have hired to pursue a malpractice action against defendants. Thus, EBG's conduct did not involve the procurement of confidential or privileged information, and defendants failed to show any other basis for prejudice. We reject defendants' argument that EBG's nondisclosure prejudiced them because defendants would have withdrawn as counsel from the arbitration matter had they known plaintiff was considering suing them for malpractice. The adverse interim award, which was based in large part upon plaintiff's failure to call an expert witness to prove damages, and the communications with plaintiff thereafter, should have alerted defendants about potential malpractice exposure and possible conflicts in continuing to represent plaintiff.

We also reject defendants' argument, relying on our decision in *Matter of Weinberg* (132 AD2d 190 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988]; *Matter of Beiny [Weinberg]*, 129 AD2d 126 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988]), that there are circumstances where a counsel's conduct is so egregious that a court should impose the most severe sanctions, even in the absence of actual prejudice. The troubling conduct in this case does not rise to the level of the highly unethical conduct that we addressed in *Matter of Weinberg*. Further, there was actual

prejudice in *Matter of Weinberg*, where the information surreptitiously obtained was confidential attorney client communications.

The motion court also properly denied spoliation sanctions. There is no showing on this record that plaintiff's failure to place a litigation hold on electronic data resulted in the destruction of any evidence, let alone key evidence necessary for the defense of this action (*see VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 47 [1st Dept 2012]). Plaintiff testified that he maintained a folder containing all the electronic documentation and that he had produced over 2,800 documents during discovery. Moreover, he has no history of willful noncompliance with discovery, and his attorneys subsequently produced additional emails in response to a subpoena that, inter alia, was different in scope from the demand served on him.

Sanctions were also properly denied in connection with plaintiff's failure to disclose a file maintained by his former counsel, who counseled him after the alleged acts of malpractice had occurred, since defendants failed to establish that the file contained discoverable documents that could affect their defense.

The court correctly denied defendants' motion for summary

judgment since defendants failed to establish that, even in the absence of their alleged negligence, i.e. their failure to introduce expert testimony during the arbitration of plaintiff's partnership interest in his former law firm, plaintiff would not have prevailed at arbitration (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). They did not show that the arbitration panel's finding that plaintiff failed to prove impropriety in the dissolution and liquidation of the firm precluded an award of damages (*cf. Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009]). Indeed, in rejecting plaintiff's claim that respondents "looted" the firm, the arbitration panel noted that plaintiff had not shown that respondents' appraisal reports were materially inaccurate or presented any expert testimony in that regard.

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

ENTERED: JUNE 19, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12639 Bengal House Ltd., Index 104543/05
Plaintiff-Respondent,

-against-

989 3rd Ave., Inc, etc., et al.,
Defendants-Appellants,

Consolidated Edison, et al.,
Defendants.

[And Other Actions]

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Crafa and Sofield, P.C., Rockville Centre (Thomas R. Sofield of counsel), for appellants.

Heitner & Breitstein, Brooklyn (Eugene M. Banta of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered March 5, 2013, which granted plaintiff's motion to vacate the dismissal of the complaint and restore the action to the calendar and for leave to file a note of issue nunc pro tunc, unanimously affirmed, without costs, on condition that plaintiff, within 30 days of the date hereof, (1) file in the office of the Clerk of the Supreme Court a stipulation waiving its right to recover statutory interest pursuant to CPLR 5001 and (2) pay to defendants the sum of $1,000 to compensate them for costs in opposing the motion. If these conditions are not complied with

within 30 days, the order is reversed, and the motion is denied.

This action was dismissed pursuant to CPLR 3126 after numerous delays by former counsel in filing a note of issue. Although no medical evidence was submitted, the motion court vacated the dismissal, accepting the affidavit of a family member and the affirmation of current counsel, former counsel's son, that his 82-year-old father suffers from diminished mental acuity and memory problems (*see Goldstein v Meadows Redevelopment Co Owners Corp. I*, 46 AD3d 509, 511 [2d Dept 2007]). On an application to vacate the dismissal of a complaint, assessment of the sufficiency of the excuse proffered for the delay and the adequacy of the merit of the action are consigned to the sound discretion of the court (*see Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 633 [2003] [Appellate Division]; *Mediavilla v Gurman*, 272 AD2d 146, 148 [1st Dept 2000] [Supreme Court]).

While we agree that the record does not disclose an intent to abandon the action (*see Di Simone*, 100 NY2d at 634), the court vacated the dismissal under the misapprehension that it was unable to impose conditions on the grant of relief. To the contrary, CPLR 5015(a) provides that relief from an order or judgment may be granted "upon such terms as may be just" (*see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-*

CIO, 293 AD2d 324, 325 [1st Dept 2002]), affording the necessary discretion, which extends to the Appellate Division (*see Smith v Daca Taxi*, 222 AD2d 209 [1st Dept 1995]; *Wright v 145 Tenants Corp.*, 151 AD2d 421 [1st Dept 1989]). We share the motion court's stated concern that as a result of plaintiff's dilatory conduct defendants have been unnecessarily exposed to excessive statutory interest on any potential judgment, and we condition the grant of relief accordingly.

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

ENTERED: JUNE 19, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12643 In re John Acevedo, etc., Index 260779/13
Petitioner-Respondent,

-against-

Preston High School,
Respondent-Appellant.

_____

Pino & Associates, LLP, White Plains (Brian P. Mitchell of counsel), for appellant.

Heslop & Kalba LLP, Brooklyn (Garfield A. Heslop and Shaun C. Reid of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered January 14, 2014, granting the petition to annul the expulsion of petitioner's daughter from respondent high school, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78, dismissed.

Respondent substantially adhered to its own published rules and guidelines providing for automatic expulsion for fighting. The record shows that respondent's determination expelling petitioner's daughter on that basis was an exercise of discretion that was made after a full review of the operative

facts within its knowledge and was not arbitrary and capricious (*see Matter of Quercia v New York Univ.*, 41 AD3d 295 [1st Dept 2007]; *Sabin v State Univ. of N.Y. Mar. Coll. at Fort Schuyler*, 92 AD2d 831 [1st Dept 1983]).

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

ENTERED: JUNE 19, 2014

CLERK

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

12814 The People of the State of New York, Ind. 1114/75
Appellant,

-against-

David Bryant,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington of counsel), for appellant.

Paul J. Casteleiro, Nyack, for respondent.

_____

Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered April 11, 2013, which granted defendant's CPL 440.10 motion to vacate a judgment of conviction, unanimously modified, on the law, that portion of the motion seeking vacatur on ineffective assistance of counsel grounds denied, and the matter remanded to determine the remaining branch of defendant's motion.

Defendant was convicted in 1976 of the rape and murder of an 8-year-old girl. Although there was a lack of physical evidence connecting defendant to the crime, his guilt was established on the basis of his voluntary statements to the police, the testimony of several witnesses placing him near the scene of the crime, and evidence indicating consciousness of guilt (*see People v Bryant*, 71 AD2d 564 [1st Dept 1979], *affd* 50 NY2d 949 [1980],

cert denied 449 US 958 [1980]).

We find that defendant received effective assistance of counsel under state and federal constitutional standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Since defendant's 80-year-old trial counsel testified at the CPL 440.10 hearing that he had no memory of representing defendant at his trial in 1976, his inability to recall his reasons for not consulting a serologist or having defendant's blood type tested did not establish that such actions were not rooted in strategic considerations. A review of the trial record demonstrates that counsel's decision not to consult a serologist in order to more effectively cross-examine the People's serology expert did not deprive defendant of a fair trial since the serology expert could not connect any of the physical evidence to defendant, and counsel relied upon such testimony in arguing defendant's innocence.

We remand for consideration of that branch of defendant's

motion which sought to vacate his conviction on the ground of actual innocence, since the motion court granted defendant's motion solely on the basis of its finding of ineffective assistance of counsel.

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

ENTERED: JUNE 19, 2014

CLERK

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

12815 Anthony Cambio, Index 102143/10
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered July 19, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff, who is legally blind, alleged in his notice of claim that he fell at a street corner because of defects in the roadway that the City negligently failed to prevent from becoming a "traplike condition." In his complaint, however, plaintiff alleged that the City negligently failed to maintain the sidewalk, curb and roadway, negligently caused and permitted damage thereto, rendering the location dangerous, and failed to properly inspect and repair the location. At the General

Municipal Law § 50-h hearing, plaintiff testified that the curb was higher than he expected, and in his bill of particulars he alleged that the accident occurred because, when he "stepped off the curb, he was caused to fall into the roadway due to the improper unexpected sudden and excessive drop of the curb to the roadway."

The City correctly argues that plaintiff raised a new theory of liability in the complaint and bill of particulars by alleging that the City caused and created the defect, since the notice of claim alleged negligent maintenance and did not alert the City that plaintiff would allege a theory of affirmative negligence, or negligent design (*see Rodriguez v Board of Educ. of the City of N.Y.*, 107 AD3d 651 [1st Dept 2013]; *Sutin v Manhattan & Bronx Surface Tr. Operating Auth.*, 54 AD3d 616 [1st Dept 2008]). Plaintiff's time to seek leave to file a late notice of claim has expired (*see* General Municipal Law § 50-e[5]).

