SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 8, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

12340 The People of the State of New York, Ind. 2639/10
Respondent,

-against-

James Schlau,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Samantha L. Stern of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered July 19, 2011, as amended November 17, 2011 and April 5, 2012, convicting defendant, after a jury trial, of rape in the first degree, criminal sexual act in the first degree (three counts), attempted rape in the first degree, sexual abuse in the first degree (four counts), and criminal possession of a weapon in the fourth degree, and sentencing him, as a second violent felony offender, to an aggregate term of 50 years, unanimously affirmed.

The police were investigating the knifepoint rape of a prostitute, who provided a description of the rapist, and also provided a detailed description of the rapist's car, including the presence of dents on particular areas of the car. The night after the rape, approximately 24 hours after it was committed, the police saw defendant in the same area as the crime scene in a car precisely matching the description. Furthermore, that area is notorious for prostitution, and it would have been reasonable for the police to draw an inference that the rape suspect had returned to look for a similar victim. Based on all these factors, viewed collectively, the police reasonably suspected that defendant was the perpetrator (*see People v Caponigro*, 76 AD3d 913, 913 [1st Dept 2010], *lv denied* 15 NY3d 952 [2010]; *see also People v Harmon*, 293 AD2d 303 [1st Dept 2002], *lv denied* 98 NY2d 676 [2002]). Accordingly, the police lawfully stopped the car and ordered defendant to get out, whereupon officers saw an illegal gravity knife in plain view, which provided probable cause to arrest defendant. Defendant was arrested and handcuffed, and one of the officers searched the front of the car. A homemade razor knife was recovered from the glove compartment.

We need not reach the issue of whether the police were

justified in searching the glove compartment of defendant's car. Even if the razor knife was not admitted as evidence, there is still overwhelming evidence sufficient to support the conviction. Such evidence included, but was not limited to, the presence of defendant's DNA on the body of one of the complaining witnesses, as well as three eyewitness identifications.

The lineup identification was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). We find no reason to disturb the hearing court's finding that defendant and the other participants were reasonably similar in appearance.

Defendant was not entitled to be present at a conference concerning the scope of cross-examination of one of the victims. There is no reason to believe that defendant could have had any meaningful input (*see People v Fabricio*, 3 NY3d 402 [2004]; *People v Velasco*, 77 NY2d 469, 473 [1991]), and his claim to the contrary is speculative (*see People v Roman*, 88 NY2d 18, 26-27 [1996]).

There was no violation of the People's disclosure obligations under *Brady v Maryland* (373 US 83 [1963]). After an ex parte inquiry, the court properly declined to compel the People to disclose the confidential informant status of one of

the victims. In addition to the fact that no promises were made to this victim, the record establishes that she became an informant six months after she reported her sexual assault and identified defendant at a lineup. Her subsequent relationship with law enforcement could not reasonably be viewed as providing a "motive" to testify at defendant's trial to the very same facts she had already related, in her status as a crime victim, long before becoming an informant. Defendant's theories under which the victim's informant status may have affected her credibility or that of police witnesses rest entirely on speculation. In any event, given the overwhelming evidence against defendant and the minimal probative value of the victim's informant status, we find that there is no reasonable possibility that disclosure of such status would have affected the verdict on the counts relating to that victim, let alone the counts relating to the other victims (*see People v Vilardi*, 76 NY2d 67, 73 [1990]).

Defendant's claim regarding the police acquisition of a DNA sample is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

The court properly adjudicated defendant a second violent felony offender. Defendant's claim that his Minnesota conviction

was not the equivalent of a New York felony conviction is unpreserved and waived (*People v Smith*, 73 NY2d 961 [1989]), and we decline to review it in the interest of justice. Defendant asserts that, given the differences between the New York and Minnesota statutes, the People were required to produce the Minnesota accusatory instrument in order to establish the requisite equivalence. However, the People had no reason to do so in the absence of any challenge from defendant (*see People v Booker*, 301 AD2d 477 [1st Dept 2003], *lv denied* 100 NY2d 592 [2003]). As an alternative holding, we reject defendant's claim on the merits. The record demonstrates that the People related the gist of the Minnesota accusatory instrument during sentencing, and that the Minnesota conviction was for the equivalent of a New York violent felony (*see People v Gonzalez*, 61 NY2d 586, 590-591 [1984]). Since a challenge to defendant's sentencing as a second violent felony offender would have been futile, counsel was not ineffective, under the state and federal

standards, for failing to raise that claim (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 8, 2014

CLERK

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

12054 Westbeth Corp. HDFC Inc., Index 570633/10
Petitioner-Appellant,

-against-

Ramscale Productions, Inc., et al.,
Defendants-Respondents,

"XYZ" Corp.", et al.,
Defendants.

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An appeal having been taken to this Court by the above-named appellant from an order of the Appellate Term of the Supreme Court, First Department, entered September 7, 2012, which reversed a judgment of the Civil Court, New York County (Brenda S. Spears, J.), entered on or about June 24, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated April 14, 2014,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MAY 8, 2014

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11887 Loreley Financing (Jersey) No. 28, Limited, Plaintiff-Respondent-Appellant, Index 652732/11

-against-

Merrill Lynch, Pierce, Fenner & Smith Incorporated, et al., Defendants-Appellants-Respondents,

250 Capital LLC, Defendant-Appellant,

Auriga CDO. Ltd., Defendant.

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Cleary Gottlieb Steen & Hamilton LLP, New York (Michael R. Lazerwitz of counsel), for appellants-respondents.

Meister Seelig & Fein LLP, New York (James M. Ringer of counsel), for respondent-appellant.

Morvillo LLP, New York (Andrew J. Morris of counsel), for appellant.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered May 16, 2013, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Merrill Lynch, Pierce, Fenner & Smith Inc. (MLPFS), Merrill Lynch International Inc. (MLI), and Merrill Lynch & Co., Inc. (Merrill Lynch) (the Merrill defendants) to dismiss the first cause of action (rescission) as against them and the second, third and

fourth causes of action (fraud, conspiracy and aiding and abetting) as against MLI and Merrill Lynch, denied the Merrill defendants' and defendant 250 Capital LLC's motions to dismiss the second cause of action as against MLPFS and 250 Capital, and denied the Merrill defendants' and 250 Capital's motion to dismiss the sixth cause of action (unjust enrichment) as against them, unanimously modified, on the law, to deny the motion to dismiss the second cause of action as against Merrill Lynch and MLI, and to grant the motions to dismiss the sixth cause of action as against the Merrill defendants and 250 Capital, and otherwise affirmed, without costs.

Plaintiff Loreley Financing (Jersey) No. 28 Limited is a company organized under the laws of Jersey, Channel Islands. It was formed to purchase $60 million of securities issued in connection to a credit default obligation (CDO). The CDO was structured around a special purpose entity, Auriga CDO, Ltd. (Auriga). Auriga was formed by Merrill Lynch. Residential mortgage-backed securities (RMBS) accounted for all the collaterals in Auriga's CDO.

Pursuant to a Collateral Management Agreement, 250 Capital, a subsidiary of Merrill Lynch, was the collateral manager for Auriga's collateral debt securities. As such, 250 Capital

selected the securities for the pool and had the right to substitute assets in and out of the pool. Two other subsidiaries of Merrill Lynch, MLPFS and MLI, were intended third-party beneficiaries of the Collateral Management Agreement.

In addition, MLPFS was the initial purchasers of the securities issued by Auriga, and MLI provided interim financing as a warehouse lender. At the same time, MLI acted as a counterparty, as purchaser of a credit default swap (CDS). At the time the CDO was created, Auriga was required to enter into a CDS with MLI. Specifically, as the buyer of the CDS, MLI agreed to make periodic payments to the seller, Auriga. In return, Auriga agreed to compensate MLI in the event the underlying RMBS defaulted or experienced a similar credit event. In effect, under the CDS, the risk of default was transferred from the holder of the fixed-income security emanating from the CDO, to the seller of the CDS, Auriga.

In 2011, plaintiff Loreley Financing commenced this action against Merrill Lynch and its affiliates MLI, MLPFS and 250 Capital, among others, accusing them of causing plaintiff to purchase a fraudulent CDO investment that is now worthless. In its complaint, plaintiff raises causes of action sounding in 1) rescission (2) common-law fraud (3) conspiracy to defraud; (4)

aiding and abetting fraud; (5) fraudulent conveyance; and (5) unjust enrichment. The rescission claims are asserted against MLPFS and MLI only, while the remaining claims are asserted against all defendants.

Merrill defendants and 250 Capital moved to dismiss the action pursuant to CPLR 3211(a)(1) and (7), and CPLR 3016(b). The motion court dismissed the claims of conspiracy to defraud, aiding and abetting fraud, fraudulent conveyance and rescission. The motion court also dismissed the common-law fraud and unjust enrichment claims asserted against MLI and Merrill Lynch. The motion court, however, denied the dismissal of the common-law fraud claims and unjust enrichment claims against MLPFS and 250 Capital. Both plaintiff and defendants appealed from the part of the court's order adversely affecting them.

We first examine defendants' contentions. With regard to the fraud claims, defendants contend that plaintiff, who is a resident of Jersey in the Channel Islands, is time-barred from raising the fraud claims pursuant to New York's borrowing statute (CPLR 202) and Jersey law. A cause of action for fraud accrues where the loss was sustained (*Prefabco, Inc. v Olin Corp.*, 71 AD2d 587, 588 [1st Dept 1979]). Generally, the loss is sustained "where the investors resided" *(Matter of Smith Barney, Harris*

Upham & Co. v Luckie, 85 NY2d 193, 207 [1995], cert denied 516 US 811 [1995]). However, a court can consider all relevant factors in determining the situs of the loss, including "how and where plaintiff paid for the securities, where plaintiff maintained the trading account in which the loss was reflected, and the manner in which the securities were handled" *(Grosser v Commodity Exch., Inc.*, 639 F Supp 1293, 1300 [SD NY 1986], *affd* 859 F2d 148 [2d Cir 1988]). Because there is an issue of fact as to where plaintiff sustained loss, the motion court correctly denied defendants statute of limitations motion, with leave to move for summary judgment later *(see e.g. Oxbow Calcining USA Inc. v American Indus. Partners*, 96 AD3d 646, 651 [1st Dept 2012]).

Defendants alternatively argue that the fraud claim should be dismissed because it is not sufficiently detailed. Generally, in a claim for fraud, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, [and] justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Furthermore, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]; *see also*

Lanzi v Brooks, 43 NY2d 778, 780 [1977] ["(CPLR 3016[b]) requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of"]).

