SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 15, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

12330-
12330A Galia Theophilova,
Plaintiff-Appellant,

Index 309230/08

-against-

Todor Dentchev,
Defendant-Respondent.

_____

Elliott Scheinberg, Staten Island, for appellant.

_____

Orders, Supreme Court, New York County (Laura E. Drager, J.), entered February 20, 2013, which, inter alia, denied plaintiff's motion for a money judgment for unpaid child support arrears, equitable distribution and other sums, directed defendant to liquidate securities in his separate brokerage account sufficient to pay plaintiff the total sum of $339,035.89, (the payment total), directed the parties to share equally the capital gains tax assessed on the payment total, and denied sub silentio plaintiff's request for postjudgment interest, unanimously modified, on the law and the facts, to grant that part of the motion seeking a money judgment for child support arrears, to direct defendant to pay all of the capital gains tax

assessed on the payment total, and interest post-dating the Special Referee's report and recommendation at the statutory rate on that part of the payment total comprising the enhanced earning capacity award, to remand the matter for further proceedings consistent herewith, and otherwise affirmed, without costs. The Clerk is directed to enter judgment for the child support arrears accordingly.

The parties' marriage was dissolved by a judgment of divorce entered September 4, 2012. In the judgment, defendant former husband was ordered to pay plaintiff former wife an enhanced earning capacity award of $653,000 over a period of five years without interest, with the first payment of $130,600 due within 30 days of entry of the judgment. The judgment also directed defendant to pay plaintiff her equitable share of other marital assets, as well as $22,616 in child support arrears. In addition, the judgment directed the parties to cooperate in equally dividing all cash and securities contained in the parties' jointly-held Ameriprise brokerage account.

In November 2012, plaintiff moved, pursuant to Domestic Relations Law § 244, for a money judgment on the ground that defendant had failed to pay certain amounts required by the divorce judgment. Plaintiff's motion included a request for interest from the date of entry of the divorce judgment. In

opposing plaintiff's motion, defendant did not dispute that he owed the sums demanded, but contended that he could not pay the amounts due unless the Ameriprise account was liquidated. Defendant argued that plaintiff had failed to cooperate in dividing the account, and cross moved for an order directing plaintiff to sign the forms necessary to effect the division.

The court orally denied plaintiff's motion for a money judgment, and subsequently issued two written orders. In the first order, the court directed Ameriprise to equally divide the cash and securities in the joint brokerage account into two separate accounts, one in plaintiff's sole name and the other in defendant's sole name. In the second order, the court directed defendant, upon the division of the joint account, to liquidate securities in his separate account sufficient to pay plaintiff the sum of $339,035.89 (comprised of the $130,600 enhanced earning capacity award, the $22,616 in child support arrears, and $185,819.85 representing plaintiff's share of certain former marital assets). The second order directed the parties to share equally the capital gains tax assessed on the $339,035.89, and did not direct payment of any postjudgment interest.

The motion court's second order should be modified to provide that defendant is solely responsible for the capital gains tax arising from the liquidation of the securities in his

separate account. Upon the division of the joint account, each party will have a separate account containing half of the assets in the former joint account. Thus, each party should be responsible for payment of capital gains tax with respect to his or her sole account (*see Teitler v Teitler*, 156 AD2d 314, 316 [1st Dept 1989], *appeal dismissed* 75 NY2d 963 [1990] [tax liability should be borne in the same proportion as each party's share of the asset]). If and when plaintiff liquidates the securities in her separate account, she must bear any resulting tax liability herself.

The motion court should have granted that part of plaintiff's motion seeking a money judgment for the $22,616 in child support arrears. Domestic Relations Law § 244 "mandates that [upon a default in paying] the court shall make an order directing the entry of judgment for the amount of arrears of child support, with no exception" (*Dox v Tynon*, 90 NY2d 166, 172 [1997] [internal quotation marks omitted]; *see Mochon v Mochon*, 74 AD3d 1156, 1157 [2d Dept 2010]). Because the record does not reflect that defendant's default in paying the child support arrears was willful, an award of interest from the date payment was due is not warranted (*see* Domestic Relations Law § 244). In light of the parties' attempt to enter a stipulation as to the division of the Ameriprise account, good cause exists to deny

that part of plaintiff's motion seeking a money judgment for the remaining sums (*see id.*).