In any event, plaintiff failed to raise an issue of fact as to the City's negligence or malpractice in the design of the subject curb. Plaintiff's expert relied on the Department of Transportation's Standard Details of Construction (*see* 34 RCNY 2-09[a][2]) in asserting that curbs must be seven inches over the adjacent roadway. However, that publication does not impose "a

"particularized mandate or a clear legal duty" (*see Fazzolari v City of New York*, 105 AD3d 409, 409-410 [1st Dept 2013] [internal quotation marks omitted]; *see also Hotaling v City of New York*, 55 AD3d 396, 398 [1st Dept 2008], *affd* 12 NY3d 862 [2009]).

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

ENTERED: JUNE 19, 2014

CLERK

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

12816-
12816A-
12816B

Index 1429/04

Terry Edmund, et al.,
Plaintiffs-Appellants,

-against-

Albert Einstein Hospital, et al.,
Defendants-Respondents,

Jacobi Hospital, et al.,
Defendants.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellants.

Shaub Ahmuty Citrin & Spratt, LLP, Lake Success (Steven J. Ahmuty, Jr. of counsel), for Albert Einstein Hospital, Montefiore Medical Group and Montefiore Medical Center, respondents.

Zachary W. Carter, Corporation Counsel, New York (Michael J. Pastor of counsel), for municipal respondents.

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Judgment, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered April 9, 2012, dismissing the complaint as against defendants Montefiore Medical Center s/h/a Albert Einstein Hospital, Montefiore Medical Group and Montefiore Medical Center (collectively Montefiore), pursuant to an order, same court and Justice, entered on or about March 16, 2012, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs. Judgment, same

court and Justice, entered on or about April 13, 2012, dismissing the complaint as against defendants the City of New York, New York City Health and Hospitals Corporation and New York City Health and Hospitals Corporation s/h/a Jacobi Hospital (collectively Jacobi), pursuant to the order entered on or about March 16, 2012, unanimously reversed, on the law, without costs, the judgment vacated, Jacobi's motion for summary judgment denied, and the complaint reinstated as against the Jacobi defendants. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeals from the judgments.

In this medical malpractice action, plaintiffs allege that Montefiore departed from the accepted standards of care in failing to timely and properly treat and diagnose compartment syndrome and that Jacobi caused and/or failed to properly treat an infection, ultimately resulting in the above-the-knee amputation of plaintiff Terry Edmund's right leg.

Montefiore made a prima facie showing of its entitlement to judgment as a matter of law by submitting an affirmation of a general and plastic surgery expert, the testimony of the plastic surgeon who performed plaintiff's first debridement surgery, and plaintiff's medical records (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). The submissions showed that while

plaintiff was initially given a working or differential diagnosis of compartment syndrome, it was disproved by observations during surgery, the lack of compartment pressures of at least 30 mmHg, the existence of a normal CPK (creatine phosphokinase) level, which one treating doctor described as "very significant" in ruling out compartment syndrome, and MRI results that showed "[n]o evidence for muscle involvement to suggest . . . compartment syndrome."

Plaintiffs' challenge regarding the qualifications of Montefiore's expert is unpreserved and, in any event, unavailing, as the objections go to the weight, and not the admissibility, of the expert's opinion (*see Rojas v Palese*, 94 AD3d 557, 558 [1st Dept 2012]; *Williams-Simmons v Golden*, 71 AD3d 413, 413 [1st Dept 2010]).

In opposition, plaintiffs failed to raise a triable issue of fact as to Montefiore's negligence. Plaintiffs' orthopedic expert's opinions concerning Montefiore's alleged deviations from the standard of care failed to address, let alone rebut, the various contraindications for the existence of compartment syndrome that were noted by Montefiore and its expert (*see Limmer v Rosenfeld*, 92 AD3d 609, 609-610 [1st Dept 2012]; *Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1st Dept 2007]).

Plaintiff's focus on the perceived inadequacies of Montefiore's alternative theory of causation (namely, a self-inflicted chemical burn) is misplaced. As the claims against Montefiore rely upon the assumption that plaintiff suffered from compartment syndrome, Montefiore needed only to disprove this theory and not to establish its own. Further, the court properly rejected the parts of plaintiff's affidavit that contradicted her deposition testimony, taken years earlier (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 501 [1st Dept 2008]; *Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007]). In any event, plaintiff's affidavit and her plastic surgery expert's opinion only challenged Montefiore's burn theory; therefore, they failed to rebut Montefiore's prima facie evidence that plaintiff did not suffer from compartment syndrome.

Jacobi's motion should have been denied as untimely, as it

was made more than 120 days after the filing of the note of issue, with no explanation given, let alone good cause shown, for the delay (CPLR 3212[a]; *see also Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]).

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

ENTERED: JUNE 19, 2014

CLERK

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

12817 In re Shirley Liverman, Index 104409/12
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

The Rosenthal Law Firm, PC, Spring Valley (Douglas Rosenthal of counsel), for petitioner.

Kelly D. MacNeal, New York (Andrew M. Lupin of counsel), for respondent.

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Determination of respondent New York City Housing Authority (NYCHA), dated September 12, 2012, terminating petitioner's tenancy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Cynthia S. Kern, J.], entered May 15, 2013), dismissed, without costs.

The determination that petitioner violated stipulations requiring her to permanently exclude her grandson from the subject apartment is supported by substantial evidence (*see Matter of Gibbs v New York City Hous. Auth.*, 82 AD3d 412 [1st Dept 2011]). The record shows that petitioner permitted two NYCHA investigators into her apartment pursuant to the stipulations' provisions for unannounced visits to confirm

petitioner's compliance with the permanent exclusion, and that the grandson was found in the apartment's living room and admitted to having been in apartment for over four hours by the time the investigators arrived.

Under the circumstances presented, including that petitioner violated at least three exclusion stipulations dating back to 2006, the penalty of termination does not shock our sense of fairness (*see Matter of Horne v New York City Hous. Auth.*, 113 AD3d 575 [1st Dept 2014]; *Gibbs*, 82 AD3d at 413; *Matter of Wooten v Finkle*, 285 AD2d 407, 408-409 [1st Dept 2001]).

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

ENTERED: JUNE 19, 2014

CLERK

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

12818- Index 650318/11
12819-
12820-
12821 Red Zone LLC,
Plaintiff-Respondent,

-against-

Cadwalader, Wickersham & Taft LLP,
Defendant-Appellant.

_____

Cravath, Swaine & Moore LLP, New York (David R. Marriott of counsel), for appellant.

Jeffrey A. Jannuzzo, New York, for respondent.

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Amended order and judgment (one paper), Supreme Court, New York County (Melvin L. Schweitzer, J.), entered May 5, 2014, awarding plaintiff $17.2 million, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered May 24, 2013, September 3, 2013 and October 11, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff commenced this action for legal malpractice against defendant law firm based on the alleged negligent drafting of an agreement (Side Agreement) that was intended to memorialize an oral agreement between plaintiff and nonparty UBS Securities LLC (UBS) to cap at $2 million the amount of fees UBS

was to receive for acting as plaintiff's exclusive financial advisor in its effort to acquire control of nonparty Six Flags, Inc., unless plaintiff acquired more than 51% of the voting shares of Six Flags. Prior to the instant lawsuit, UBS successfully sued plaintiff for $10 million in fees in connection with the Six Flags transaction. In the course of that lawsuit, we rejected plaintiff's argument that the Side Agreement, read in tandem with the main agreement (Engagement Agreement), capped UBS's fee at $2 million (*UBS Sec. LLC v Red Zone LLC*, 77 AD3d 575 [1st Dept 2010], *lv denied* 17 N.Y.3d 706 [2011]) (UBS Decision).

In this action, defendant moved for leave to amend its answer to assert the defense of assumption of the risk. In support of its motion, defendant submitted an affidavit from a partner at the firm who averred that he had warned plaintiff that the Side Agreement was ambiguous. This statement directly contradicts his earlier deposition testimony in the UBS litigation that the Side Agreement unambiguously capped plaintiff's fees and was improperly raised for the first time in opposition to plaintiff's motion (*see e.g. Ostrov v Rozbruch,* 91 AD3d 147, 154 [1st Dept 2012]). Contrary to defendant's contentions, this defense was not previously raised in its answer or motion papers, as those documents merely broadly deny that

defendant acted negligently. The motion was properly denied since the proposed amendment is patently devoid of merit (*see Bishop v Maurer,* 83 AD3d 483, 484-485 [1st Dept 2011).

The motion court also properly denied defendant's motion to renew the motion for leave to amend its answer. The motion was not based on new facts that were unavailable on the original motion (*Chelsea Piers Mgt. v Forest Elec. Corp.*, 281 AD2d 252 [1st Dept 2001]). Nor is there any basis to find that the interest of justice and substantial fairness warrant granting renewal.

The motion court properly concluded that the continuous representation doctrine applies to toll the statute of limitations on plaintiff's legal malpractice claim. Although defendant drafted the Side Agreement in 2005, it provided legal advice throughout the UBS litigation from 2007 through late 2010. Although plaintiff was represented by other counsel in the UBS litigation, plaintiff and its trial counsel continued to confer with defendant and share privileged documents regarding its defense strategy. In doing so, defendant apparently sought to rectify its earlier alleged malpractice, namely to prevent UBS from demanding more than $2 million when the Side Agreement was intended to limit UBS's fee. In such cases, the continuous

representation doctrine applies (*see Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 506-507 [2d Dept 1990]; *N&S Supply v Simmons*, 305 AD2d 648, 649-650 [2d Dept 2003]). There is no basis to find that the earlier "gap" in representation from roughly 2005 to 2007 ended defendant's prior representation. There was simply no need to consult defendant during that time, and defendant never communicated to plaintiff that its prior representation had ended (*see Shumsky v Eisenstein*, 96 NY2d 164, 170-171 [2001]).