In this case, the complaint describes the alleged fraudulent conduct as follows:

> "Auriga was one of a series of now-infamous deals, known as the "Constellation CDOs," that were initiated and designed by an undisclosed hedge-fund, Magnetar Capital LLC ("Magnetar"), that was secretly placing massive short bets against the very same deals it was sponsoring. As with its other Constellation CDOs, Magnetar sponsored Auriga by purchasing the deal's "equity" tranche, which is typically the most junior long-position in a CDO and the hardest to sell. Magnetar, however, assumed the role of Auriga's equity sponsor for the very purpose of creating a vehicle through which it could place a much larger short bet *against* hand picked collateral via credit default swaps ("CDS") that would yield huge pay-outs for Magnetar at the expense of Plaintiff and Auriga's other long investors — when the deal defaulted.
>
> "Without an equity sponsor, there could be no CDO. Thus, in order to ensure that its short bets would pay off, Magnetar conditioned its agreement to act as Auriga's equity sponsor on Merrill allowing Magnetar to influence collateral selection and dictate key aspects of Auriga's structure, and selling Magnetar both the equity and the CDOs at a discount. Merrill readily accepted, since without an equity investor the deal would not close and Merrill would not pocket the lucrative fees it stood to earn from the deal.
>
> "Merrill was one of Magnetar's favored partners, having arranged at least five Constellation CDOs (more than any other bank with whom Magnetar colluded)

> between June 2006 and March 2007 for a total issuance of over $7.5 billion. Auriga was the fourth one, and by the time it closed Merrill was well versed in the scheme. Merrill earned tens of millions of dollars in fees over a very short period of time arranging Constellation CDOs at Magnetar's behest. Plaintiff, however, at the time it invested in Auriga had no way of knowing of Magnetar's involvement or the true facts behind the deal — and none of these material facts were disclosed to Plaintiff. To the contrary, Defendants affirmatively concealed from Plaintiff and other investors that Auriga had been designed to meet the specifications of an undisclosed hedge fund whose interests as a net-short investor were diametrically opposed to the deal's success. Indeed, Magnetar's short interests in Auriga were more than twice the size of its long interest. Thus, whereas long investors like Plaintiff needed Auriga to succeed for their investments to pay out, Magnetar — in collusion with Defendants — had stacked the deck so that Magnetar could reap massive profits from the failure of the deal."

These factual allegations provide sufficient details to inform the Merrill defendants and 250 Capital of the alleged fraudulent conduct, namely that the CDO was secretly designed by an undisclosed hedge fund, Magnetar, which was secretly placing massive short bets against the very same deals it was sponsoring. Defendants, however, argue that plaintiff cannot establish the element of reasonable reliance (an element of both affirmative misrepresentation and concealment) as a result of the disclosures and disclaimers for the Auriga CDO. We cannot agree.

The offering circular states, "All or most of the Collateral

Debt Securities Acquired by the Issuer . . . will be Acquired from a portfolio of Collateral Debt Securities *selected by the Collateral Manager* . . . ." If Magnetar rather than 250 Capital was doing the selecting, the statement in the offering circular was misleading. The identity of the person selecting the collateral was material: The offering circular says, "The performance of the portfolio of Collateral Debt Securities depends heavily on the skills of the Collateral Manager in analyzing and selecting the Collateral Debt Securities." Furthermore, Magnetar's interests were not the same as 250 Capital's. The complaint alleges that "Magnetar's short interests in Auriga were more than twice the size of its long interest," so it had a vested interest in Auriga's failure; hence, the assets that Magnetar "designated for inclusion . . . [in] the Auriga CDO [collateralized debt obligation] were riddled with high percentages of nonconforming loans and were much more likely to default than their credit ratings suggested."

Under the circumstances, it cannot be said that the disclaimers and disclosures in the offering circulars preclude a claim of fraud on the ground of a prior misrepresentation as to the specific matter, namely that the CDO's collateral had been carefully selected by an independent collateral manager, in the

interests of the success of the deal and for the benefit of Auriga's long investors. Whether it was reasonable for plaintiff to rely on the representation in the offering circular that 250 Capital would select Auriga's collateral is a factual matter that cannot be determined on a CPLR 3211 motion to dismiss (*see e.g. Skillgames, LLC v Brody*, 1 AD3d 247, 251 [1st Dept 2003]; *Swersky v Dreyer & Traub*, 219 AD2d 321, 328 [1st Dept 1996]).

Moreover, we agree with plaintiff that Supreme Court erred in dismissing the common-law fraud claims against Merrill Lynch and MLI. The motion court dismissed the fraud claims against these defendants on the ground that there are no specific allegations that they engaged in any fraudulent conduct. However, plaintiff's theory of fraud does not rest upon a single decisive event which manifestly demonstrates defendants' wrongdoing, but on a series of interrelated events which, viewed as whole, portray the alleged fraudulent scheme. It is clear from the complaint that Merrill Lynch and MLI were key players integrally involved in the structuring and sale of Auriga to investors such as plaintiff. In essence, Merrill Lynch, through its affiliates, structured the CDO, was the initial purchaser of the securities, provided the initial financing, and acted as a counterparty by purchasing the CDS.

We find, however, that the unjust enrichment cause of action should have been dismissed because the CDO transaction was governed by written agreements. "The theory of unjust enrichment is one created in law in the absence of any agreement" *(Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 141 [1st Dept. 2014]; *see also Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). Finally, contrary to plaintiff's contention, the motion court properly dismissed the rescission cause of action because the complaint fails to allege the absence of a "complete and adequate remedy at law" *(see Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]).

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

ENTERED: MAY 8, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12040 Keith Holmes, Index 307726/11
Plaintiff-Respondent, 83912/12

-against-

Business Relocation Services, Inc.,
Defendant/Third-Party
Plaintiff-Appellant,

-against-

United Staffing Systems, Inc.,
Third-Party Defendant-Respondent.

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Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for appellant.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for Keith Holmes, respondent.

Samuel E. Kramer, New York, for United Staffing Systems, Inc., respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered August 5, 2013, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint as barred by the Workers' Compensation Law, affirmed, without costs.

Issues of fact exist as to whether defendant was the special employer of plaintiff. Plaintiff was assigned to work for defendant, for two days, as a truck driver by his general

employer, United Staffing Systems, Inc., a temporary employment company. Although plaintiff used defendant's trucks and was told where and when to deliver and pick up voting machines, this does not establish as a matter of law that United surrendered complete control and direction over plaintiff's work or that defendant assumed such control and direction (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 558-559 [1991]; *Vasquez v Cohen Bros. Realty Corp.*, 105 AD3d 595, 597 [1st Dept 2013]). Nor did United's relinquishment of contact with and direct supervision of plaintiff after assigning him to defendant establish that defendant had in fact assumed "complete and exclusive control" over plaintiff's work (*Bellamy v Columbia Univ.*, 50 AD3d 160, 165 [1st Dept 2008]). Notably, although plaintiff was accompanied by one of defendant's supervisors during his deliveries and pickups of the voting machines, the supervisor testified that he did not supervise drivers.

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

FRIEDMAN, J. (dissenting)

I respectfully dissent. In my view, the record establishes, as a matter of law, that plaintiff was working as defendant's special employee when he was injured. That plaintiff, a qualified commercial driver, may have been working without direct supervision at the time of his accident does not change this conclusion, since constant direct supervision — which is typically absent in the case of a professional driver — is not necessary for the employee to be deemed to be working under the employer's control and direction (*see Warner v Continuum Health Care Partners, Inc.*, 99 AD3d 636, 637 [1st Dept 2012]). Accordingly, I would reverse and grant defendant's motion for summary judgment dismissing the complaint based on the bar of the Workers' Compensation Law.

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

ENTERED: MAY 8, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12232-
12233 Harch International Limited, etc.,
Plaintiff-Respondent,

-against-

Harch Capital Management, Inc., etc.,
Defendant-Appellant,

Harch CLO I Limited, etc., et al.,
Defendants.

Index 601312/05

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White Fleischner & Fino LLP, New York (Jared T. Greisman of counsel), for appellant.

Munsch Hardt Kopf & Harr, P.C., Austin, TX (David C. Mattka of the bar of the State of Texas, admitted pro hac vice, of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about February 15, 2013, which, to the extent appealed from, denied defendant Harch Capital Management Inc.'s (HCM) counterclaim for indemnification, and order, same court and Justice, entered on or about October 22, 2013, which to the extent appealed from as limited by the briefs, granted plaintiff Harch International Limited's (HIL) motion to release funds and denied HCM's cross motion to renew its indemnification claims, unanimously affirmed, without costs.

A bench trial was held in September 2011 at which time the

court tried HIL's breach of contract and fiduciary duty claims, and HCM's counterclaim for indemnity. Each party was provided with a full opportunity to introduce evidence and raise all legal arguments. Among other things, each side raised the issue of what should happen with the certain funds that JPMorgan Chase Bank held in trust and had deposited with the court. HIL sought release of these monies based upon the terms of the Collateral Management Agreement (CMA), whereas HCM sought indemnity and the right to the funds based upon a Subadvisory Agreement. In its February 15, 2013 decision and order, the court dismissed HIL's remaining claims against HCM. The court also denied HCM's indemnity counterclaim. Subsequently, HIL brought a motion for the release of monies from the court's registry; HCM opposed that motion and cross moved to, among other things, renew the decision after trial. In its order dated October 21, 2013, the court granted HIL's motion for the release of funds and denied HCM's cross motion.

The court properly denied HCM's indemnity counterclaim, granted HIL's motion for the release of funds, and denied HCM's cross motion for renewal. At trial, HCM failed to present any evidence of its costs and expenses in connection with those indemnity claims, despite its arguments that it had a contractual

right to indemnity against HIL. The court denied the indemnity counterclaim based not only on HCM's failure to introduce any evidence of the costs and expenses it was seeking, but also on its interpretation of the referenced agreements.

Although HCM contends that its indemnity claims did not ripen until after the court decided HIL's claims against it, its decision to forgo the introduction of any evidence at trial of its costs and expenses attendant to its indemnification claims was unjustified given the procedural posture of the case. It was clear that the issues at trial included HCM's counterclaim. There had been no motion to sever the counterclaim nor was the counterclaim bifurcated so that only the issue of liability was before the court. Consequently, HCM was required to put forth all of its proof at the time of trial. Having failed to do so, the court properly denied the counterclaim. The court also properly denied HCM's motion to renew since HCM did not satisfy

the standards applicable to such a motion (CPLR 2221 [e]).

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

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

ENTERED: MAY 8, 2014

CLERK

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

12408 The People of the State of New York, Respondent, Ind. 6030/10

-against-

Sheldon Herron, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Lewis Bart Stone, J. at plea and sentencing), rendered April 19, 2012, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 2½ years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Ramos*, 7 NY3d 737 [2006]; *People v Lopez*, 6 NY3d 248 [2006]; *compare People v Bradshaw*, 18 NY3d 257 [2011]). The court did not conflate the right to appeal with the rights automatically forfeited by pleading guilty. Instead, it separately explained to defendant that, as part of his plea bargain, and in return for the promised sentence, he was agreeing

to waive his right to appeal. Defendant confirmed that he understood, and the oral colloquy was supplemented by a written waiver.