Plaintiff's request for postjudgment interest is governed by the prior appeal in this action (111 AD3d 463 [1st Dept 2013]). In that appeal, we modified the judgment of divorce to the extent of awarding plaintiff interest post-dating the Special Referee's report and recommendation at the statutory rate on the enhanced earning capacity award. Thus, the motion court's second order should be modified accordingly. Plaintiff, however, is not entitled to postjudgment interest on the remaining portion of the equitable distribution award. In the earlier appeal, we rejected that claim as unpreserved and plaintiff is barred by the law of the case doctrine from relitigating this issue (*see Matter of Brodsky v New York City Campaign Fin. Bd*, 107 AD3d 544, 545-546 [1st Dept 2013]; *American Guar. & Liab. Ins. Co. v. CNA Reins. Co., Ltd.*, 42 AD3d 338 [1st Dept 2007]). We decline to address plaintiff's argument that CPLR 5003 requires postjudgment interest on the award of child support arrears. Plaintiff waived this issue by failing to raise it in the prior appeal (*see U.S. Bank N.A. v APP Intl. Fin. Co., B.V.*, 100 AD3d 179, 180 [1st Dept 2012]).

The judgment of divorce required defendant to pay certain unreimbursed medical expenses for plaintiff and unreimbursed

and/or unpaid medical, dental, therapy and college expenses for the child. Although plaintiff's motion papers included receipts for these expenses, the motion court neglected to address this issue. Thus, the matter should be remanded for the court to make findings as to the validity of the claimed expenses and enter an appropriate order or judgment. The court also failed to address defendant's failure to have transferred 344,365 Northwest Airlines miles to plaintiff as required by the divorce judgment. In light of defendant's having used some of the miles and the subsequent dissolution of the airline, the court on remand should determine the cash equivalent of the miles and direct defendant to pay plaintiff that sum.

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

ENTERED: MAY 15, 2014

CLERK

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

7382- Index 603751/07
7383 Biotronik A.G.,
Plaintiff-Appellant-Respondent,

-against-

Conor Medsystems Ireland, Ltd., et al.,
Defendants-Respondents-Appellants.

_____

Proskauer Rose LLP, New York (Ronald S. Rauchberg of counsel), for appellant-respondent.

Kramer Levin Naftalis & Frankel LLP, New York (Harold P. Weinberger of counsel), for respondents-appellants.

_____

Upon remittitur from the Court of Appeals (__ NY3d __, 2014 NY Slip Op. 02101 [2014]), judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered November 21, 2011, dismissing the complaint, unanimously reversed, on the law, without costs, and the matter remanded for further proceedings in accordance herewith.

In this action for breach of a distribution agreement, this Court previously held that a contractual provision that prohibited recovery for consequential damages barred plaintiff Biotronik's claim for lost profits (95 AD3d 724 [1st Dept 2012], *affg* 33 Misc 3d 1219(A) [Sup Ct, NY County 2011]). The Court of Appeals reversed on the ground that the lost profits were direct

and not consequential damages under the agreement (__ NY3d __, 2014 NY Slip Op. 02101 [2014]).

This case is now before us with respect to defendants' claim that they are entitled to summary judgment on the issue of liability because no breach occurred.[1] We did not reach the issue in our prior decision because our ruling that Biotronik only suffered consequential damages disposed of the case.

Briefly, the facts are as follows: in May 2004, plaintiff Biotronik and defendant Conor Medsystems Ireland entered into a distribution agreement under which Conor, a medical device manufacturer, agreed both to sell plaintiff a supply of coronary stents that Conor produced and to appoint Biotronik the stents' exclusive distributor in certain European countries. However, because defendants did not obtain European regulatory approval for the stents until February 2006, Biotronik did not begin selling the stents until early 2006. In 2007, Johnson & Johnson acquired Conor and later that year began selling a different model stent on the international market and discontinued producing the stent for which Biotronik was the exclusive distributor.