Plaintiff's motion for summary judgment on its legal malpractice claim was also properly granted. Notably, defendant does not dispute that the Side Agreement was intended to cap UBS's fees at $2 million. Given our prior finding in the UBS litigation that the Side Agreement failed to do just that (*UBS Sec. LLC*, 77 AD3d 575), summary judgment is warranted. Accordingly, no expert opinion evidence was necessary before granting the motion (*see Northrop v Thorsen*, 46 AD3d 780, 782 [2d Dept 2007]). There are no triable issues as to whether defendant, as opposed to plaintiff or its trial counsel in the UBS litigation, caused plaintiff's injuries. But for defendant's drafting of the Side Agreement, UBS would not have prevailed in its lawsuit seeking $10 million (*see Rudolf v Shayne, Dachs,*

Stanisci, Corker & Sauer, 8 NY3d 438, 442 [2007]).

Regarding plaintiff's motion to dismiss defendant's affirmative defenses, having concluded that the action was timely commenced, the motion court properly dismissed the laches defense (*Cadlerock, LLC v Renner*, 72 AD3d 454, 454 [1st Dept 2010]). Plaintiff did not waive its claims by attempting to defend the terms of the Side Agreement in the UBS litigation. Thus, the waiver defense was also properly dismissed.

In addition, the motion court properly dismissed the defense of failure to mitigate damages. Contrary to defendant's argument that plaintiff could have mitigated its damages by avoiding gaining control of Six Flags, the Side Agreement was intended to limit plaintiff's liability in the event that it acquired control. Defendant further argues that plaintiff could have invested more resources to adequately defending the UBS litigation, but it does not detail what strategies should have

been pursued to persuade the trial court or this Court to look beyond the plain and unambiguous terms of the Side Agreement.

We have considered defendant's remaining contentions and find them unavailing or not properly before this Court.

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

ENTERED: JUNE 19, 2014

CLERK

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

12823 Joseph R. C., etc., et al., Index 350704/09
Plaintiffs-Appellants,

-against-

Bronx Underground LLC,
Defendant,

First Lutheran Church of
Throggs Neck, et al.,
Defendants-Respondents.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellants.

Law Offices of Claudia P. Lovas, Garden City (Claudia P. Lovas of counsel), for First Lutheran Church of Throggs Neck, respondent.

Drinker Biddle & Reath LLP, New York (Marsha J. Indych of counsel), for David Rose, respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 10, 2013, which granted the motions of defendants First Lutheran Church of Throggs Neck (the Church) and David Rose for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Summary judgment was properly granted in favor of the Church, in this action where infant plaintiff was injured when he was struck in the head by an unidentified participant at a music event held at the Church's premises and hosted by defendant Bronx

Underground LLC. The Church owed no duty to supervise the subject music event, or to otherwise retain control of its premises (*see McGlynn v St. Andrew Apostle Church*, 304 AD2d 372 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]).

Dismissal of the complaint as against Rose was also proper where Rose, a principal of Bronx Underground LLC, did not commit an affirmative tort so as to subject him to personal liability to plaintiff (*see Peguero v 601 Realty Corp.*, 58 AD3d 556, 559 [1st Dept 2009]). Nor did Rose exercise complete dominion over the LLC alleged to have committed the wrong (*see Brito v DILP Corp.*, 282 AD2d 320 [1st Dept 2001]; *see also Mendez v City of New York*, 259 AD2d 441 [1st Dept 1999]).

We have considered plaintiffs' remaining contentions, including that the motion court improperly resolved issues of credibility on a motion for summary judgment, and find them unavailing.

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

ENTERED: JUNE 19, 2014

CLERK

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

12824 Sandra Beras, Index 113374/09
Plaintiff-Appellant,

-against-

The New York City Housing Authority,
Defendant-Respondent.

_____

Joelson & Rochkind, New York (Kenneth Joelson of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 8, 2013, as amended May 29, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law in this action where plaintiff was injured when she slipped and fell as she descended the interior stairs of defendant's building. Defendant submitted evidence, including the testimony of its supervisor of caretakers, as to its activities on the day of the accident, and when the area where plaintiff fell was last inspected and cleaned (*see Rodriguez v New York City Hous. Auth.*, 102 AD3d 407 [1st Dept 2013]; *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500-501 [1st Dept 2008]).

In opposition, plaintiff failed to raise a triable issue of fact concerning defendant's constructive notice of the oily condition of the stairs. Although the record shows that the stairwell was last inspected at approximately 1 p.m. on a Sunday and plaintiff fell at 7 p.m. that evening, "[t]he court cannot impose a duty upon a municipal authority to alter its cleaning schedule or hire additional cleaners without a showing that the established schedule is manifestly unreasonable," which was not made here (*Harrison v New York City Tr. Auth.*, 94 AD3d 512, 514 [1st Dept 2012]; *see Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837 [2005]).

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

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

ENTERED: JUNE 19, 2014

CLERK

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

12825 The People of the State of New York, Ind. 528/09
Respondent,

-against-

Sergei Khramtsov,
Defendant-Appellant.

_____

Stephen C. Cooper, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered April 28, 2011, convicting defendant, after a jury trial, of criminal mischief in the second degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters of strategy regarding the selection of witnesses that are not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). At most, the record suggests that defense counsel had considered calling a particular medical witness, but it does not explain why that witness, or other potential witnesses cited by defendant on appeal, were not

called. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: JUNE 19, 2014

CLERK

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

12826 Leonard Bisk, et al., Index 652662/13
Plaintiffs-Respondents,

-against-

The Manhattan Club Timeshare Association, Inc., et al.,
Defendants-Appellants.

_____

Katsky Korins LLP, New York (Joel S. Weiss of counsel), for appellants.

Blau Leonard Law Group, LLC, Huntington (Steven Bennett Blau of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 26, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

In this putative class action lawsuit alleging deceptive practices by defendants that prevented plaintiffs from being able to use their timeshare units for their stated purpose, a vacation accommodation experience, the IAS court denied defendants' motion

to dismiss, and credited plaintiffs' allegation that defendants rented up to 96% of the available units to the general public, thus preventing plaintiff owners from reserving accommodations. This was error, as plaintiffs made this contention not in their complaint or in an affidavit opposing the motion to dismiss, but in their memorandum of law opposing the motion to dismiss (*see Basilotta v Warshavsky*, 91 AD3d 460 [1st Dept 2012]). Moreover, the allegation is based on an apparent misreading of the documents submitted by defendants in support of their motion to dismiss.

We find that plaintiffs' other claims are similarly deficient, as they are conclusory and speculative at best (*see e.g. Sheppard v Manhattan Club Timeshare Assoc., Inc.*, No 11-Civ-4362, 2012 WL 1890388, 2012 US Dist LEXIS 72902 [SD NY 2012]) and *Smith v Manhattan Club Timeshare Assn., Inc.*, 944 F Supp 2d 244, 249 [SD NY 2013]). Moreover, the key deceptive practice alleged, that defendants would rent a portion of the unused accommodations to the general public, was plainly disclosed to plaintiffs in the

offering documents.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JUNE 19, 2014

CLERK

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

12827 Florentino Camilo, Index 308689/10
Plaintiff-Appellant,

-against-

Villa Livery Corp., et al.,
Defendants-Respondents,

Hazel R. Mercedes,
Defendant.

_____

Law Office of Ryan S. Goldstein, PLLC, Bronx (Ryan S. Goldstein of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered August 26, 2013, which granted defendants' motions for summary judgment dismissing plaintiff's complaint for failure to establish a serious injury pursuant to Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not suffer a significant or permanent limitation of use of the left shoulder or spine. Defendants submitted the affirmed report of an orthopedic surgeon who examined plaintiff's allegedly injured body parts, listed the tests he performed and recorded range-of-motion measurements, expressed in numerical degrees and the corresponding normal values, and found normal range of motion in

the spine and that the left shoulder and uninjured right shoulder had the same limitations (*see Frias v Son Tein Liu*, 107 AD3d 589 [1st Dept 2013]; *see also Martinez v Goldmag Hacking Corp.*, 95 AD3d 682, 683 [1st Dept 2012]). The orthopedic surgeon's finding of minor limitations in range of motion in two planes does not defeat defendants' showing (*see Tuberman v Hall*, 61 AD3d 441 [1st Dept 2009]). Defendants also submitted the affirmed report of their radiologist, who, along with their orthopedic surgeon, reviewed plaintiff's MRIs, and opined that plaintiff's injuries were degenerative in nature and not causally related to the accident (*see Tuberman*, 61 AD3d at 441).

In opposition, plaintiff failed to provide any medical evidence concerning his condition contemporaneous to the accident (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]; *see also Rosa v Mejia*, 95 AD3d 402, 403-404 [1st Dept 2012]). Although the affirmation of plaintiff's orthopedic surgeon shows range-of-motion limitations, he did not examine plaintiff until approximately 15 months after the accident, which is insufficient to raise an issue of fact as to causation (*Linton v Gonzales*, 110 AD3d 534, 535 [1st Dept 2013]; *Mejia*, 95 AD3d at 404). The surgeon also failed to address evidence of degeneration in the MRI reports of the cervical and lumbar spine (*see Rosa*, 95 AD3d

at 404), or his own findings that the right shoulder, which plaintiff does not claim suffered injury in the accident, had greater limitations in range of motion than the uninjured left shoulder.