Regardless of whether defendant made a valid waiver of his right to appeal, we find that his suppression motion was properly denied. The description at issue was sufficiently specific to provide probable cause, given the spatial and temporal factors (*see e.g. People v Johnson*, 63 AD3d 518 [2009], *lv denied* 13 NY3d 797 [2009]).

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

ENTERED: MAY 8, 2014

CLERK

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

12409 Louis M. Atlas, Index 301091/06
Plaintiff-Appellant,

-against-

Frances Smily,
Defendant-Respondent.

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Advocate & Lichtenstein, LLP, New York (Jason A. Advocate of counsel), for appellant.

Frances Smily, respondent pro se.

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Order, Supreme Court, New York County (Lori S. Sattler, J.), entered May 1, 2013, which denied plaintiff's motion for an order permitting him to sell the marital residence pursuant to the terms of the parties' stipulation of settlement, and granting him a money judgment, unanimously reversed, on the law, without costs, to the extent of awarding plaintiff a judgment in the amount of $1,943, and remanding the matter for a hearing on the issue of the parties' youngest child's emancipation.

Plaintiff alleges that he is entitled to a money judgment for mortgage payments he made on the marital residence following the emancipation of the parties' children and to compel the sale of the residence. Pursuant to the parties' stipulation of settlement, before plaintiff may ultimately seek to compel the

sale of the subject residence, it must be determined that the parties' children have been emancipated and the stipulation of settlement provides that a child is emancipated by, inter alia, "[p]ermanent residence away from the residence of [defendant] [m]other." Here, the parties' submissions on the issue of their younger daughter's emancipation disclosed the existence of genuine questions of fact warranting a hearing on the issue (*see Readick v Readick*, 80 AD3d 512, 513 [1st Dept 2011]; *Matter of Forte v Forte*, 304 AD2d 577 [2d Dept 2003]). Although a residence at college does not constitute an emancipation event, there is evidence that the child changed her permanent residence prior to commencing college (*compare Trepel v Trepel*, 40 Misc 3d 1044 [Sup Ct, NY County 2013]).

Plaintiff is entitled to a money judgment in the amount of $1,943 based on the uncontested evidence that defendant owed him

$3,786.13 for their child's high school tuition, that he received only $1,843.13, and that he notified defendant of her default and gave her time to cure as required by the parties' stipulation.

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

ENTERED: MAY 8, 2014

CLERK

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

12410 JPMorgan Chase Bank, N.A., Index 107184/11
Plaintiff-Respondent,

-against-

Dermott W. Clancy, etc., et al.,
Defendants-Appellants.

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Law Office of Michael G. Dowd, New York (Niall MacGiollabhui of counsel), for appellants.

Helfand & Helfand, New York (Michael A. D'Emidio of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered November 8, 2012, which granted plaintiff's motion for summary judgment, unanimously reversed, on the law, with costs, and the motion denied.

Plaintiff's motion was based on two sets of exhibits, one attached to plaintiff's complaint, and the other to an affidavit of plaintiff's employee. The exhibits would be in admissible form only if plaintiff satisfied the requirements for their admission as business records under CPLR 4518(a). Plaintiff failed to satisfy those requirements. Although a verified pleading may be used anytime an affidavit is called for (*see* CPLR 105[u]), here the complaint was verified only by counsel, rather than a person with knowledge. Thus, it was insufficient to

establish that the attached documents were admissible under the business records exception to the hearsay rule (*see A.B. Med. Servs. PLLC v Travelers Prop. Cas. Corp.*, 5 Misc 3d 214, 215 [Civ Ct, Kings County 2004] [attorney's affirmation was insufficient to establish that a report was an admissible business record]). The exhibits to the employee's affidavit were also inadmissible, because the affiant failed to state in words or substance that it was the regular business of the plaintiff to create such records (*see People v Kennedy*, 68 NY2d 569, 579 [1986]). Furthermore, the critical document relied upon by plaintiff to establish nonpayment is not self-explanatory and does not contain the date referenced in the employee's affidavit.

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

ENTERED: MAY 8, 2014

CLERK

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

12413 The People of the State of New York, Ind. 1868/11
Respondent,

-against-

Davelle Conklin,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered on or about November 2, 2011,

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

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

ENTERED: MAY 8, 2014

CLERK

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

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

12414 Lawrence D. Jahn, Index 102805/11
Plaintiff-Respondent,

-against-

SH Entertainment, LLC doing business as RDV,
Defendant-Appellant.

_____

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for appellant.

Rappaport Glass Levine & Zullo, LLP, Hauppauge (Michael Glass of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered May 14, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was injured when he allegedly slipped and fell on water as he walked across the floor. Defendant failed to establish that it lacked constructive notice of the alleged condition by demonstrating when the accident location itself was last inspected prior to plaintiff's accident (*see Rodriquez v Concourse Vil. Inc.*, 104 AD3d 410 [1st Dept 2013]; *Williams v New York City Hous. Auth.*, 99 AD3d 613 [1st Dept 2012]). Defendant's

submission of an affidavit of one of its owners, was insufficient to establish a lack of constructive notice as a matter of law because he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident (*see Lorenzo v Plitt Theatres*, 267 AD2d 54, 56 [1st Dept 1999]; *Yioves v T.J. Maxx, Inc.*, 29 AD3d 572 [2d Dept 2006]; *compare Green v Gracie Muse Rest. Corp.*, 105 AD3d 578 [1st Dept 2013]). The owner only averred that he and his staff performed walk throughs during the event, which was being held in a large open space, and that he found no slippery substances or dangerous conditions on the floor.

Furthermore, the record presents triable issues as to whether defendant caused or created the wet condition. Contrary to defendant's contention, the nonparty affidavit submitted by plaintiff, which described a stream of water coming from stacked bags of ice, was not tailored to avoid the consequences of plaintiff's deposition testimony. Instead, it supplemented plaintiff's account by providing additional details of the source of the water that allegedly caused the accident (*see Bauman v Homefield Bowl, Inc.*, 12 AD3d 212 [1st Dept 2004]). The nonparty affidavit provides some evidence that defendant's employees may have created the complained-of defect by leaving the bags of ice

that melted (*see Yuk Ping Cheng Chan v Young T. Lee & Son Realty Corp.*, 110 AD3d 637 [1st Dept 2013]*; compare Stefan v Monkey Bar*, 273 AD2d 133 [1st Dept 2000]).

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

ENTERED: MAY 8, 2014

CLERK

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

12417 The City of New York, Index 450397/12
Plaintiff-Respondent,

-against-

Zurich American Insurance Company,
Defendant-Appellant.

_____

Coughlin Duffy LLP, New York (Adam M. Smith of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan P. Greenberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered January 11, 2013, which granted the motion of plaintiff City of New York (City) for summary judgment declaring that defendant Zurich American Insurance Company was obligated to defend the City in an underlying action, unanimously affirmed, without costs.

The underlying plaintiff alleged that he was injured when exposed to chlorine and other toxins at a work site while he was employed by Skanska Mechanical and Structural, Inc. (Skanska). Skanska contracted with the City to perform reconstruction and rehabilitation at the work site, and maintained a commercial general liability insurance policy with Zurich, listing Skanska as a named insured and the City as an additional insured.

Here, the City's January 31, 2011 email to Skanska's counsel, provided sufficient information for Zurich to timely disclaim coverage. The City's email stated "[k]indly please forward this onto the right carrier," and requested that Skanska's insurance carrier "pick it up now." Counsel for Skanska forwarded this email and attachment in its entirety to an employee of Skanska's insurance broker, requesting that the information be sent "to the right person," and suggesting that in the event that "the City is entitled to indemnity and or AI coverage, a take over would make the third party action a nullity."

Although Zurich contends that counsel for Skanska was not its "agent," notice may be provided through intermediaries where the policy, as here, merely requires that an additional insured "see to it" that the insurer receives notice (*see Chelsea Vil. Assoc. v U.S. Underwriters Ins. Co.*, 82 AD3d 617 [1st Dept 2011]; *Industry City Mgmt. v Atlantic Mut. Ins. Co.*, 64 AD3d 433 [1st Dept 2009]; *Bovis Lend Lease LMB Inc. v Garito Contr., Inc.*, 38 AD3d 260, 261 [1st Dept 2007]). While there is a dispute as to whether the City's email included a copy of the original complaint, in addition to the third-party complaint, "[i]nconsistent information is information nonetheless" (*U.S.*

Underwriters Ins. Co. v City Club Hotel, LLC, 369 F3d 102, 108 n 5 [2d Cir 2004]). The record also demonstrates that Zurich did have prior notice of the underlying action, and to the extent Zurich could possibly have had any uncertainty as to whether the City was seeking a defense, "nothing in the record suggests that [Zurich] made any attempts to contact [Skanska or the City] to clear up any uncertainty that [it] may have had" (*id.*).

Accordingly, under the circumstances presented, Zurich's disclaimer of coverage more than one year after it received the City's communications, was untimely as a matter of law.

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

ENTERED: MAY 8, 2014

CLERK

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

12419 The People of the State of New York, Ind. 1741/09
Respondent,

-against-

Donald Paige,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about September 5, 2012, which adjudicated defendant a level three predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly applied the presumptive override for a prior felony sex crime conviction, and properly exercised its discretion in denying a downward departure (*see People v Cintron*, 12 NY3d 60, 70, *cert denied sub nom. Knox v New York*, 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Among other

things, the underlying conviction involved a pattern of serious criminal conduct committed against a child, and defendant has been convicted, in another state, of failing to comply with sex offender registration requirements.

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

ENTERED: MAY 8, 2014

CLERK

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

12420 Lynnece L. Acosta, et al., Index 304677/10
Plaintiffs-Respondents,

-against-

Consolidated Edison Company
of New York, Inc., et al.,
Defendants,

Maspeth Supply Company,
Defendant-Appellant.

_____

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for appellant.

The Cochran Firm, New York (Rudyard F. Whyte of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered July 30, 2013, which, to the extent appealed from as limited by the briefs, denied the motion of defendant Maspeth Supply Company (Maspeth) for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff Lynnece Acosta was struck by a vehicle operated by nonparty Vincente Reyes-Lopez as she attempted to cross First Avenue in or near the northern crosswalk at 110th Street. Reyes-Lopez had been traveling east on 110th Street, and his vehicle

struck plaintiff after he executed a left turn onto First Avenue. Maspeth was performing work on First Avenue near its intersection with 110th Street, requiring the closure of the south crosswalk across First Avenue at the intersection as well as some traffic lanes on First Avenue. Maspeth's work area extended no further north than the middle of 110th Street. Plaintiff alleges that Maspeth's work and crosswalk closure on the south side of the intersection created dangerous traffic conditions for pedestrians in the north crosswalk where she was struck, by increasing or concentrating pedestrian and vehicular traffic at that location.