---

[1]Supreme Court denied defendants' cross motion for summary judgment but ultimately dismissed the action on the ground that plaintiff only claimed consequential damages (33 Misc 3d 1219[A]).

Plaintiff commenced this action for, among other things, breach of contract. Inasmuch as plaintiff's contract with Conor continued until the end of 2007, plaintiff sought as damages profits that plaintiff claimed it would have made from reselling Conor's stents to third parties if defendants had continued to furnish them as provided in the agreement. As discussed above, Supreme Court dismissed the claims for lost profits but allowed other claims to go forward and denied defendants' cross motion for summary judgment on liability (33 Misc 3d 1219[A]).

The distribution agreement contains three relevant provisions: section 7, titled "Assurance of Supply," provides that Conor shall give Biotronik at least one year's notice before discontinuing its manufacture of the stent. "Where possible," section 7 continues, the parties shall agree on a replacement for the discontinued stent, but if no agreement is reached, Biotronik has the right to terminate the distribution agreement on 30 days' notice.

Section 10.7, titled "Product Recall," provides that if either party believes a product recall in Biotronik's sales territory is "desirable or required by law," the parties "shall . . . discuss reasonably and in good faith whether such recall is appropriate or required and the manner in which any mutually agreed recall should be handled."

Finally, section 10.7, titled "Remedial Actions," gives Conor the "exclusive right and obligation to issue recalls, safety alerts, advisory notices or similar remedial actions on the [stents]."

Biotronik contends that defendants breached the distribution agreement by discontinuing the stents in 2007 without giving the requisite notice and trying to provide plaintiff with a replacement stent in accordance with section 7. Defendants claim that, under section 10.7, they had the right to stop production because they had issued a recall. Plaintiff contends that section 10.7 only applies to recalls for safety concerns and that defendants were motivated by financial issues. Plaintiff further argues that, even if the recall was in accordance with section 10.7, defendants nevertheless breached their obligation to give notice and continue to supply a suitable replacement.

Supreme Court found that the term "recall" as used in section 10.7 is ambiguous and that defendants were still obligated under section 7 to give appropriate notice. Thus, it held that even if defendants had recalled the stents out of safety concerns, there was still an issue of fact as to whether defendants breached their obligations under section 7 (*see* 33 Misc 3d 1219[A]).

We agree with the court's determination denying summary

judgment to defendant. The record raises an issue of fact as to what motivated the recall and whether defendants fulfilled their obligations under section 7, which refers to the stents' discontinued production for any reason. Section 10.7 only applies to discontinued production in connection with a safety recall of the stents.

A contract should be read to give meaning and effect to each of its provisions (*see Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 986-987 [1st Dept 2009]). Thus, defendants' obligations under section 7 cannot apply to stent recalls made as a "remedial action" under 10.7. Otherwise, section 10.7 would be superfluous. Because section 7 governs the stents' discontinuance for any reason, defendants' recalls under section 10.7 must be for the specific reasons identified in section 10.6 and 10.7, so that section 10.7 is not rendered superfluous.

Defendants further contend that the Supreme Court improperly denied that portion of their cross motion seeking summary judgment on the cause of action for breach of contract based on plaintiff's claims that they furnished stents that did not conform with the initial specifications under the supply contract and later materially altered the stents' design, which made them less efficacious. Summary judgment was properly denied because

there are issues of fact and of contract interpretation with regard to defendants' motivation for discontinuing stent production, the stents' conformity with contractual specifications, and the materiality of the changes that defendants made to the stent without plaintiff's knowledge, that must be resolved in order to determine whether defendants breached the contract.

Based on our holding and the Court of Appeals' determination that Biotronik's lost profits constitute direct damages in this case, we remand for a trial on both liability as set forth above and damages as set forth in the Court of Appeals decision.