Given the lack of evidence of causation, the court properly dismissed plaintiff's 90/180-day injury claim (*see Linton*, 110 AD3d at 535).

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 19, 2014

CLERK

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

12828 The People of the State of New York, Ind. 2562/10
Respondent,

-against-

Blu Vaz, etc.,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), and Alston & Bird LLP, New York (Adam Baker of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 15, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of two years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's belated mistrial motion, made after a detective revealed defendant's involvement in an uncharged crime. The court gave curative instructions that were sufficient to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]), and which the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]). Although the prosecutor should have

sought an advance ruling before introducing this testimony, the drastic remedy of a mistrial was not warranted, particularly since defense counsel allowed the prosecutor to continue questioning the detective about defendant's prior arrest and raised no objection until after the completion of the detective's direct examination (*see People v Maschi*, 49 NY2d 784 [1980]).

The evidence at a *Hinton* hearing established an overriding interest that warranted a limited closure of the courtroom (*see Waller v Georgia*, 467 US 39 [1984]). The undercover officer's testimony, including testimony that he expected to continue working undercover in the vicinity of defendant's arrest, established a substantial probability that his undercover status and safety would be jeopardized by testifying in an open courtroom (*see People v Echevarria*, 21 NY3d 1, 12-14 [2013]). Defendant did not preserve his specific claims regarding the manner in which the court made its ruling, including his claim that the court employed irrelevant or inappropriate criteria (*see e.g. People v Doster*, 13 AD3d 114, 115 [2004], *lv denied* 4 NY3d 763 [2005]), and we decline to review them in the interest of justice. As an alternative holding, we find that these claims do not warrant reversal.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's resolution of a conflict between field and laboratory tests for controlled substances.

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

ENTERED: JUNE 19, 2014

CLERK

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

12829 James Shields, et al., Index 100620/07
Plaintiffs-Respondents, 590608/08

-against-

First Avenue Builders LLC, et al.,
Defendants-Appellants,

Worthington S.p.A.,
Defendant.
- - - - -
Worthington S.p.A.,
Third-Party Plaintiff,

-against-

MC & O Masonry, Inc.,
Third-Party Defendant-Respondent.

_____

Ahmuty Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for appellants.

Rosenberg Minc, Falkoff & Wolff, LLP, New York (Daniel Minc of counsel), for James Shield and Eileen Cavanagh, respondents.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa Corchia of counsel), for MC & O Masonry, Inc., respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered April 30, 2013, which, to the extent appealed from, denied so much of defendants-appellants' motion for summary judgment as sought dismissal of plaintiffs' Labor Law § 241(6) claim as predicated on Industrial Code (12 NYCRR) § 23-9.2(a), unanimously affirmed, without costs.

Plaintiff James Shields was cleaning a concrete pump, with the engine running, when a swing tube in the pump swivelled, severing his fingers. Plaintiff was inspecting a ring or groove in the tube for residual grout, and claims that the hydraulics that caused the pipe to move reengaged on their own, despite the fact that he had turned them off.

Third-party defendant, MC & O Masonry, Inc., failed to preserve its contention that the concrete pump is not "power-operated equipment" under Industrial Code subpart 23-9. In any event, the argument is unavailing, as the pump constitutes "power-operated heavy equipment or machinery used in construction" under 12 NYCRR 23-9.1 (*see St. Louis v Town of N. Elba*, 16 NY3d 411, 415 [2011]).

The third sentence of 12 NYCRR 23-9.2(a), which states that "[u]pon discovery, any structural defect or unsafe condition in [power-operated] equipment shall be corrected by necessary repairs or replacement," is inapplicable to the facts of this case. The evidence shows that neither defendants nor MC & O had prior actual notice of the unsafe condition of the hydraulics reengaging after they had been turned off (*see generally Misicki v Caradonna*, 12 NY3d 511, 521 [2009]), and the affidavits of plaintiffs' experts are insufficient to raise a triable issue of

fact.

Nevertheless, dismissal of the claim is unwarranted, as the last sentence of 12 NYCRR 23-9.2(a), which states that "[a]ny servicing or repairing of such equipment shall be performed only while such equipment is at rest," is applicable. That sentence is sufficiently specific to form a predicate basis for Labor Law § 241(6) liability (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 504-505 [1993]; *see also Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350-351 [1998]). Given the evidence that the pump would not operate properly if the ring or groove was not completely cleaned of grout after each use, plaintiff's work on the pump at the time of the accident constitutes "servicing" within the meaning of 12 NYCRR 23-9.2(a). Further, the evidence that the engine was still running and that the hydraulics reengaged on their own shows that the machine was not "at rest."

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

ENTERED: JUNE 19, 2014

CLERK

CORRECTED ORDER - JUNE 19, 2014

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

12830-
12831-
12832 The People of the State of New York,
Respondent,

Dkts **50357C/12**
50564C/12
51819C/12

-against-

Barry Kouronma also known as Barry Kouroma,
Defendant-Appellant.

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

Judgments, Supreme Court, Bronx County (George Villegas, J.), rendered on or about September 20, 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 19, 2014

CLERK

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

12833 In re Metropolitan Transportation Authority, etc., Petitioner-Respondent, Index 401875/09

-against-

Conrad Riedi, et al., Respondents-Appellants.

_____

George S. Locker Esq., P.C., New York (George S. Locker of counsel), for appellants.

Berger & Webb, LLP, New York (Kenneth J. Applebaum of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Martin Shulman, J.), entered on or about May 21, 2013, which, upon converting respondent tenants' motion for summary judgment into a proceeding pursuant to CPLR article 78, denied the petition and dismissed the proceeding, unanimously affirmed, without costs.

The agency's application of a 6% net present value discount to the lump sum payment it made under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 USC § 4621 *et seq.*) (the Act) as replacement housing assistance for the displacement of the tenants in connection with the Second Avenue Subway Project was neither irrational (*see e.g. Matter of*

Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 428 [1st Dept 2007], *affd* 11 NY3d 859 [2008]) nor affected by any error of law. As per the Act and accompanying regulations, the agency properly exercised its "broad latitude" in carrying out its statutory obligations, given that the purpose of the relocation payment was to "minimize hardship" and provide "reasonable," "fair and equitable" assistance at a "reasonable cost" to the agency, not to provide dollar for dollar coverage of the difference in rent between the vacated rent-regulated apartment and the comparable replacement apartment, and in this instance the payment comported with that purpose in each respect. In view of the foregoing, we need not address the tenants' other contentions.

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

ENTERED: JUNE 19, 2014

CLERK

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

12834 The People of the State of New York, Ind. 2667/07
Respondent,

-against-

Michael Brizen,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered December 18, 2007, as amended January 8, 2008, convicting defendant, after a jury trial, of attempted rape in the first degree, sexual abuse in the first degree (two counts) and endangering the welfare of an incompetent or physically disabled person in the first degree (two counts), and sentencing him to an aggregate term of 15 years, unanimously affirmed.

Under the unusual circumstances of the case, where one of the victims was unable to speak intelligibly because of her physical impairment, the court properly exercised its discretion in permitting the prosecutor to clarify the testimony by means of

leading questions (*see People v Williams*, 242 AD2d 469 [1st Dept 1997], *lv denied* 91 NY2d 883 [1997]), and defendant has not established that he was thereby deprived of a fair trial.

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

ENTERED: JUNE 19, 2014

CLERK

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

12835 Georgia Malone & Company, Inc., Index 158913/12
Plaintiff-Respondent,

-against-

Extell Development Company, et al.,
Defendants-Appellants.

_____

Schlam Stone & Dolan LLP, New York (Richard H. Dolan of counsel), for appellants.

Claude Castro & Associates, PLLC, New York (Claude Castro of counsel), for respondent.

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Judgment, Supreme Court, New York County (Joan M. Kenney, J.), entered January 16, 2014, in favor of plaintiff, unanimously affirmed, with costs.

Plaintiff's entitlement to a broker's commission is established by the real estate contract, which acknowledges plaintiff's performance of services and expressly promises that plaintiff will be paid by the sellers in the subject transaction (*Helmsley-Spear, Inc. v New York Blood Ctr.*, 257 AD2d 64, 67 [1st Dept 1999]). However, the contract does not specify the amount of the commission, and there is no separate brokerage agreement. Thus, plaintiff is entitled to a commission that is "fair and reasonable," i.e. "the customary rate in the community at the time when the services are rendered" (*Kaplon-Belo Assoc. v Cheng*,

258 AD2d 622, 622 [2d Dept 1999]). Plaintiff's expert opined, based on the specific transaction at issue, that plaintiff is entitled to a 2% commission. Defendants' vice president's affirmation, which states that brokerage commissions such as this are generally arrived at by negotiation, is conclusory, has no basis in the record, and fails to address plaintiff's expert's claims. We reject defendants' challenge, made for the first time on appeal, to plaintiff's expert's credentials (*see Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 49 [1st Dept 2008]), as well as their contention that the motion court should not have considered the affidavit because plaintiff failed to disclose the expert (*see Downes v American Monument Co.*, 283 AD2d 256 [1st Dept 2001]).