Maspeth established its entitlement to judgment as a matter of law by submitting evidence showing that its work on First Avenue extended no further north than the middle of 110th Street and that any materials north of this location did not belong to it (*see Jones v Consolidated Edison Co. of N.Y., Inc.*, 95 AD3d 659, 660 [1st Dept 2012]). Moreover, Reyes-Lopez's testimony indicated that his vision was not obstructed, when he made the left turn.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff submitted an expert affidavit stating that Maspeth violated Part Six of the federal Manual of Uniform Traffic Control Devices (Manual) regarding the placement of

warning signs, advance warnings signs, traffic cones, and other types of temporary traffic control devices to make the north crosswalk at the intersection safe for pedestrians. Plaintiff's expert, however, failed to specify what Part Six of the Manual requires with regard to the placement of such safety devices and further failed to assert how such safety devices could or should have been placed or arranged at the subject intersection to make it safer, or how it would have prevented the accident. Accordingly, the expert's opinions that Maspeth failed to comply with Part Six of the Manual, and that such alleged failure was a contributing cause of the accident, are conclusory (*see e.g. Hernandez v Pace El. Inc.*, 69 AD3d 493, 495 [1st Dept 2010]). Plaintiff failed to offer any other evidence that Maspeth's work created a dangerous condition on the north side of the intersection.

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

ENTERED: MAY 8, 2014

CLERK

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

12421 The People of the State of New York, Ind. 4525/12
Respondent,

-against-

Rawchaayah Wright,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about January 10, 2013, unanimously affirmed.

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

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

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

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

ENTERED: MAY 8, 2014

CLERK

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

12422 Olga Piedra, Index 260497/12
Petitioner-Appellant,

-against-

New York State Division of Parole,
Respondent-Respondent.

_____

Olga Piedra, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Judith Vale of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered December 12, 2012, which dismissed, without prejudice, the petition brought pursuant to CPLR article 78 to annul a determination of respondent New York State Division of Parole, finding that petitioner violated the conditions of her parole, revoked her parole, and imposed an assessment of five months of additional imprisonment, unanimously affirmed, without costs.

The motion court properly found that petitioner's failure to exhaust her administrative remedies precludes judicial review of respondent's determination (*see Sumner v Hogan*, 73 AD3d 618, 619-620 [1st Dept 2010]). Petitioner's assertion of constitutional claims does not excuse the lack of exhaustion, since these claims

"require the resolution of factual issues reviewable at the administrative level" (*Town of Oyster Bay v Kirkland*, 19 NY3d 1035, 1038 [2012], *cert denied* __ US __ 133 S Ct 1502 [2013] [internal quotation marks and citation omitted]).

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

ENTERED: MAY 8, 2014

CLERK

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

12423 The People of the State of New York, Ind. 2282/04
Respondent,

-against-

Robert Haigler,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered August 2, 2012, resentencing defendant, as a second felony offender, to an aggregate term of 20 years, with five years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12425 The People of the State of New York, Ind. 6142/08
Respondent,

-against-

Baasil Reynolds,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J. at plea and sentencing; Ruth Pickholz, J., at *Outley* hearing), rendered August 23, 2011, convicting defendant of criminal possession of a weapon in the third degree and menacing in the second degree, and sentencing him, as a second felony offender, to concurrent terms of two to four years and one year, respectively, unanimously affirmed.

The court properly determined that defendant violated the "no-arrest" condition of his plea agreement, and thus forfeited the opportunity to have his conviction replaced by a misdemeanor conviction. After defendant challenged the validity of his new arrest, the court conducted a hearing pursuant to *People v Outley* (80 NY2d 702 [1993]), and the court's findings and determination

comported with the standards articulated in *Outley* (*see id.* at 712-713). Defendant has not established that the hearing court employed a different standard from the "legitimate basis for the arrest" standard set forth in *Outley* (*id.* at 713).

We reject defendant's argument that his plea should be vacated as conditioned on an illegal sentence. The plea court proposed a plea bargain, accepted by defendant, whereby after pleading guilty to a felony defendant would be remanded for six months, after which his sentencing would be delayed for an additional year, at which time he would be permitted to replace his conviction with a misdemeanor plea if he met the conditions that he have no new arrests and no violations of orders of protection. Regardless of what the court may have intended, and regardless of the merits of this arrangement, the period of presentencing detention was not part of the sentence. As a matter of law, the only sentence was the undisputedly legal sentence imposed on August 23, 2011, against which all prior detention was credited. The presentencing detention was based, instead, on a securing order (*see* CPL 510.10). Such an order is not reviewable on an appeal from a judgment of conviction (*see*

People ex rel. Chakwin v Warden, 63 NY2d 120, 125 [1984]), and, although CPL 380.30(1) requires reasonably prompt sentencing, defendant consented to the delay (*see Matter of Weinstein v Haft*, 60 NY2d 625 [1983]).

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12426 David Harrison, Index 107810/08
Plaintiff-Respondent,

-against-

NYU Downtown Hospital, et al.,
Defendants-Appellants.

_____

Cascone & Kluepfel, LLP, Garden City (Howard Altman of counsel), for appellants.

Richard J. Katz, LLP, New York (Richard J. Katz of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered March 6, 2013, which denied defendants' motion to enforce a settlement agreement, unanimously reversed, on the law, without costs, and the motion granted.

This matter was settled in "open court" where, following negotiations in the trial-ready part with the assistance of the presiding judge, the part notified the County Clerk, who marked the matter "settled ... $85,000" (*see* CPLR 2104; *Hawkins v City of New York*, 40 AD3d 327 [1st Dept 2007]; *Popovic v New York City Health and Hosps. Corp.*, 180 AD2d 493 [1st Dept 1992]). Plaintiff does not dispute the terms of the settlement and the

settlement was memorialized by the court (*cf. Velazquez v St. Barnabas Hosp.*, 13 NY3d 894 [2009][settlement not binding where conditions of settlement not recorded or memorialized, and agreement not made in open court or filed with county clerk]).

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12427 Stacy Sonkin, Index 304447/09
Plaintiff-Respondent,

-against-

Paul Sonkin,
Defendant-Appellant.

_____

Norman A. Olch, New York, for appellant.

Bender Rosenthal Isaacs & Richter LLP, New York (Randi S. Isaacs of counsel), for respondent.

_____

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered September 16, 2013, which denied defendant husband's motion for a downward modification of his maintenance obligation, unanimously affirmed, without costs.

Defendant failed to demonstrate the extreme hardship necessary to obtain modification of the maintenance obligations contained in the stipulation of settlement that was incorporated but not merged into the parties' divorce judgment (*see Sheila C. v Donald C.*, 5 AD3d 123 [1st Dept 2004]; Domestic Relations Law § 236 [B][9][b][1]).

We find defendant's argument that the court violated the antiduplication principles set forth in *Holterman v Holterman* (3 NY3d 1, 9 [2004]), unavailing since they have never been extended

to modifications of maintenance awards agreed to in a settlement agreement.

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: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12428-
12429 Devlon Williams,
Plaintiff-Appellant,

-against-

Esor Realty Co., et al.,
Defendants,

C.L.B. Check Cashing, Inc.,
Defendant-Respondent.

Index 17971/05

_____

Codelia & Socorro, P.C., Bronx (Peter R. Shipman of counsel), for appellant.

O'Connor Redd, LLP, Port Chester (Amy Lynn Fenno of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered October 4, 2012, which, insofar as appealed from, granted the motion of defendant C.L.B. Check Cashing, Inc. (CLB) for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered June 13, 2013, which, insofar as appealable, denied plaintiff's motion to renew, unanimously dismissed, without costs, as academic.

Defendant tenant CLB failed to establish its entitlement to judgment as a matter of law in this action for personal injuries

allegedly sustained by plaintiff when he slipped and fell on a sheet of ice on a private sidewalk located adjacent to CLB's check cashing store. CLB was located within a lot that also contained a gas station and the alleged cause of the icy condition was water leakage from a drainpipe that ran down the side of the building within which CLB was located.

It is well established that a tenant owes a common-law duty of reasonable care to maintain the demised premises in a reasonably safe condition, independent of any obligation that might be imposed by the existence of a lease (*see DeMatteis v Sears, Roebuck and Co.*, 11 AD3d 207, 208 [1st Dept 2004]; *Zito v 241 Church St. Corp.*, 223 AD2d 353, 355 [1st Dept 1996]). The fact that nonparty C.L.B. #6 Inc. (CLB#6) was required to maintain the sidewalk under its lease with the landlord is irrelevant to CLB's common-law duty to maintain the demised premises (*see DeMatteis*, 11 AD3d at 208; *Chadis v Grand Union Co.*, 158 AD2d 443 [2d Dept 1990]). Additionally, whether a gas station was also a tenant of the premises is also irrelevant to CLB's duty (*see Chadis* at 444). Because CLB never produced the lease between itself and CLB#6, which might reflect whether the subject sidewalk was part of the demised premises, it failed to establish prima facie that it owed no duty to maintain the

subject sidewalk (*cf. Vivas v VNO Bruckner Plaza LLC*, 113 AD3d 401 [1st Dept 2014]).

CLB also failed to establish that it did not create the condition, as it did not submit any evidence showing that it was not the party that installed the subject drainpipe, which allegedly created the icy condition (*see DeMatteis*, 11 AD3d at 207). Contrary to CLB's contention, it may reasonably be inferred from plaintiff's testimony and the photographs submitted that the icy condition was attributable to leakage from the pipe (*see Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 568 [1st Dept 2011]). CLB also did not satisfy its burden of establishing lack of constructive notice, as it did not submit any evidence from a store employee showing that employees regularly inspected the sidewalk (*id.* at 567). In any event, plaintiff raised a triable issue of fact as to constructive notice by submitting the photographs and his testimony showing that a layer of ice had formed over the entire section of the sidewalk on which he slipped (*id.*; *Taylor v Bankers Trust Co.*, 80 AD2d 483, 487-488 [1st Dept 1981]).

CLB's argument that plaintiff's negligence in walking on the

ice despite having observed it was the sole proximate cause of the accident, is unavailing. The evidence shows that plaintiff did not have a safe alternative route around the ice (*compare Thomas v City of New York*, 16 AD3d 203 [1st Dept 2005]).

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12430 The People of the State of New York, Ind. 72331C/10
Respondent,

-against-

Derrick Moore,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (William L. McGuire, J.), rendered on or about October 6, 2011, unanimously affirmed.

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

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

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

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12431 Washika Rich, Index 308938/09
Plaintiff-Respondent, 83945/11

-against-

Twin Parks Northeast
Associates, LP, et al.,
Defendants-Appellants.

[And A Third-Party Action]

_____

Gannon, Rosenfarb, Balletti & Drossman, New York (Jason B. Rosenfarb of counsel), for appellants.