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

ENTERED: MAY 15, 2014

CLERK

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

11889 Jose Humareda, et al., Index 106409/10
Plaintiffs-Respondents,

-against-

500A East 87th Street, LLC, et al.,
Defendants-Appellants.

_____

Mauro Lilling Naparty LLP, Woodbury (Timothy J. O'Shaughnessy of counsel), for appellants.

Finz & Finz, P.C., Mineola (Stuart L. Finz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 26, 2013, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motion as to defendants 500A East 87th Street, LLC, Garson Holdings, LLC, and Garson Management Company, LLC, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint against said defendants.

Plaintiff Jose Humareda injured his right hand when, in the course of his employment, he inserted a short stick into a malfunctioning trash compactor in an attempt to loosen garbage. Plaintiff's employer, nonparty SMJ Associates LLC, was the net lessee of the premises, which were owned by defendant 500A East 87th Street (500A).

500A demonstrated that as an out-of-possession owner it had no responsibility for the complained-of defect, because the defect was not a significant structural or design defect that was contrary to a specific statutory safety provision (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [1st Dept 2011]; *Velazquez v Tyler Graphics*, 214 AD2d 489 [1st Dept 1995]). In support of his position that the trash compactor is a structural component of the building, plaintiff cited Administrative Code of City of NY § 27-232 (defining "Service Equipment" to include "refuse disposal"). However, that provision is not a safety provision. Plaintiff's argument that as an out-of-possession owner 500A remained liable for any dangerous condition that existed at the time it net leased the building – four years before the accident – is unavailing, since the net lessee "had reasonable time to discover and remedy the defect" after the conveyance of the property interests (*see Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317, 318 [1st Dept 2001]).

In view of the foregoing, defendants Garson Holdings, LLC and Garson Management Company, LLC, as direct and indirect owners of 500A, a limited liability company, cannot be held liable to plaintiff, since there was no showing that they dominate and

control 500A with respect to the matter in issue (*see Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [1st Dept 2005]; Limited Liability Company Law § 609).

The admission by defendants' counsel that S. Garson, LLC had control over the trash compactor and the method of its operation raises an issue of fact whether S. Garson is liable to plaintiff for injuries caused by the malfunctioning trash compactor (*see Morel v Schenker*, 64 AD3d 403 [1st Dept 2009]; *Walsh v Pyramid Co. of Onondaga*, 228 AD2d 259, 260 [1st Dept 1996]; *see also People v Brown*, 98 NY2d 226, 232 n 2 [2002] [an informal judicial admission is "not conclusive on the defendant in the litigation"] [internal quotation marks omitted]). Further, the record suggests some interchangeability or, at the very least, confusion, concerning which entity was responsible for managing the building. For example, when asked who he considered to have been the managing agent of the building at the time of the accident, Staffard Garson, the individual who is the principal of both entities, testified, "My company . . . . Staffard Garson Properties, S. Garson, LLC, my office." Accordingly, it is impossible to conclude, as a matter of law, that the latter was not the managing agent for the building, or for that matter, that it did not exercise control over the property.

Defendants argue that plaintiff's act of inserting his hand

into the trash compactor was a superseding cause of his accident, severing any causal link between their negligence and his injuries. However, since the record shows that plaintiff and other building workers had been using sticks to unclog garbage in the trash compactor for years, we cannot conclude as a matter of law that plaintiff's conduct was unforeseeable (although it raises an issue of comparative negligence) (*see Litts v Best Kingston Gen. Rental*, 7 AD3d 949 [3d Dept 2004]).

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

ENTERED: MAY 15, 2014

CLERK

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

12122 Jeremy Jimenez, an Infant Over the Age of Fourteen Years, by his Legal Guardian, Christine Cruz, et al., Plaintiffs-Respondents,

-against-

The City of New York, Defendant-Appellant.

Index 108416/08

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

Breadbar, Garfield, New York (Martin R. Garfield of counsel), for respondents.

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered December 18, 2012, which, insofar as appealed from as limited by the briefs, denied so much of defendant's motion for summary judgment as sought to dismiss the claim that the playground equipment from which the infant plaintiff fell was inherently dangerous, unanimously affirmed, without costs.