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

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

ENTERED: JUNE 19, 2014

CLERK

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

12836-
12837N Index 21951/13E

276-8 Pizza Corp. doing
business as John's Pizzeria,
Plaintiff-Respondent,

-against-

Lisa Free also known as
Lisa Castellotti,
Defendant-Appellant.

- - - - -

276-8 Pizza Corp. doing
business as John's Pizzeria,
Plaintiff-Appellant,

-against-

Lisa Free also known as
Lisa Castellotti,
Defendant-Respondent.

- - - - -

Robert Vittoria,
Intervenor-Respondent.

_____

Fox Rothschild LLP, New York (Ernest Edward Badway of counsel), for appellant/respondent.

Moulinos & Associates LLC, New York (Peter Moulinos of counsel), for respondent/appellant.

Arent Fox LLP, New York (Eric Roman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered on or about September 13, 2013, which granted intervenor-respondent's motion to intervene, unanimously affirmed, without costs. Order, same court and Justice, entered January 27, 2014,

which granted plaintiff's motion for a preliminary injunction, unanimously reversed, on the law, without costs and the motion denied.

This is an action for trademark dilution and infringement resulting from defendant's use of plaintiff's trade name, "John's Pizzeria," and related marks. Intervenor-respondent, who is plaintiff's co-president and majority shareholder, was not consulted about, and did not authorize, the lawsuit before it was brought. He objects to it on the ground that it has the potential to cause irreparable harm to the corporation's reputation and goodwill and because he believes it is in the corporation's best interests to permit defendant to stay in business and use the "John's Pizzeria" name. As respondent holds 60% of the corporation's voting shares, the lawsuit was impermissibly brought without his authorization (*see* Business Corporation Law § 614[b]). Under the circumstances, he is entitled to intervene as of right, since he has established that his interest could not be adequately represented by the parties and that he may be bound by any judgment entered in this case (*see* CPLR 1012[a][2]).

Respondent has also established that he should be permitted to intervene pursuant to CLPR 1013, since his claims and those

asserted in the main action have common questions of law and fact, and his participation in the lawsuit does not threaten to unduly delay or complicate the litigation.

Plaintiff failed to demonstrate its entitlement to preliminary injunctive relief pursuant to General Business Law § 360-l, which provides that "[l]ikelihood of injury to business reputation or of dilution of the distinctive quality of a mark or trade name shall be a ground for injunctive relief . . . notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services." In light of defendant's showing that she has operated other "John's Pizzeria" locations for 16 years without objection from plaintiff, plaintiff has not established that defendant's recent use of the trade name and marks in connection with a new restaurant in Bronx County poses any risk of suddenly blurring the distinction between the Bleecker Street pizzeria and defendant's separate restaurants in a manner that would threaten to tarnish the goodwill and reputation of plaintiff's business (*see Allied Maintenance Corp. v Allied Mech. Trades*, 42 NY2d 538, 545 [1977]).

Furthermore, plaintiff failed to demonstrate that it had a likelihood of success on the merits, that it would sustain

irreparable injury absent the grant of injunctive relief, and that the equities balanced in its favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; *Matter of Fireman's Assn. of State of N.Y. v French Am. School of N.Y.*, 41 AD3d 925 [3d Dept 2007]). Plaintiff's shareholders' agreement explicitly provides that Vittoria (the majority shareholder) and "Castellotti" – which is defined to include defendant Lisa Free a/k/a Castellotti – "shall not authorize any person, firm or organization in which they shall not be owners to permit the use of the corporate assumed name without the consent of the Board of Directors in writing." Interpreted according to its plain meaning, the agreement permits defendant to use the "John's Pizzeria" trade name in the operation of her restaurants without written authorization from plaintiff's board. Defendant and Vittoria also urge that plaintiff was not authorized to commence

the action. In light of the parties' long history of shared use of the trade name, plaintiff failed to demonstrate either potential irreparable injury in the absence of injunctive relief or that the balance of equities weighs in its favor.

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

ENTERED: JUNE 19, 2014

CLERK

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

12838N Frances C. Peters, Index 600456/04
Plaintiff-Appellant,

-against-

George Christy Peters, et al.,
Defendants-Respondents.

_____

Leslie Trager, New York, for appellant.

Law Offices of Howard Benjamin, New York (Howard Benjamin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Kapnick, J.), entered on or about November 23, 2012, which granted defendants' motion to quash plaintiff's nonparty subpoenas to the extent of quashing the subpoenas served on Colonial Navigation Company Inc. (Colonial) and Cardillo & Corbett, Esqs. and limiting the subpoena served on Newman & Cahn, LLP, unanimously reversed, on the law and in the exercise of discretion, without costs, and the motion denied.

The amended complaint sets forth allegations of conversion with respect to the purchase of a ship known as the M/V Athena, the principal asset of nonparty Sea Trade Maritime Corporation. It is alleged in the amended complaint that Colonial was the managing agent of the Athena. According to the deposition of

defendant George Christy Peters, the two law firms mentioned above were the attorneys for Sea Trade. In light of the foregoing, it has been demonstrated that the discovery sought by way of the subject subpoenas is "material and necessary" under CPLR 3101 (4) insofar as it is relevant to the prosecution of plaintiff's claims (*see Matter of Kapon v Koch*, __NY3d__, 2014 NY Slip Op 02327, *4-*5 [2014]). Accordingly, the motion court abused its discretion in granting the motion.

We reject defendants' argument that the doctrine of law of the case calls for a different result. Here, defendants erroneously rely on a prior order dismissing certain claims set forth in the original complaint for failure to state a cause of action. Because the original complaint was superseded by the amended complaint, the sufficiency of the allegations in the earlier complaint is rendered academic (*Thompson v Cooper*, 24

AD3d 203, 205 [1st Dept 2005]). Defendants' assertion that plaintiff's claims lack merit is equally unavailing for purposes of the instant discovery motion.

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

ENTERED: JUNE 19, 2014

CLERK

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

12839
[M-2053] In re Theodore Simpson, Ind. 603/96
Petitioner,

-against-

The State of New York, et al.,
Respondents.

Theodore Simpson, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for state respondent.

Jorge Dopico, New York (Kevin M. Doyle of counsel), for Departmental Disciplinary Committee for the First Judicial Department, 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 19, 2014

CLERK

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

12418 BasicNet S.p.A., et al., Index 653266/11
Plaintiffs-Appellants,

-against-

CFP Services Ltd., etc.,
Defendant-Respondent,

Corporate Funding Partners, LLC, et al.,
Defendants.

_____

Satterlee Stephens Burke & Burke LLP, New York (James F. Rittinger of counsel), for appellants.

Noël F. Caraccio, PLLC, Mamaroneck (Noël F. Caraccio of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered on or about October 30, 2013, reversed, on the law, without costs, and the motion granted.

Opinion by Andrias, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
Richard T. Andrias
Leland G. DeGrasse
Rosalyn H. Richter, JJ.

12418
Index 653266/11

_____x

BasicNet S.p.A., et al.,
Plaintiffs-Appellants,

-against-

CFP Services Ltd., etc.,
Defendant-Respondent,

Corporate Funding Partners, LLC, et al.,
Defendants.

_____x

Plaintiffs appeal from the order of the Supreme Court, New York County (Lawrence K. Marks, J.), entered on or about October 30, 2013, which denied their motion for summary judgment on their breach of contract claim against defendant CFP.

Satterlee Stephens Burke & Burke LLP, New York (James F. Rittinger, Alun W. Griffiths and Dai Wai Chin Feman of counsel), for appellants.

Noël F. Caraccio, PLLC, Mamaroneck (Noël F. Caraccio of counsel), for respondent.

ANDRIAS, J.

Plaintiffs are the beneficiaries of irrevocable standby letters of credit (SLCs) issued by defendant CFP Services Ltd. d/b/a CFP Trade Services. The SLCs were issued in connection with an amended license agreement between plaintiffs, as licensors, defendant Kappa North America, Inc., as licensee, and defendant Total Apparel Group, Inc. (TAG), as Kappa's guarantor. Although CFP allegedly issued the SLCs with the understanding that the amendment to the license agreement had already been signed, it was executed shortly after the SLCs were issued and was backdated.

After Kappa and TAG defaulted in their obligations under the amended license agreement, CFP refused to honor plaintiffs' demands for payment due to alleged discrepancies between certain documents required by the SLCs and those submitted by plaintiffs. These included the alleged failure of plaintiffs to submit, pursuant to Requirement E of the SLCs, an authenticated Society for Worldwide Financial Telecommunication (SWIFT) message from CFP confirming plaintiffs' "fulfilment of their commitment towards the account party."

Supreme Court denied plaintiffs' motion for summary judgment on their breach of contract claim against CFP on the grounds that the backdating of the amendment to the license agreement was

arguably a material misrepresentation and that plaintiffs had not established, as a matter of law, compliance with Requirement E. We now hold that plaintiffs are entitled to payment under the SLCs and that their motion for summary judgment should have been granted.

Analysis of the parties' claims requires a brief history of the events leading up to the issuance of the SLCs. By agreement dated April 24, 2009, plaintiffs granted Kappa the exclusive right to use certain of their trademarks used on sportswear apparel in the United States and Canada for a specified term. TAG, which owned Kappa, signed the agreement as Kappa's guarantor.