Zlotolow & Associates, P.C., Sayville (Jason S. Firestein of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered October 30, 2013, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff seeks damages for injuries she suffered when she slipped on a wet substance on the stairs of premises owned and managed by defendants. She testified that she observed trash and liquid on the stairs some 13 hours before her fall, and that the staircase had been in that condition the entire weekend preceding the accident. The investigation that immediately followed the

accident found that there was urine on the stairs where plaintiff fell.

Defendants failed to establish that they lacked notice of the dangerous condition on the stairs (*see Bowie v 2377 Creston Realty, LLC*, 14 AD3d 457, 459 [1st Dept 2005]; *Harrison v New York City Tr. Auth.*, 94 AD3d 512, 514 [1st Dept 2012]). They submitted no evidence of the actual condition of the stairs at the time of, or in the hours preceding, plaintiff's accident, or that the janitorial schedule was followed on the date of the accident.

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12432-
12433 Madison 96th Associates, LLC,
Plaintiff,

-against-

17 East Owners Corp.,
Defendant.

[And Other Third-Party Actions]

- - - - -

Madison 96th Associates, LLC,
Third Third-Party Plaintiff-Respondent,

-against-

QBE Insurance Corporation,
Third Third-Party Defendant-Appellant.

Index 601386/03
591089/05
590585/07
590113/08

_____

Newman Myers Kreines Gross Harris, P.C., New York (Olivia M. Gross of counsel), for appellant.

Reed Smith LLP, New York (Paul E. Breene of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about April 22, 2013, to the extent appealed from as limited by the briefs, declaring that third third-party defendant QBE Insurance Corporation (QBE) is obligated to defend third third-party plaintiff Madison 96th Associates LLC (Madison) on claims brought against it by 17 East Owners Corp. (17 East) and to reimburse Madison for costs and

legal fees incurred in defending against the claims, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 11, 2012, which, to the extent appealed from as limited by the briefs, granted Madison's motion for partial summary judgment and denied QBE's motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court correctly found that Madison was an additional insured under the insurance policy issued by insurer QBE to the insured, third-party defendant Marson Contracting Co., Inc. The policy accepted as an additional insured any entity that Marson was required to insure by written contract, but "only with respect to liability arising out of" Marson's work. The Construction Management Agreement between Madison and Marson, Madison's construction manager, specifically requires that Madison be named as an additional insured. Moreover, the injuries allegedly sustained by 17 East arose out of Marson's work (*see e.g. Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37-38 [2010]).

Madison's alleged encroachment onto 17 East's property constitutes "property damage" caused by an "occurrence" or "accident" within the meaning of the policy (*see Saks v Nicosia*

Contr. Corp., 215 AD2d 832 [3d Dept 1995]).

QBE failed to preserve its argument that 17 East's claims fall outside the policy period, and, in any event, the argument is unavailing.

The court properly rejected QBE's late notice defense. QBE's initial disclaimer, dated February 2006, failed to raise the issue of late notice; accordingly, QBE waived that defense (*see e.g. Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 AD3d 33 [1st Dept 2009]; *see also Hotel des Artistes v General Acc. Ins. Co. of Am.*, 9 AD3d 181, 193 [1st Dept 2004], *lv dismissed* 4 NY3d 739 [2004]).

The policy language does not prohibit QBE from being impleaded into this action.

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

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12434 In re Brandon S.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for presentment agency.

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about April 10, 2013, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination (Family Court, Rockland County [Sherri L. Eisenpress, J.]) that he committed an act that, if committed by an adult, would constitute the crime of sexual abuse in the first degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

There is no basis for disturbing the court's credibility determinations, including its evaluation of inconsistencies.

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12435- Ind. 8230/99
12436 The People of the State of New York,
Respondent,

-against-

Terence Wells,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

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

Judgment of resentence, Supreme Court, New York County (Renee A. White, J.), rendered July 24, 2012, as amended July 26, 2012, resentencing defendant to an aggregate term of 50 years to life, and imposing an aggregate term of five years' postrelease supervision as to certain convictions, unanimously affirmed.

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

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12437 In re Jeanne Moore, MD, Index 104252/12
Petitioner,

-against-

State of New York Department
of Motor Vehicles,
Respondent.

_____

Jeanne Moore, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Judith Vale of counsel), for respondent.

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Determination of respondent's appeals board, which affirmed, after a hearing, petitioner's traffic conviction, 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 [Doris Ling-Cohan, J.], entered July 9, 2013), dismissed, without costs.

Respondent's determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The officer who issued the subject summons testified that he observed petitioner driving her scooter at an excessive speed and making numerous

lane changes without signaling (*see* 34 RCNY 4-02[c]; *Matter of Nelke v Department of Motor Vehs. of the State of N.Y.*, 79 AD3d 433 [1st Dept 2010]).

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12439 Jose Alameda-Cabrera, et al., Index 18315/07
Plaintiffs-Respondents,

-against-

Noble Electrical Contracting Co., Inc., et al.,
Defendants,

CJ Partners L.L.C., et al.,
Defendants-Appellants.

_____

Mauro Lilling Naparty LLP, Woodbury (Seth M. Weinberg of counsel), for appellants.

The Perecman Firm, PLLC, New York (David H. Perecman of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 31, 2013, which, to the extent appealed from as limited by the briefs, denied that portion of defendants-appellants' motion for summary judgment seeking dismissal of plaintiffs' Labor Law § 241(6) and common law negligence claims as against defendants CJ Partners L.L.C. (CJ), Bellerose Builders Inc. (Bellerose), Viceroy Development Ltd. (Viceroy), Parker Development Ltd. (Parker) and Jackson Development Group, Ltd. (Jackson), and granted plaintiffs' cross motion for partial summary judgment as to liability on the Labor Law § 241(6) claim as against CJ and Bellerose, unanimously modified, on the law, to the extent of

granting the portion of defendants-appellants' motion seeking dismissal of the common-law negligence claims as against CJ, Bellerose, Viceroy, Parker and Jackson, and the Labor Law § 241(6) claims as against Viceroy, Parker and Jackson, and otherwise affirmed, without costs.

Plaintiff Jose Alameda-Cabrera was injured while using a miter saw provided by his employer, defendant FLJ Development Inc., a subcontractor hired by defendant Bellerose, the general contractor, to install flooring at a property owned by defendant CJ Partners. FLJ provided plaintiff with the saw which did not have a retractable guard or a vise clamp. At the time of his accident, plaintiff was halfway through a cut on a piece of wood, using the miter saw, when an electrical outage cut power to the saw. When the power returned in a matter of seconds, plaintiff's left hand moved a little to the right, and/or the wood he was holding with that hand to steady it "flew" to the right and drew his hand under the miter saw, and the miter saw came down and severed his left thumb.

The motion court properly rejected defendants-appellants' argument that plaintiff's actions were the sole proximate cause of his injuries. Their argument is premised, in part, on a mischaracterization of plaintiff's deposition testimony (*see*

Gasper v LC Main, LLC, 79 AD3d 428 [1st Dept 2010]). Furthermore, it cannot be held, as a matter of law, that the absence of a protective guard on the miter saw, in violation of 22 NYCRR § 23-1.12(c), was not a proximate cause of plaintiff's accident (*see Keneally v 400 Fifth Realty LLC*, 110 AD3d 624 [1st Dept 2013]; *Once v Service Ctr. of N.Y.*, 96 AD3d 483 [1st Dept 2012], *lv dismissed* 20 NY3d 1075 [2013]).

Plaintiffs demonstrated their entitlement to judgement as a matter of law on their section 241(6) claim as against CJ and Bellerose by establishing that the miter saw provided, which was the only one available for plaintiff's use, lacked both a protective guard and a vise clamp, in violation of Industrial Code (12 NYCRR) §§ 23-1.12(c)(2) and 23-9.2(a) (*see Misicki v Caradonna*, 12 NY3d 511, 520-21 [2009]; *Once*, 96 AD3d at 483). In opposition, defendants' expert failed to address the Industrial Code violations and their counsels' arguments concerning those provisions are insufficient to raise an issue of fact. Defendants also failed to establish comparative negligence (*see Once*, 96 AD3d at 483).

Plaintiffs' common-law negligence and Labor Law § 241(6) claims are dismissed as against defendants Viceroy, Parker and Jackson. The motion court dismissed plaintiffs' claims pursuant

to Labor Law § 200 which is a codification of common-law negligence (*see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505* [1993]), and, in any event, plaintiffs did not pursue either of these claims or their Labor Law § 241(6) claims as against defendants Viceroy, Parker and Jackson on appeal. Thus, they are deemed abandoned (*see Rodriguez v Dormitory Authority of State*, 104 AD3d 529, 530-531 [1st Dept 2013]).

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12440-
12441 Index 652594/11

LFR Collections LLC, as Acquirer
of The Stillwater Asset-Backed Fund LP,
Plaintiff-Respondent,

-against-

Blan Law Offices, et al.,
Defendants-Appellants.

_____

Nowell Amoroso Klein Bierman, P.A., New York (Rick A. Steinberg of counsel), for appellants.

Mayer Brown LLP, New York (Kathryn M. Throo of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered September 21, 2012, awarding plaintiff the total sum of $4,589,352.30, and bringing up for review an order, same court and Justice, entered March 29, 2012, which granted plaintiff's motion for summary judgment in lieu of complaint, unanimously affirmed, without costs. Order, same court and Justice, entered August 27, 2012, which, to the extent appealable, denied defendants' motion to renew, unanimously affirmed, without costs.

Plaintiff's motion for summary judgment in lieu of complaint was properly granted. With respect to the individual defendant, Kenneth W. Blan, he signed an unconditional guarantee in which he waived the right to interpose a defense. The guaranty also

stated that it would not be affected by any invalidity or unenforceability of the underlying obligation of the borrower defendant Blan Law Offices (*see e.g. Citibank v Plapinger,* 66 NY2d 90 [1985]; *Red Tulip, LLC v Neiva,* 44 AD3d 204 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008], *lv denied* 13 NY3d 709 [2009]). Although defendant law firm waived the right to interpose any set-off or counterclaim and not the right to assert defenses, its defenses fail to raise a triable issue of fact since they do not provide any excuse for the failure to pay on the note.

The motion court properly denied defendants' motion to renew. To the extent it was not based on "new facts," it was a motion to reargue, the denial of which is not appealable (*see* CPLR 2122[e][2]; *Prime Income Asset Mgt., Inc. v American Real Estate Holdings L.P.,* 82 AD3d 550, 551 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]), and defendants failed to provide any justification for failing to present the motion court with these facts which were available at the time the original motion was made. To the extent defendants submitted new evidence, albeit without a "reasonable justification" for not previously offering it, the facts submitted would not "change the prior determination" (*Prime Income Asset Mgt.,* 82 AD3d at 551).