While the notice of claim may not have expressly stated that the flat, circular, spinning playground disc from which the infant fell had a defective design, the complaint alleged that the infant plaintiff's injury was caused by "the dangerous, defective and unsafe condition" posed by the disc, "including *but not limited to* lack of supervision, lack of control, lack of

guidance and lack of instruction" (emphasis added). This was sufficient to place defendant on notice that part of plaintiffs' theory was that the disc itself was defective (*see e.g. Jackson v New York City Tr. Auth.*, 30 AD3d 289, 291 [1st Dept 2006]). In addition, that plaintiffs were alleging that the disc was defective could be inferred from the allegation that the mere presence of excessive speed caused plaintiff to be ejected from it. This contrasts with cases such as *Rodriguez v Board of Educ. of the City of N.Y.*, 107 AD3d 651 [1st Dept 2013], and *Chieffet v New York City Tr. Auth.*, 10 AD3d 526, 527 [1st Dept 2004], where the theories of liability introduced by the plaintiffs were wholly independent of the theories alleged in the notices of claim.

On the merits, defendant failed to satisfy its prima facie burden of establishing its entitlement to summary judgment, because it did not assert that it did not create the unsafe condition by installing an unreasonably dangerous piece of equipment (*see O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). Even if defendant had satisfied its burden, plaintiffs' expert's affidavit created an issue of fact. It is irrelevant that the expert inspected the disc five years after the accident, because the condition on which he opined was

unlikely to have changed in the intervening period of time (*see* *Rhodes v City of New York* (88 AD3d 614 [1st Dept 2011]).

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

ENTERED: MAY 15, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12311 In re Gescard Isnora, Index 103330/12
Petitioner,

-against-

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

_____

Karasyk & Moschella, New York (Philip Karasyk of counsel), for petitioner.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Kathy H. Chang of counsel), for respondents.

_____

Determination of respondent Police Commissioner of the City of New York, dated March 23, 2012, terminating petitioner's employment as a police officer, 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 [Peter H. Moulton, J.], entered February 8, 2013), dismissed, without costs.

Substantial evidence supports the determination that petitioner unnecessarily acted outside his role as an undercover officer and discharged his firearm in violation of department guidelines (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]).

The penalty of termination is not so disproportionate to the

offense as to shock the conscience (*see Matter of Kelly v Safir*, 96 NY2d 32, 39 [2001]).

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

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

ENTERED: MAY 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12489 The People of the State of New York, Respondent, Ind. 7874/98 7877/98

-against-

David Johnson, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lewis Bart Stone, J.), entered on or about October 24, 2011, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of defendant's application. In affirming an order which denied resentencing on defendant's class A-II felony conviction, this Court noted defendant's "role as a leader of an extensive and violent drug trafficking enterprise" (51 AD3d 598 [1st Dept 2008]). The record does not support defendant's argument that the court applied an incorrect standard, allegedly treating defendant's present motion as one for reargument of the denial of resentencing on the A-II felony. The court merely found that the

same factors that warranted denial of defendant's prior motion, i.e., his leadership role in the enterprise, also warranted denial of his present motion, especially given defendant's extensive criminal history and prison disciplinary record (*see e.g. People v Vargas*, 113 AD3d 570 [1st Dept 2014]).

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

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

ENTERED: MAY 15, 2014

CLERK

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

12490 Maria Goodwin, Index 304890/12
Plaintiff-Appellant,

-against-

Western Beef Retail, Inc.,
Defendant-Respondent.

_____

Segal & Lax, P.C., New York (Patrick D. Gatti of counsel), for appellant.

Albert W. Cornachio, P.C., Rye Brook (Christopher R. Block of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about July 18, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleged in her bill of particulars, and testified at her deposition that she was injured when she slipped on an oily substance on the floor of defendant's grocery store. Defendant established prima facie its lack of constructive notice of the alleged dangerous condition with its porter's affidavit stating that he inspected the accident site a half hour prior to plaintiff's fall and that there were no slipping hazards present, together with its manager's deposition testimony concerning

cleaning and mopping routines (*Harrison v New York City Tr. Auth.*, 94 AD3d 512, 514 [1st Dept 2012]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419 [1st Dept 2011]).