By June 2010, Kappa had allegedly defaulted in its obligations under the license agreement to pay minimum guaranteed royalty payments and to deliver a bank guaranty to plaintiffs. TAG defaulted on its guaranty. Consequently, plaintiffs served Kappa and TAG with default and termination notices. However, to avoid termination of the licensing agreement, in or about September 2010, plaintiffs, Kappa and TAG began negotiating an amendment to the agreement under which Kappa's and TAG's monetary obligations to plaintiffs would be extended and reduced, and Kappa and TAG would obtain SLCs for the benefit of plaintiffs in lieu of a bank guaranty. The purpose of the SLCs was to insure

that plaintiffs had a guaranteed, easily accessible recourse to funds in the event of another breach by Kappa and TAG.

Kappa applied to CFP for the SLCs. CFP provided Kappa with drafts of the SLCs, which Kappa gave to plaintiffs for review. Several of these drafts contained a clause that gave CFP the discretion to determine whether plaintiffs fulfilled their commitment to Kappa (the control clause). When plaintiffs objected to the inclusion of the control clause, Kappa advised them that it would be omitted from the SLCs. Kappa then provided plaintiffs with draft SLCs that did not include the clause, which plaintiffs approved. However, CFP asserts that it did not agree to this and that it advised Kappa that it was unwilling to issue the SLCs without the control clause unless Kappa and TAG put up a 100% margin to protect CFP in the event of Kappa's default.

On or about October 6, 2010, CFP issued two SLCs, one in favor of plaintiff BasicNet in the amount of $106,344 (SLC 765) and the other in favor of plaintiff Basic Properties in the amount of $519,424 (SLC 769). Each SLC stated "WE HEREBY ISSUE OUR IRREVOCABLE STANDBY LETTER OF CREDIT" and included the following five presentation requirements:

> "A) A SIGNED LETTER OF CLAIM FROM THE BENEFICIARY ADDRESSED TO THE ISSUER CFP ... FOR THE CLAIM AMOUNT UNDER STANDBY LETTER OF CREDIT ISSUED BY THEM IN ONE ORIGINAL AND TWO COPIES.

"B) A WRITTEN SIGNED STATEMENT FROM BENEFICIARY STATING THAT THEY HAVE DISCHARGED ALL THEIR OBLIGATIONS TOWARDS THE APPLICANT AND APPLICANT HAS FAILED TO DISCHARGE ITS OBLIGATIONS AS PER THE TERMS OF THE UNDERLYING CONTRACT AND THIS SLC IN ONE ORIGINAL AND TWO COPIES.

"C) A SIGNED LETTER OF DEFAULT NOTICE FROM []THE BENEFICIARY TO APPLICANT KAPPA ... WITH A TEN BUSINESS DAY CURE PERIOD PROVISION CALLING FOR THE AMOUNT OF PAYMENT DUE AS PER THE CONTRACT SENT VIA FEDEX OR DHL SUPPORTED BY PROOF OF DELIVERY OF THIS DEFAULT NOTICE TO KAPPA... AT 525 SEVENTH AVENUE SUITE 501 NEW YORK, NY 10018 ISSUED BY FEDEX/DHL OR FEDEX/DHL WRITTEN CONFIRMATION EVIDENCING INABILITY TO DELIVER FOR ANY REASON WHATSOEVER.

"D) AN AUDITED PAYMENT STATEMENT ISSUED AND SIGNED BY J.P. LALL, P.C. ... CERTIFYING THAT .... KAPPA... HAS DEFAULTED ON ITS MINIMUM ROYALTY PAYMENTS DUE TO [BENEFICIARY] IN A SPECIFIC AMOUNT NOT TO EXCEED THE AMOUNT STATED IN THE DEFAULT NOTICE AS PER (C) ABOVE WITHIN THE VALUE OF THIS SLC AND THAT KAPPA ... FAILED TO MAKE THE PAYMENT TO CURE THE DEFAULT DURING THE CURE PERIOD AS PER DEFAULT NOTICE SENT TO KAPPA ....

"E) AUTHENTICATED SWIFT MSG FROM CFNYUS33 [CFP] TO BENEFICIARY'S BANK CONFIRMING BENEFICIARY'S FULFILMENT OF THEIR COMMITMENT TOWARDS THE ACCOUNT PARTY AND THAT WE ARE IN FUNDS."

The SLCs provided that they were to be valid for one-year and that all claims under the SLCs were to be submitted "ONLY AFTER 345 DAYS AFTER THE DATE OF ISSUANCE." Each SLC also stated, "THIS [SLC] IS OPENED ON THE ACCOUNT OF KAPPA ... AND THE BENEFICIARY AS PER AMENDED AND RESTATED LICENSE AGREEMENT DATED 9/28/10 FOR ROYALTY AND COMMISSION AND IS SUBJECT TO STRUCTURED TERMS AND CONDITIONS ASSOCIATED WITH THIS SLC," and "WE HEREBY ENGAGE WITH THE DRAWER THAT THE DRAFT DRAWN IN COMPLIANCE WITH

THE TERMS OF THIS [SLC] WILL BE DULY HONOURED BY US UPON PRESENTATION DULY COMPLIED WITH THE TERMS AND CONDITIONS STATED IN THIS [SLC]."

Although the SLCs were issued on or about October 6, 2010, the amended licence agreement was not signed until on or about October 14, 2010, at which time plaintiffs, Kappa and TAG backdated it to September 28, 2010. Also, on or about that day, Requirement E of the SLCs was amended to delete the phrase "AND THAT WE ARE IN FUNDS."

Plaintiffs acknowledge that they were aware of the inclusion of Requirement E in the SLCs when they executed the amendment to the license agreement, but maintain that after Kappa advised them that it would be too time-consuming to delete the clause, the following language was inserted into the amendment in paragraph 2 to address their concerns:

> "Therefore the Company [Kappa] undertakes to have the issuing bank [CFP] issue a swift message to [BasicNet (BN)] and [Basic Properties America's (BPA)] advising bank confirming as per 'REQUIREMENT E' beneficiary's fulfilment of their commitment towards the account party and to provide BN and BPA with a copy of the relevant swift messages as soon as possible, and in any case not later than on 21 October 2010. Being receipt of such swift messages a condition precedent to the entering into force of this Amendment, it is expressly agreed that in case the BasicNet Group does not receive such swift messages for each of the standby letter of credit before 21 October 2010, this Amendment will be automatically null and void with no need for any formality nor for any notice."

On or about November 6, 2010, CFP sent a SWIFT message to plaintiffs' bank confirming its receipt of the fully executed agreement. As discussed below, a major issue in the resolution of this appeal is whether this SWIFT message satisfied Requirement E.

On July 1, 2011, Kappa and TAG executed a waiver and release agreement in which they acknowledged that they were "in significant and material default under the terms of the [amended licensing agreement]." On September 29, 2011, plaintiff made separate draw demands on SLC 765 and SLC 769 seeking full payment from CFP. Plaintiffs assert that in their presentation for each SLC they satisfied Requirement A by submitting one original and two copies of a written signed statement addressed to CFP for the claim amount under the SLC; Requirement B by submitting one original and two signed copies of a statement signed by plaintiffs stating that plaintiffs had discharged all of their obligations to Kappa and that Kappa had failed to satisfy its obligations under the amended licensing agreement; Requirement C by submitting a signed letter from plaintiffs to Kappa providing a notice of default with a 10-day cure period and calling for the amount due under the amended licensing agreement, sent via FedEx to the address designated in the SLCs, together with proof of inability to deliver from FedEx; Requirement D by submitting an

audited payment statement from the accountant designated in the SLCs certifying that Kappa had defaulted on its minimum royalty payments in an amount that did not exceed the amount in the default notice submitted per Requirement C, and that Kappa failed to cure the default during the cure period; and Requirement E by submitting the November 6, 2010 SWIFT message from CFP confirming its receipt of the fully executed amended licensing agreement.

On October 6, 2011, CFP refused to honor the demands on the grounds that (i) both demands were discrepant for failure to produce the SWIFT message from CFP confirming plaintiffs' fulfillment of their commitments towards Kappa as per Requirement E; (ii) both demands were discrepant for failure to comport with Requirement B in that the signed statements submitted thereunder said "and of SLC [relevant number]," instead of "and this SLC"; and (iii) the demand relating to SLC 769 was discrepant for failure to comport with Requirement D because FedEx's letter stating that it had been unable to deliver Basic Properties's notice of default to Kappa was addressed to BasicNet instead of Basic Properties. As to plaintiffs' contention that they had satisfied Requirement E by submitting the November 6, 2010 SWIFT message in which CFP confirmed its receipt of the amended licensing agreement, on December 8, 2011, CFP sent a SWIFT message to plaintiffs' advising bank stating that:

> "THIS REFERS TO YOUR MSG [message] DT [dated] 5TH AUGUST 2011 REG[arding] OUR ABOVE SLC, PLS [please] NOTE THAT OUR MT 799 REFERRED TO BY YOU IN YOUR MSG [message] IS NOT THE SWIFT MSG [message] REQUIRED AS PER POINT (E) of our SLC. WE CONTACTED THE ACCOUNT PARTY AND THEY HAVE INFORMED US THAT THERE IS A DISPUTE BETWEEN THEM AND THE BENEFICIARY AND BENE[ficiary] HAS NOT FULFILLED THEIR COMMITMENT TOWARDS THE ACCOUNT PARTY. IN VIEW OF THIS WE ARE NOT IN A POSITION TO SEND ANY SUCH SWIFT MSG [message] AS OF NOW."