Defendants also failed to explain why they did not previously argue that plaintiff improperly compounded the interest (*see Cuccia v City of New York*, 306 AD2d 2, 3 [1st Dept 2003]). Even if we were to consider the merits of this argument in the interest of justice (*see Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007]), plaintiff denied that it compounded the interest and explained its calculations in its opposition to the motion to renew and defendants did not submit a reply disputing plaintiff's calculations.

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12442 The People of the State of New York, Ind. 6304/08
Respondent,

-against-

Evette Wynn,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Debevoise & Plimpton LLP, New York (Nwamaka G. Ejebe of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

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Appeal from judgment, Supreme Court, New York County (Carol Berkman, J.), rendered December 16, 2009, convicting defendant, upon her plea of guilty, of robbery in the first degree, and sentencing her to a term of 10 years, held in abeyance and the matter remitted for a suppression hearing.

The court erred in summarily denying the portion of defendant's motion that sought to suppress statements and physical evidence as fruits of an allegedly unlawful arrest. Although the People provided defendant with extensive information about the facts of the crime and the proof to be offered at trial, they provided no information whatsoever, at any stage of the proceedings, about how defendant came to be a suspect, and

the basis for her arrest, made hours after the crime at a different location. The People never explained, even by implication, whether defendant met a description, was named by a witness familiar with her, or was connected to the crime in some other way. While the People disclosed defendant's detailed confession, it did not shed any light on how she came to be arrested (*compare People v Lopez*, 5 NY3d 753, 754 [2005] [defendant's statement described events leading to arrest and established probable cause]).

Accordingly, given defendant's complete lack of relevant information, that portion of her motion papers alleging a "lack of probable cause to arrest the defendant based on the unreliability of the information provided to the police and/or the insufficiency of the description," while conclusory, was sufficient to state a basis for suppression and raise a factual issue requiring a hearing (*see People v Bryant*, 8 NY3d 530 [2007]; *People v Vasquez,* 200 AD2d 344 [1st Dept 1994], *lv denied* 84 NY2d 873 [1994]). We note that the People's response to defendant's motion was still silent as to the basis for connecting defendant to the crime. Under the circumstances, the People's disclosure of the facts of the crime, without any explanation for defendant's arrest at a different time and place,

failed to trigger defendant's "burden to supply the motion court with any relevant facts [s]he did possess" (*People v Jones*, 95 NY2d 721, 729 [2001]).

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12443 Milton R. Galarza, Index 309464/11
Plaintiff-Appellant,

-against-

J.N. Eaglet Publishing Group, Inc., et al.,
Defendants-Respondents.

_____

Philip Newman, P.C., Bronx (Philip Newman of counsel), for appellant.

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered October 7, 2013, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff initially alleged that, as a result of being struck by defendants' motor vehicle in June 2011, he suffered a serious injury involving permanent or significant limitations in the use of his left knee, exacerbation of a prior knee injury, and a 90/180-day injury (Insurance Law § 5102[d]). However, in opposition to defendants' summary judgment motion, plaintiff limited his claim to the 90/180-day category.

Defendants established their entitlement to judgment as a matter of law on the 90/180-day claim by submitting the affirmed

report of an orthopedic surgeon, who opined that plaintiff's need for arthroscopic surgery for his left knee was overwhelmingly the result of his previous accident in 2001, which had resulted in injury to his left femur and knee, and surgical placement of a metal rod in his left femur (*see Winters v Cruz*, 90 AD2d 412 [1st Dept 2011]). Defendants also relied on medical records of plaintiff's treating physicians who found, among other things, that plaintiff had near normal range of motion in the period following the accident, that X rays showed degeneration in the knee, and that the MRI taken after the June 2011 accident showed no meniscal or ligament tears, but suggested a contusion. Defendants thus demonstrated an absence of serious injury that would prevent plaintiff from performing substantially all of his usual and daily customary activities during the relevant period (*see Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463 [1st Dept 2010]), and that his injuries were not caused by the subject accident, but were preexisting (*see Jimenez v Polanco*, 88 AD3d 604 [1st Dept 2011]). Plaintiff's objection to defendants' reliance on unaffirmed medical records is unpreserved and, in any event, is unavailing (*see Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878, 881 [2d Dept 2010]; *cf. Thompson v Abbasi*, 15 AD3d 95, 97 [1st Dept 2005]).

In opposition, plaintiff submitted only an affidavit asserting that he was out of work for over five months following the accident. Since plaintiff's assertion that he was out of work for more than 90 days after his accident was not supported by any evidence of a medically determined injury caused by the subject accident, he failed to raise an issue of fact (*see Winters v Cruz*, 90 AD3d at 413).

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12444 Michael Miano, Index 102712/10
Plaintiff-Respondent,

-against-

Battery Place Green LLC, et al.,
Defendants/Third-Party
Plaintiffs-Respondents,

-against-

Five Star Electric Corp.,
Third-Party Defendant-Appellant.

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

Ahmuty Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Battery Place Green LLC, Albanese Organization, Inc. and Turner Construction Company, respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 10, 2013, which, to the extent appealed from as limited by the briefs, denied the motion of third-party defendant Five Star Electric Corp. (Five Star) for summary judgment dismissing the third-party complaint, unanimously affirmed, without costs.

Triable issues of fact exist as to whether Five Star, the electrical subcontractor responsible for providing temporary lighting in the building under construction, had constructive

notice of the allegedly inadequate temporary lights in the stairwell at the time of plaintiff's accident (*see Beltran v Navillus Tile, Inc.*, 108 AD3d 414, 415 [1st Dept 2013]), and whether inadequate lighting was a proximate cause of the accident (*see Robbins v Goldman Sachs Headquarters, LLC*, 102 AD3d 414 [1st Dept 2013]; *Schirmer v Athena-Liberty Lofts, LP*, 48 AD3d 223 [1st Dept 2008]).

The indemnification provision of the contract between defendant Turner Construction Company, the construction project's general contractor, and Five Star is not void under General Obligations Law § 5-322.1. The provision provided for partial indemnification by including "savings" language (*see Williams v City of New York*, 74 AD3d 479, 480 [1st Dept 2010]).

In light of the triable issues of fact as to Five Star's negligence, its motion for summary judgment, seeking dismissal of the third-party claims for contractual indemnity, common-law indemnity and contribution, was properly denied (*see Robbins*, 102

AD3d at 414).

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

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12445 John Gaudio, Index 7411/05
Plaintiff-Appellant,

-against-

David Gonzalez, et al.,
Defendants-Respondents,

Our Lady of Mercy Medical Center, et al.,
Defendants.

_____

Peter E. Tangredi & Associates, White Plains (Stephen D. Chakwin, Jr. of counsel), for appellant.

Kaufman, Borgeest & Ryan LLP, Valhalla (Edward J. Guardaro, Jr. of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered July 20, 2012, which, to the extent appealed from, granted defendants-respondents' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants made a prima facie showing of their entitlement to judgment as a matter of law by submitting medical records and the affirmations of two experts (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). Based upon their review of medical records and diagnostic films, defendants' experts concluded that defendant Dr. David Gonzalez's treatment of plaintiff's right tibia/fibula fracture was within the standard of care. Further,

the experts attributed plaintiff's injuries to the nature of his fractures, his co-morbidities, his noncompliance with directions to avoid bearing weight on the leg, and/or an intervening trauma.

In opposition, plaintiff failed to raise a triable issue of fact. His expert's conclusory opinion was made without reference to any diagnostic or clinical findings, failed to explain how earlier use of electrical stimulation, which the expert conceded had no appreciable effect on plaintiff, could have contributed to the alleged injuries, and failed to controvert, let alone address, the defense experts' claims (*see Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1st Dept 2007]; *Margolese v Uribe*, 238 AD2d 164, 166-167 [1st Dept 1997]).

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: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12446 The People of the State of New York, Ind. 5469/00
Respondent,

-against-

Kevin L. Moore,
Defendant-Appellant.

_____

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

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

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Judgment of resentence, Supreme Court, New York County (Rena K. Uviller, J.), rendered July 5, 2012, resentencing defendant, as a second violent felony offender, to an aggregate term of 23 years, with five years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: MAY 8, 2014

CLERK

Saxe, J.P., Moskowitz, Freedman, Gische, Kapnick, JJ.

12447N Salamon Davis, etc., Index 113854/11
Plaintiff-Appellant,

-against-

Herbert Rudnick, et al.,
Defendants-Respondents.

_____

Law Office of Salamon Davis, Garden City (Salamon Davis of counsel), appellant pro se.

Law Office of Daniel L. Abrams, PLLC, New York (Daniel L. Abrams of counsel), for respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered January 9, 2013, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The doctrine of res judicata precludes plaintiff from relitigating his claim for an alleged unpaid balance of attorney's fees (*see Matter of Hunter*, 4 NY3d 260, 269-270 [2005]; *O'Brien v City of Syracuse*, 54 NY2d 353 [1981]). The record demonstrates that plaintiff represented defendant Herbert Rudnick in a prior guardianship proceeding. In September 2011, the guardianship court entered an order which, among other things, set the amount of reasonable compensation for plaintiff's

legal services at $35,000, which Herbert promptly paid. Plaintiff participated in the fee determination process and was afforded, and availed himself of, an opportunity to submit an affirmation substantiating his request. Under the circumstances, to the extent that the fee award was too low, plaintiff was aggrieved and could have moved for reconsideration or appealed the amount of the award.

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: MAY 8, 2014

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11886 Loreley Financing (Jersey) No. 3 Ltd., et al., Plaintiffs-Respondents-Appellants, Index 650212/12

-against-

Citigroup Global Markets Inc., et al., Defendants-Appellants-Respondents,

Lacerta ABS CDO 2006-1, Ltd., et al., Defendants.

_____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Susanna M. Buergel of counsel), for appellants-respondents.

Kasowitz, Benson, Torres & Friedman LLP, New York (Sheron Korpus of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 6, 2012, modified, on the law, to grant the motion to dismiss the unjust enrichment claim against said defendants, and otherwise affirmed, without costs.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
John W. Sweeny, Jr.
Dianne T. Renwick
Helen E. Freedman
Judith J. Gische, JJ.

11886
Index 650212/12

_____x

Loreley Financing (Jersey)
No. 3 Ltd., et al.,
Plaintiffs-Respondents-Appellants,

-against-

Citigroup Global Markets Inc., et al.,
Defendants-Appellants-Respondents,

Lacerta ABS CDO 2006-1, Ltd., et al.,
Defendants.

_____x

Cross appeals from the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 6, 2012, which, insofar as appealed from as limited by the briefs, denied the motion of defendants Citigroup Global Markets Inc. (CGMI), Citibank, N.A., and Citigroup Global Markets Limited (CGML) (defendants) to dismiss the unjust enrichment claim as against them and the fraud claims as against CGMI and CGML, and granted their motion to dismiss the rescission claim as against CGMI and CGML.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Susanna M. Buergel, Brad S. Karp, Donna Lee and Jane B. O'Brien of counsel), for appellants-respondents.