Asserting that Kappa and TAG acknowledged their material default in the July 1, 2011 release and waiver agreement and that their payment demand to CFP satisfied all five documentary requirements of the SLCs, plaintiffs seek to recover the full amount of the SLCs from CFP under a breach of contract theory. CFP answered, and asserted affirmative defenses and counterclaims, including misrepresentation and fraud based on the backdating of the amended license agreement.

A SLC assures the performance of an obligation, enabling the beneficiary to make a demand for payment under the SLC upon the occurrence of certain events, such as the default of the other party in the underlying transaction (*see Mennen v J.P. Morgan & Co.*, 91 NY2d 13, 19-20 [1997]; *One Step Up, Ltd. v Webster Bus. Credit Corp.*, 87 AD3d 1 [1st Dept 2011]). Like commercial letters of credit, they are "documentary," in that the default or non-occurrence of an event is predicated on one or more prescribed documents, as set forth in the SLC itself.

We first consider whether plaintiffs' presentation complied with Requirement E. Plaintiffs contend that, pursuant to paragraph 2 of the amendment to the licence agreement, their only commitment to Kappa as per Requirement E was to execute the amendment, and that Requirement E was satisfied when, on November 6, 2010, CFP sent a SWIFT message to plaintiffs' bank confirming its receipt of the fully executed agreement. CFP disputes this, and contends that pursuant to Requirement E it was to be the sole arbiter of plaintiffs' fulfillment of their commitment towards Kappa under the amended licensing agreement.

Under New York law, in order to recover on its claim that the issuer wrongfully refused to honor its request to draw down on a letter of credit, the beneficiary must prove that it strictly complied with the terms of the letter of credit (*see United Commodities-Greece v Fidelity Int'l Bank*, 64 NY2d 449 [1985]; *see also Marino Indus. Corp. v Chase Manhattan Bank, N.A.*, 686 F2d 112 [2nd Cir 1982]). "The corollary to the rule of strict compliance is that the requirements in letters of credit must be explicit, and that all ambiguities are construed against the [issuer]" (*Marino*, 686 F3d at 115 [internal quotations omitted]); *see also Nissho Iwai Europe v Korea First Bank*, 99 NY2d 115, 121-122 [2002]; *Barclay Knitwear Co. v King'swear Enters.*, 141 AD2d 241, 246-247 [1st Dept 1988], *lv denied* 74 NY2d

605 [1989]). The reasoning is that "[s]ince the beneficiary must comply strictly with the requirements of the letter, it must know precisely and unequivocally what those requirements are" (*Marino*, 686 F2d at 115). "Where a letter of credit is fairly susceptible of two constructions, one of which makes it fair, customary and one which prudent men would naturally enter into, while the other makes it inequitable, the former interpretation must be preferred to the latter, and a construction rendering the contract possible of performance will be preferred to one which renders its performance impossible or meaningless" (*Venizelos, S.A. v Chase Manhattan Bank*, 425 F2d 461, 466 [2d Cir 1970]).

Requirement E is ambiguous. It obligates plaintiffs to submit an authenticated SWIFT message from CFP confirming their "FULFILMENT OF THEIR COMMITMENT TOWARDS THE ACCOUNT PARTY." However, the term "commitment," singular, is not defined, and the clause makes no reference to the amended license agreement. In contrast, Requirement B requires "A WRITTEN SIGNED STATEMENT FROM BENEFICIARY STATING THAT THEY HAVE DISCHARGED *ALL THEIR OBLIGATIONS* TOWARDS THE APPLICANT AND APPLICANT HAS FAILED TO DISCHARGE ITS OBLIGATION*S AS PER THE TERMS OF THE UNDERLYING CONTRACT* AND THIS SLC" (emphasis added). Requirement C requires a "A SIGNED LETTER OF DEFAULT NOTICE FROM [] THE BENEFICIARY TO APPLICANT KAPPA ... WITH A TEN BUSINESS DAY CURE PERIOD PROVISION

CALLING FOR THE AMOUNT OF PAYMENT DUE *AS PER THE CONTRACT*" (emphasis added).

Construing this ambiguity as to what "commitment" Requirement E refers to, and therefore what document was required to satisfy it, in plaintiffs' favor, we find that plaintiffs' interpretation of Requirement E is the only reasonable and legally cognizable interpretation of the provision before the Court. The purpose of the amended license agreement was to restructure the debt owed and payable to plaintiffs as a result of Kappa's and TAG's default under the original licensing agreement, and plaintiffs fulfilled their commitment to Kappa and TAG to do so when they executed the amendment. When CFP issued the SWIFT message acknowledging receipt of the fully executed amended agreement, Requirement E was satisfied. This is consistent with the terms of paragraph 2 of the amendment to the licensing agreement in which Kappa undertook to have CFP issue a SWIFT message "confirming as per 'REQUIREMENT E' beneficiary's fulfilment of their commitment towards the account party and to provide [plaintiffs' bank] with a copy of the relevant SWIFT messages as soon as possible, and in any case not later than on 21 October 2010."

Furthermore, CFP's interpretation of Requirement E would impermissibly conflict with the Independence Principle, which is

the foundation on which all letters of credit are built.

There are three parties to an SLC: the applicant who requests the SLC; the beneficiary to whom payment is due upon the presentation of the documents required by the SLC; and the issuer which obligates itself to honor the SLC and make payment when presented with the documents the SLC requires. In turn, there are three corresponding agreements: the agreement between the applicant and the beneficiary, which creates the basis for the SLC; the agreement between the issuer and the applicant; and the SLC itself (*see Nissho*, 99 NY2d at 120).

> "[A] fundamental principle governing these transactions is the doctrine of independent contracts, [which] provides that the issuing bank's obligation to honor drafts drawn on a letter of credit by the beneficiary is separate and independent from any obligation of its customer to the beneficiary under the ... contract and separate as well from any obligation of the issuer to its customer under their agreement" (*First Commercial Bank v Gotham Originals*, 64 NY2d 287, 294 [1985]).

From the beneficiary's perspective, the independence principle makes a letter of credit superior to a normal surety bond or guaranty because the issuer is primarily liable and is precluded from asserting defenses that an ordinary guarantor could assert. Indeed, "a letter of credit would lose its commercial vitality if before honoring drafts the issuer could look beyond the terms of the credit to the underlying contractual controversy or performance between its customer and the

beneficiary" (*Township of Burlington v Apple Bank for Sav.*, 94 Civ 6116 (JFK), 1995 WL 384442, *5, 1995 US Dist LEXIS 8878, *4 [SD NY June 28, 1995]; *see also Voest-Alpine Intl. Corp. v Chase Manhattan Bank*, 707 F2d 680, 682-683 [2d Cir 1983]).

SLC 765 and SLC 769 each specify that "THIS LETTER OF CREDIT IS SUBJECT TO ISP [International Standby Practices] 98 ICC [International Chamber of Commerce] NO. 590 AND THE LAWS OF THE UNITED STATES OF AMERICA. PLACE OF JURISDICTION NEW YORK." Pursuant to New York Uniform Commercial Code § 5-116(a), "[t]he liability of an issuer ... is governed by the law of the jurisdiction" designated by the SLC. Pursuant to UCC 5-116(c), if an SLC governed by UCC article 5 incorporates "any rules of custom or practice," such as ISP 98, and if there is conflict between article 5 and those rules, then the rules govern "except to the extent of any conflict with the nonvariable provisions specified in subsection (c) of section 5-103."

Both ISP 98 and article 5 of the UCC recognize that the issuer's obligation to honor an SLC is independent of the rights and liabilities of the parties to the underlying contract. Rule 1.06(c) of ISP 98 states:

> "Because a standby is independent, the enforceability of an issuer's obligations under a standby does not depend on:
>
> "(i) the issuer's right or ability to obtain

> reimbursement from the applicant;
>
> "(ii) the beneficiary's right to obtain payment from the applicant;
>
> "(iii) a reference in the standby to any reimbursement agreement or underlying transaction; or
>
> "(iv) the issuer's knowledge of performance or breach of any reimbursement agreement or underlying transaction."

Rule 1.07 of ISP 98, titled "Independence of the issuer-beneficiary relationship," states that "[a]n issuer's obligations toward the beneficiary are not affected by the issuer's rights and obligations toward the applicant under any applicable agreement, practice, or law."

In November 2000, the independence principle was codified in a general revision of article 5 of the UCC. UCC 5-103(d) now provides that:

> "[r]ights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary."

The doctrine of independent contracts, as codified in UCC article 5, allows the letter of credit to provide "'a quick, economic and trustworthy means of financing transactions for parties not willing to deal on open accounts'" (*Mennen*, 91 NY2d

at 21, quoting *All Serv. Exportacao, Importacao Comercio, v Banco Bamerindus do Brazil, S.A.*, 921 F2d 32, 36 [2nd Cir 1990]). "Only staunch recognition of this principle by the issuers and the courts will give letters of credit the continuing vitality that arises from the certainty and speed of payment under letters of credit" (Official Comment, reprinted in McKinney's Cons Laws of NY, Book 62½, UCC 5-103 at 374).

As interpreted by CFP, Requirement E would conflict with the independence principle, as incorporated into both ISP 98 and UCC, and would make CFP's obligations under the SLCs truly illusory. Rather than performing a ministerial function of determining whether the documents submitted by plaintiffs complied with the requirements of the SLCs, under CFP's interpretation of Requirement E, CFP has the unfettered discretion to decide whether or not it will pay on the SLCs based on its unilateral determination that plaintiffs did or did not fulfill their undefined "commitment" to Kappa.

CFP asserts that its interpretation of Requirement E is nonetheless enforceable and must be strictly construed because the rules of ISP 98 may be varied by the terms of the SLCs (Rule 1.01[c]), and plaintiffs accepted the SLCs with Requirement E. CFP reasons that the definition of "document" in ISP 98 encompasses a "representation of fact, law, right, or opinion"

(Rule 1.09[a]), and that it had the right to express its "opinion" as to whether plaintiffs had fulfilled their commitment towards Kappa. We disagree.

Rule 1.01(c) of ISP 98 states that "[a]n undertaking subject to these Rules may expressly modify or exclude their application." Rule 1.04 states that "[u]nless the context otherwise requires, or unless expressly modified or excluded, these Rules apply as terms and conditions incorporated into a standby ...." Rule 1.11(d)(iii) states, "[A]ddition of the term 'expressly' ... to the phrase 'unless a standby otherwise states' or the like emphasizes that the rule should be excluded or modified only by wording in the standby that is specific and unambiguous." Here, the SLCs do not expressly modify or exclude the application of Rules 1.06(c) and 1.07 of ISP 98. Moreover, the UCC, which would govern in the event of a conflict (*see* UCC 5-116[c]), provides that the independence principle is mandatory and may not be varied by agreement (UCC 5-103[c]).[1]

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[1]Section 5-103 states:

"With the exception of this subsection, subsections (a) and (d) of this section [the independence principle], ..., the effect of this article may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this article."

Even assuming, arguendo, that CFP's interpretation of Requirement E is correct and that the parties could contract out of such a fundamental principle, CFP would be estopped from enforcing Requirement E based on the improper communications it had with Kappa relating to dishonoring the SLCs (*see E & H Partners v Broadway National Bank*, 39 F Supp 2d 275, 284-285 [SD NY 1998]). To evaluate plaintiffs' presentations, CFP spoke to officers of Kappa and considered Kappa's written notices of the dispute between itself and plaintiffs and its objections to payment of plaintiffs' claims. While CFP asserts that its discussions with Kappa related to whether the alleged discrepancies in plaintiffs' presentations should be waived, CFP's answer to interrogatories confirms that its discussions with Kappa predate plaintiffs' demands for payment, including "letters to [CFP], dated August 10, 2011 [] [and] September 1, 2011 ..., wherein [Kappa] clearly notified [CFP] of a dispute between [Kappa] and TAG and [plaintiffs] concerning the underlying Contract between those parties and the amounts due on [plaintiffs'] claim." "[T]o permit the payor to pressure or collude with the bank to dishonor the draft destroys the very principle upon which the commercial utility of letters of credit rests" (*E&H Partners*, 39 F Supp 2d at 285). In this regard, as a further indication of collusion, we note that according to the

amended complaint, unbeknownst to plaintiffs, on October 14, 2010, Kappa, at CFP's request, provided a notarized letter to CFP, stating:

> "We agree that these standby letters of Credit will have the following documentary requirement as a 'special clause['].
>
> "AUTHENTICATED SWIFT MSG FROM CNFUS33 TO BENEFICIARY'S BANK CONFIRMING BENEFICIARY's FULFILLMENT OF THEIR COMMITMENT TOWARDS THE ACCOUNT PARTY.
>
> "*We agree that you shall have no obligation whatsoever to send the Swift Message or issue any amendments.*"

CFP is not excused from making payment because the amendment to the license agreement was backdated. The fraud exception has been codified in the UCC, which provides that an issuing bank may refuse to honor documents that "appear on [their] face strictly to comply with the terms and conditions of the letter of credit" but are "forged or materially fraudulent," or if "honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant" (UCC 5-109[a]). However, because the smooth operation of international commerce requires that requests for payment under letters of credit not be routinely obstructed by pre-payment litigation, the fraud exception to the independence principle "is a narrow one" that is only available on a showing of "intentional fraud" (*All Service Exportacao, Importacao Comercio, S.A. v Banco Bamerindus do Brazil, S.A.*, 921

F2d 32, 35 [2d Cir 1990]; *see also First Commercial Bank,* 64 NY2d at 295 [fraud is "[a] limited exception to this rule of independence"]; *Banque Worms, New York Branch v Banque Commerciale Privee*, 679 F Supp 1173, 1182 [SD NY 1988] [the fraud exception "is limited to situations in which the wrongdoing of the *beneficiary* has permeated the entire transaction"], *affd 849 F2d 787* [2d Cir 1988]).

The fact that plaintiffs signed the amended license agreement on or about October 14, 2010 instead of September 28, 2010 is not material to the terms of the SLCs, i.e., that plaintiffs submit signed letters of claim and audited payment statements from a licensed independent public accounting firm (*see E & H Partners*, 39 F Supp at 286). There was a valid underlying transaction, and the backdating does not excuse CFP from paying on the SLCs (*see Semetex Corp. v UBAF Arab Am. Bank*, 853 F Supp 759, 775 [SD NY 1994], *affd* 51 F3d 13 [2d Cir 1995]).

We next consider whether plaintiffs satisfied Requirements B and C of the SLCs. While CFP has not abandoned its assertion that plaintiffs' presentation did not satisfy these requirements, the discrepancies invoked by CFP do not excuse it from paying on the SLCs.

Rule 4 of ISP 98 governs the duties and responsibilities an issuing bank must undertake when examining documents. Rule

4.01(b) states that "[w]hether a presentation appears to comply is determined by examining the presentation on its face against the terms and conditions stated in the standby as interpreted and supplemented by these Rules which are to be read in the context of standard standby practice." Rule 4.09 states:

> "If a standby requires:
>
> "(a) a statement without specifying precise wording, then the wording in the document presented by must appear to convey the same meaning as that required by the standby;
>
> "(b) specified wording by the use of quotation marks, blocked wording, or an attached exhibit or form, the typographical errors in spelling, punctuation, spacing, or the like that are apparent when read in context are not required to be duplicated and blank lines or spaces for data may be completed in any manner not inconsistent with the standby; or
>
> "(c) specified wording by the use of quotation marks, blocked wording, or an attached exhibit or form, and also provides that the specified wording be "exact" or "identical", then the wording in the documents presented must duplicate the specified wording, including typographical errors in spelling, punctuation, spacing and the like, as well as blank lines and spaces for data must be exactly reproduced."

According to the official UCC commentary, the strict compliance standard does not require that the documents presented by the beneficiary be exact in every detail (Official Comment 1, reprinted in McKinney's Cons Laws of NY, Book 62½, UCC 5-108, at 367) ["Strict compliance does not mean slavish conformity to the terms of the letter of credit . . . [and] does not demand

oppressive perfectionism"]).

The documents provided by plaintiffs contained the information specified in Requirements B and C. Requirement B calls for a written signed statement from the beneficiary (plaintiffs) stating that the applicant (Kappa) "FAILED TO DISCHARGE ITS OBLIGATIONS AS PER THE TERMS OF THE UNDERLYING CONTRACT [THE LICENSE AGREEMENT] AND THIS SLC." Plaintiffs submitted written signed statements stating that Kappa "failed to discharge its obligations as per the terms of the License Agreement . . . and of SLC [relevant number]." There is no possibility that the difference between "this SLC" and "SLC [relevant number]" "could mislead [CFP] to its detriment" (*see E & H Partners*, 39 F Supp 2d at 283-284; *Bank of Cochin, Ltd. v Manufacturers Hanover Trust Co.*, 612 F Supp 1533, 1541 [SD NY 1985], *affd* 808 F2d 209 [2d Cir 1986]).

Requirement C called for "A SIGNED LETTER OF DEFAULT NOTICE FROM [THE BENEFICIARY] ... TO ... KAPPA ... SENT VIA FEDEX OR DHL SUPPORTED BY PROOF OF DELIVERY ... ISSUED BY FEDEX/DHL OR FEDEX/DHL WRITTEN CONFIRMATION EVIDENCING INABILITY TO DELIVER." Plaintiffs submitted signed letters of default notice to Kappa, sent via FedEx, and written confirmations from FedEx evidencing inability to deliver. CFP is refusing to pay on the SLC with Basic Properties as beneficiary because -- instead of one FedEx

confirmation being addressed to BasicNet and the other being addressed to Basic Properties -- they are both addressed to BasicNet. However, both of FedEx's notices say that Kappa moved. Thus, regardless of who sent the package (BasicNet or Basic Properties), Kappa would not have received it. Thus, the fact that both FedEx confirmations were addressed to BasicNet is a "nonmeaningful" error (*see Ocean Rig ASA v Safra Natl. Bank of N.Y.*, 72 F Supp 2d 193, 199 [SD NY 1999]).

Accordingly, the order of the Supreme Court, New York County (Lawrence K. Marks, J.), entered on or about October 30, 2013, which denied plaintiffs' motion for summary judgment on their breach of contract claim against defendant CFP, should be reversed, on the law, and the motion granted, without costs.

All concur.

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

ENTERED: JUNE 19, 2014

CLERK