Kasowitz, Benson, Torres & Friedman LLP, New York (Marc E. Kasowitz and Sheron Korpus of counsel), Meister Seelig & Fein LLP, New York (James M. Ringer of counsel), and Carter Ledyard & Milburn LLP, New York (Stephen M. Plotnick of counsel), for respondents-appellants.

RENWICK, J.

This appeal stems from an action alleging fraud with respect to an investment bank's sale of collaterized debt obligations (CDOs) which depended upon the positive performance of residential mortgage-backed securities (RMBS). The main issue here is whether the seller's disclaimers and disclosures in the offering documents preclude the purchasers from establishing the reasonable reliance element of the fraud claim. Usually, comprehensive disclaimers contained in carefully drafted documents executed by sophisticated commercial parties are sufficient to insulate sellers from tort liability *(see e.g. HSH Nordbank AG v UBS AG*, 95 AD3d 185 [1st Dept 2012]). But there is a limit to the efficacy of those disclaimers, as this case aptly demonstrates.

Plaintiffs Loreley Financing Ltd.(s) (Jersey No. 3 Ltd., No. 5 Ltd., No. 6 Ltd., No. 7 Ltd., No. 25 Ltd., No. 27 Ltd., No. 29 Ltd., No. 31 Ltd., and No. 32 Ltd.) are companies organized under the laws of Jersey, Channel Islands. Between September 2006 and June 2007, through their investment advisors, nonparties IKB Deutsche Industries Bank AG and IKB Credit Assets Management GmbH, plaintiffs invested in nearly $1 billion of CDOs backed by RMBS: Lacerta, Jackson, Cookson, Pinnacle Peak, ABsynth and Plettenberg Bay. At the time of these transactions, Citigroup

and its affiliates were reportedly major players at multiple levels of the subprime capital market; Citigroup acted as a mortgage originator, an underwriter of subprime RMBS, and an arranger of structured finance products, like CDOs, that invested in RMBS. In this case, Citigroup's affiliates, Citigroup Global Markets, Inc. (CGMI) and Citigroup Global Markets, Ltd. (CGML), were the underwriters and direct sellers of the Lacerta, Jackson, Cookson, Pinnacle Peak, ABsynth and Plettenberg Bay CDOS purchased by plaintiffs in 2006 and 2007.

In 2012, plaintiffs commenced this action accusing Citigroup of defrauding plaintiffs into purchasing "fraudulent [CDO] investments that are now worthless."[1] In essence, plaintiffs accuse Citigroup of using the CDOs plaintiffs purchased to offload the risk of toxic RMBS on its books and to help preferred clients "short" the housing market. In their complaint, plaintiffs raise causes of action sounding in: 1) fraud; 2) rescission; 3) fraudulent conveyance; and 4) unjust enrichment. Subsequently, Citigroup moved to dismiss the entire action

[1] The defendants here are Citigroup Global Markets Inc. (CGMI), Citibank, N.A. (Citibank), and Citigroup Global Markets Limited (CGML). They are collectively referred to here as Citigroup.

pursuant to CPLR 3211(a)(7).[2] The motion court granted in part and denied in part Citigroup's motion, dismissing plaintiffs' claim for rescission and fraudulent conveyance, while sustaining plaintiffs' fraud and unjust enrichment claims.[3] Citigroup appeals from the denial of the remaining claims, while plaintiffs appeal from the dismissal of the rescission claim.

We first examine Citigroup's contentions. With regard to the fraud claim, Citigroup argues, inter alia, that it should be dismissed because it is not sufficiently detailed. Generally, in a claim for fraud, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on

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[2] Citigroup moved pursuant to CPLR 3211(a)(7) but has submitted documentary evidence allegedly refuting plaintiffs' fraud allegations. Such allegations will be accepted as true unless refuted by documentary evidence. "When documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff has stated a cause of action to whether it has one'" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014]), quoting John R. Higgitt, CPLR 3211[A][1] and [A][7]: Dismissal Motions - Pitfalls and Pointers, 83 NY ST BJ 32, 33 [2011]; John R. Higgitt, CPLR 3211[A]{7]: Demurrer or Merits-Testing Device?, 73 Albany Law Rev. 99, 110 [2009]). Thus, "if [[Citigroup's] evidence establishes that the [plaintiffs] have] no cause of action (i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate." (*id.*).

[3] The motion court also rejected plaintiffs' claim for punitive damages.

the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Furthermore, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]; *see Lanzi v Brooks*, 43 NY2d 778, 780 [1977] ["(CPLR 3016[b]) requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of"]).

In this case, the complaint describes the alleged fraudulent conduct, as to each CDO transaction, as follows:

> "From 2000 to 2006, Citigroup earned increasingly large returns from originating subprime mortgages, securitizing them into residential mortgage-backed securities ('RMBS'), arranging CDOs, and underwriting other structured finance transactions derived from subprime mortgages. When the overheated housing market began to cool in 2006, the market for subprime-based financial products began to decline. Yet Citigroup was accustomed to these profits. In now infamous words, Citigroup's then-CEO Chuck Prince said in July 2007, literally days before the subprime market collapse, 'As long as the music is playing, you've got to get up and dance,' and added, 'We're still dancing.'
>
> "By early 2007, Citigroup knew that even the most senior tranches of CDOs were far more risky than their ratings suggested. Citigroup's peculiar knowledge was based on information on individual loan performance that was available only to financial institutions that, like Citigroup, originated subprime mortgages and securitized them into RMBS. As a result of its insider's knowledge, Citigroup knew that the RMBS it and other major banks were packaging into CDOs included a significant percentage of subprime mortgages that violated basic underwriting standards and were likely to default — making the RMBS assets and the CDOs that rested on them far less secure than portrayed by their

ratings. Rather than disclosing these material facts to investors in the deals it arranged, Citigroup concealed them so that it could offload some of the massive exposure to subprime RMBS that Citigroup carried on its own balance sheet to unsuspecting investors — while at the same time continuing to earn lucrative fees from generating CDOs — and used its position to transfer its risk to Plaintiffs and other long investors in Citigroup CDOs.

"Indeed, to continue generating outsized profits in a market that it knew, as an insider, was doomed to collapse sooner rather than later, Citigroup began arranging fraudulent CDOs for its own benefit and for the benefit of certain preferred clients who wanted to 'short' the housing market (i.e., to bet that subprime securities would fail). Citigroup also used these CDOs to offload the risk of toxic RMBS and CDO assets that Citigroup carried on its own books by concealing key facts that were peculiarly within its knowledge, while at the same time knowingly misrepresenting to unsuspecting long investors that these assets were of high quality.

"For example, Citigroup colluded secretly with a now-notorious hedge fund known as Magnetar Capital LLC ('Magnetar') to create six of Magnetar's infamous 'Constellation' CDO deals in which Magnetar secretly controlled, undisclosed to investors, critical deal features (including the choice of collateral) to further its scheme to profit from short bets against the housing market. Citigroup benefitted from this deceptive scheme by reaping tens of millions of dollars in fees. Working closely with Citigroup, Magnetar purchased the hard-to-sell equity tranches of these CDOs [Lacerta], (which carried the most risk) at discounted prices, while using the returns to finance inexpensive short bets against those same CDOs by secretly buying credit protection via credit default swaps ('CDS') on those reference portfolios, as well as CDS contracts referencing tranches of the CDOs themselves. As Magnetar and Citigroup expected, the CDS contracts generated substantial net profits for Magnetar when the CDOs failed.

"Citigroup marketed Lacerta, a Constellation CDO, to Plaintiffs as a legitimate long investment opportunity meeting Plaintiffs' stringent investment requirements, representing that its portfolio was selected 'solely to create a long investment for equity and mezzanine investors.' Citigroup did not disclose the material fact that Magnetar — a party that stood to reap massive profits from the collapse of the housing market — was actually dictating the collateral selection criteria and deal structure of Lacerta behind the scenes. Magnetar's economic interests as a net-short investor were directly adverse to those of long investors like Plaintiffs. Moreover, also unbeknownst to Plaintiffs, Citigroup caused the Lacerta CDO to, in effect, sell CDS contracts to Magnetar at below-market prices. In short, Citigroup helped Magnetar stack the deck in its favor so that Magnetar would win no matter what cards were dealt. None of this was disclosed to Plaintiffs.

"Lacerta was not the only CDO that Citigroup arranged at the behest of a short investor. Like Citigroup, Morgan Stanley & Co., Inc. ('Morgan Stanley') purchased subprime loans that it packaged into RMBS for sale to unsuspecting investors. Also like Citigroup, Morgan Stanley learned through non-public due diligence reports that a substantial percentage of these loans did not conform to applicable underwriting guidelines, thus rendering the RMBS it was selling much riskier than their credit ratings suggested. Because Morgan Stanley had been unable to sell many of its RMBS directly and needed to offload its exposure to them, it colluded with Citigroup to create the Jackson CDOs — which were purportedly arranged by Citigroup, but were actually Constructed by Morgan Stanley to permit it to buy protection on the very toxic securities it had created and could not sell. Citigroup participated in this deception in order to earn lucrative fees for arranging the transaction."

These factual allegations, which are more fully detailed in the 81-page complaint, provide sufficient details to inform

Citigroup of the alleged fraudulent conduct. As indicated, the gravamen of the complaint is essentially that Citigroup secretly selected its riskiest mortgages for sale to its investors as CDOs and purchased credit default swaps to short the issuance. The complaint also alleges that Citigroup used a similar scheme to help preferred clients offload the risks of toxic RMBS from their books.

While the complaint fails to specify dates as to many of the relevant events, and fails to mention the Citigroup employees who were involved in these activities that comprised the fraudulent scheme, under the circumstances here, where the facts were generally "peculiarly within the knowledge of the party against whom the [fraud] is being asserted" *(Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]), the misconduct complained of is set forth in sufficient detail to apprise Citigroup of the alleged wrongs. Given that the allegations must be given their most favorable intendment (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982], *cert denied* 459 US 1146 [1983], "it would be impossible for the plaintiff[s] to state the circumstances in more detail because, if the allegations are true, only [Citigroup] would have knowledge of the details" (*Grumman Aerospace Corp. v Rice*, 196 AD2d 572, 573 [2d Dept 1993]).

Citigroup, however, argues alternatively that plaintiffs cannot establish the element of reasonable reliance (an element of both affirmative misrepresentation and concealment) as a result of the disclosures and disclaimers contained in the offering circulars for the securities that plaintiffs purchased. As plainly explained by this Court in *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.* (115 AD3d 128, 137 [1st Dept. 2014] [internal citations omitted],

> "The law is abundantly clear in this state that a buyer's disclaimer of reliance cannot preclude a claim of justifiable reliance on the seller's misrepresentations or omissions unless (1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the seller's knowledge. Accordingly, only where a written contract contains a specific disclaimer of responsibility for extraneous representations, that is, a provision that the parties are not bound by or relying upon representations or omissions as to the specific matter, is a plaintiff precluded from later claiming fraud on the ground of a prior misrepresentation as to the specific matter. In other words, in view of the disclaimer, no representations exist and that being so, there can be no reliance."

In this case, Citigroup claims that the disclaimers and disclosures in the offering circulars are sufficiently specific to the particular information that was either misrepresented or undisclosed. First, Citigroup points out that the offering circulars required the purchaser to disclaim reliance on "the

advice or recommendations of or any information, representation . . . provided by [Citigroup] or any of its affiliates" and concomitantly acknowledged that they have "determined (independently and without relying on [Citigroup] or any of its affiliates) . . . that [they are] financially able to bear such risks that [the] investment" entails. Secondly, Citigroup points out that the offering circulars disclosed that the collateral will be subject to various types of risks associated with RMBS, "including, among others, credit risks, liquidity risks and interest rate" risks. Thirdly, Citigroup points out that the offering circulars disclosed that Citigroup and its affiliates "may be acting in a number of capacities," that the "roles played by [Citigroup and its] affiliates may, at times, conflict with the interest" of the purchaser, and that "the decisions made by such entities may prejudice (possibly materially) the interests of . . . the Noteholders."

We find that these disclaimers and disclosures fall well short of tracking the particular misrepresentations and omissions alleged by plaintiffs. Indeed, the disclaimers here are strikingly similar to the disclaimers at issue in Basis Yield and which this Court found did not sufficiently track the particular omissions and representations alleged in that case (*Basis Yield,* 115 AD3d at 138).

Initially, it should be noted that the fraudulent misrepresentations and omissions alleged here are indistinguishable from those alleged in *Basis Yield.* In that case, like here, an investment fund purchased CDOS that were linked to the performance of RMBS (*id*. at 131). Again, as alleged here, the seller of the bonds, an investment bank, deliberately included its riskiest assets in that package of mortgages; at the same time, the seller "shorted" the bonds by purchasing credit default swaps that would pay off if the bonds turned out to be unprofitable (*id.* at *137-138)*. As part of the purchase agreement, the seller, like Citigroup here, included very strongly-worded disclaimers and disclosures about the inherently risky nature of mortgage-backed bonds, that the purchaser would conduct its own due diligence, and revealing that the seller would be purchasing credit protection as a hedge (*id*. At 131). When the housing market collapsed, the fund lost almost $70 million (id. at 131-132). It then brought suit against the seller, claiming fraud (id.). The seller moved to dismiss on the basis of the disclaimers and disclosures, arguing that the purchaser could not have relied on the seller's alleged misrepresentations. The motion court denied the motion to dismiss, and this Court affirmed.

Specifically, *Basis Yield* found that the seller's disclaimer

regarding the inherently risky nature of mortgage-backed bonds did not encompass the secret risk that the seller had deliberately selected the riskiest assets:

> "[The seller] structured, marketed and sold the . . . CDOs with the intent of reducing its long term exposure to subprime risk by betting against them. The complaint further alleges that [the seller] not only knew that it was selling toxic assets (based upon [the seller's] internal valuation of the securities and its involvement in the underlying asset selection process) to its clients and failed to disclose those sales to investors, but that [the seller] also sought to profit from its own actions. Yet, the . . . disclosures simply provide boilerplate statements regarding the speculative and risky nature of investing in mortgaged-backed CDOs and the possibility of market turns. If plaintiff's allegations are accepted as true, there is a "vast gap" between the speculative picture [the seller] presented to investors and the events [the seller] knew had already occurred" (*id.* at 138).

Secondly, the seller *in Basis Yield* argued that it had disclosed that it was purchasing credit protection, thus indicating to the buyer, like Citigroup did here, that there was a potential conflict of interest (since the credit protection was a potential source of profit in the event of a shortfall in the bonds) (*id.*). But *Basis Yield* held that these disclosures did not reveal that the seller had deliberately sabotaged the bond issuance so as to profit from the credit default swaps:

> "[The purchaser] is alleging more than the fact that [the seller] was a mere "contrarian" looking to capitalize on over-priced long [mortgage] bets that would be unprofitable when the housing prices

> collapsed, contrary to the general belief at the time that prices would continue to perpetually rise . . . [The purchaser] claims that [the seller] had more than a profit motive . . . . [The purchaser] claims that [the seller] not only structured, marketed and sold [these bonds], but that it did so with the intent to rid itself of long term exposure to subprime mortgages, and to profit by selling them to its clients and betting against its own long term position" (*id.* 138-139).

Moreover, *Basis Yield* found that even if the disclosures had been facially sufficient, the purchaser's allegations were sufficient to withstand a motion to dismiss because of the seller's "peculiar knowledge" of secret information that was unavailable to the purchaser:

> "[The purchaser] alleges that because of what [the seller] knew from its role as an underwriter and because of what the mortgage investigations conducted on its behalf . . . revealed, [the seller] had access to nonpublic information regarding the deteriorating credit quality of subprime mortgages. These allegations are supported by quotes from [the seller's internal] documents, complete with dates and names, expressing derogatory remarks about the CDOs. These allegations are more than adequate to allege the peculiar knowledge exception to the disclaimer bar" (*id.* at 139).

Our recent pronouncement in *Basis Yield*, therefore, constitutes clear precedent that compels us to find that Citigroup's disclaimers and disclosures do not preclude, as a matter of law, a claim of justifiable reliance on the seller's misrepresentations or omissions, as an element of fraud. The cases relied upon by Citigroup, namely, this Court's recent

pronouncements in *ACA Fin. Guar. Corp. v Goldman, Sachs & Co.* (106 AD3d 494 [1st Dept 2013], appeal dismissed 22 NY3d 909 [2013]) *and HSH Nordbank AG v UBS AG* (95 AD3d at 185), do not mandate a different result.

In *ACA Financial*, the plaintiff issued a guaranty on a CDO investment in reliance on the defendants' representation that Paulson, the "transaction sponsor" who would be picking the CDO's collateral, would purchase the "first loss tranche" (*i.e.*, the equity) and would therefore have interests aligned with those of long investors (*106 AD3d at 496-497*). The plaintiff alleged that the defendants misrepresented and concealed that, in reality, Paulson had a short position on the CDO, did not hold the first loss tranche, and had adversely selected the CDO's portfolio. ACA Financial's finding that the plaintiff's reliance on the defendant's alleged representation was not reasonable was predicated on this Court's determination that the transaction documents specifically disclosed the information that the plaintiff alleged was concealed (*id.* at 496 ["plaintiff received, inter alia, the offering circular for the transaction, which expressly discloses that no one was investing in the first-loss tranche"]). Thus, ACA Financial reasoned, this disclosure "should have alerted plaintiff," who then "should have questioned" the defendants or Paulson, which "would have likely

informed plaintiff that [Paulson] was taking a short rather than the long equity position represented" (*id.* at 496-97).

The allegations here are fundamentally different. In the case of the Lacerta CDO, for example, plaintiffs allege that Citigroup actively concealed Magnetar's identity and control over collateral selection as well as its massive short positions. Citigroup has not established that anything in the deal documents or elsewhere could have "alerted" plaintiffs to the falsity of Citigroup's representations that the deal's portfolio had been selected by the equity investor (i.e., a long investor) "solely to create a long investment." Moreover, in four of the other five CDO transactions at issue (Pinnacle Peak, Plettenberg Bay, Cookson, and ABSynth), there were — as the trial court correctly found - no "red flags" or "alarm bells" in the deal documents or elsewhere that could have alerted plaintiffs to Citigroup's purported fraud. With respect to the other CDO, Jackson, where the offering documents did raise a red flag, plaintiffs took precisely the action prescribed by *ACA Financing*: they conducted additional due diligence, but Citigroup allegedly provided plaintiffs with inaccurate information, "falsely claiming that its CDS customer was a hedge fund that wanted to hedge its exposure to certain investments, not an investment bank that wanted to unload risk it was unable to sell in the market."

Similarly unavailing is Citigroup's reliance on *Nordbank*. *Nordbank* involved a plaintiff, HSH, that entered into a credit default swap with the defendant, UBS, in which the plaintiff assumed the risk of losses on a $2 billion portfolio of mortgage-backed securities related to the U.S. market. *Nordbank* is inapposite here for two significant reasons.

First, unlike here, in *Nordbank* the disclaimers and disclosures were sufficiently specific to the particular type of information allegedly misrepresented. In Nordbank "the core subject of the complained-of-representations was the reliability of the credit ratings used to define the permissible composition of the reference pool" (*Nordbank*, 95 AD3d at 196). Yet, the disclaimers and disclosures "relate[d] directly or indirectly to the reliability of credit ratings in the relevant market" (id. at 199). Thus, in view of the disclaimer, Nordbank held that no representation existed, and there could not have been any reliance (*id.*).

Secondly, *Nordbank* found that the alleged misrepresentation did not concern facts peculiarly within the seller's knowledge. This is because the reliability of the credit ratings could have been ascertained from reviewing market data or other publicly available information (*id.*). In fact, the allegations of the complaint itself established that HSH could have uncovered any

misrepresentation of the risk of the transaction through the exercise of reasonable due diligence within the means of a financial institution of its size and sophistication (*id.*).

Here, by contrast, Citigroup has not presented documentary evidence to undermine plaintiffs' allegations that it was not "common knowledge" that Citigroup was creating CDOs as vehicles for it and others to short adversely selected collateral. Moreover, unlike the situation in *Nordbank*, plaintiffs here specifically plead that the facts comprising the fraud were peculiarly within Citigroup's knowledge and that plaintiffs could not have discovered this information despite their reasonable due diligence. Thus, as the motion court correctly found, plaintiffs here allege a scheme that no investor, "sophisticated or not," could have discovered.

We find, however, that the unjust enrichment cause of action should have been dismissed because the CDO transactions were governed by written agreements. "The theory of unjust enrichment is one created in law in the absence of any agreement" (*Basis Yield*, 115 AD3d at 141; *see also Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). Finally, contrary to plaintiffs' contention, the motion court properly dismissed the rescission cause of action because the complaint fails to allege the absence of a "complete and adequate remedy at law" (see

Rudman v Cowles Communications, 30 NY2d 1, 13 [1972]).

Accordingly, the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 6, 2012, which, insofar as appealed from as limited by the briefs, denied the motion of defendants Citigroup Global Markets Inc. (CGMI), Citibank, N.A., and Citigroup Global Markets Limited (CGML) (defendants) to dismiss the unjust enrichment claim as against them and the fraud claims as against CGMI and CGML, and granted their motion to dismiss the rescission claim as against CGMI and CGML, should be modified, on the law, to grant the motion to dismiss the unjust enrichment claim against said defendants, and otherwise affirmed, without costs.

All concur.

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

ENTERED: MAY 8, 2014

CLERK