Contrary to defendant's contention, plaintiff's supplemental bill of particulars and affidavit in opposition to the summary judgment motion did not raise a new theory of liability concerning the condition of the floor; rather, they merely expanded on the original theory that plaintiff slipped on a foreign substance by alleging that "areas of missing or broken tiles allowed foreign substances to accumulate and remain on the floor." Nevertheless, because plaintiff did not contest defendant's evidence that it inspected for slipping hazards on the premises one-half hour before the accident but did not find any, she failed to raise a triable issue of fact (*see Kesselman v Lever House Rest.*, 29 AD3d 302, 303-304 [1st Dept 2006]).

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 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12491 Walter Pantovic, Index 117471/08
Plaintiff-Appellant, 590807/09

-against-

YL Realty, Inc.,
Defendant,

Sprint Communications Company L.P.,
Defendant-Respondent.

- - - - -

Sprint Communications Company L.P.,
Third-Party Plaintiff,

-against-

Penmark Realty Corporation,
Third-Party Defendant-Respondent.

_____

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

Haworth Coleman & Gerstman, LLC, New York (Scott Haworth of counsel), for Sprint Communications Company L.P., respondent.

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for Penmark Realty Corporation, respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered August 2, 2012, which, to the extent appealed from as limited by the briefs, granted the motion of defendant Sprint Communications Company L.P. (Sprint) for summary judgment on plaintiff's claims pursuant to Labor Law §§ 240(1) and 200, sua sponte dismissed plaintiff's common law claims and claims pursuant to OSHA against Sprint, and sua sponte dismissed

plaintiff's complaint against YL Realty, Inc., unanimously affirmed, without costs.

Plaintiff's Labor Law § 240(1) claim was properly dismissed. Plaintiff, a superintendent, was injured when he fell off a ladder while feeding a portable AC exhaust tube into a pre-existing duct hole. The work being performed by plaintiff does not qualify as an "alteration" pursuant to the statute (*see Labor Law* § 240[1]; *see e.g. Amendola v Rheedlen 125th St., LLC*, 105 AD3d 426 [1st Dept 2013]). In any event, liability against defendant Sprint, a lessee of space at the building where plaintiff was employed, cannot be predicated on Labor Law § 240(1), since it did not contract for the work or have any right to control it (*see Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316 [1st Dept 2009]).

Plaintiff's claim pursuant to Labor Law § 200 was also properly dismissed since the alleged defect, excessive heat from Sprint's equipment, merely furnished the need for a personal air conditioning unit, it did not cause plaintiff's accident (*see Escalet v New York City Hous. Auth., 56 AD3d 257* [1st Dept 2008]).

The motion court properly dismissed plaintiff's common law cause of action against Sprint since it implicated the same

issues as his Labor Law § 200 claim (*see Hunter v R.J.L. Dev., LLC*, 44 AD3d 822, 825 [2d Dept 2007]). Plaintiff's OSHA claims were also properly dismissed since OSHA provides no private right of action (*see Donovan v Occupational Safety & Health Review Commn.*, 713 F2d 918, 926 [2d Cir 1983]; *see also Khan v Bangla Motor & Body Shop, Inc.*, 27 AD3d 526, 528-529 [2d Dept 2006], *lv dismissed* 7 NY3d 864 [2006]; *Gain v Eastern Reinforcing Serv.*, 193 AD2d 255, 258 [3d Dept 1993]).

Although the court erred in sua sponte dismissing plaintiff's complaint against YL Realty, since issue had not yet been joined as to that defendant (CPLR 3212[a]; *see Pilatich v Town of New Baltimore*, 100 AD3d 1248, 1249 [3d Dept 2012]), upon a search of the record, we dismiss the complaint against YL Realty pursuant to CPLR 3215(c) on the ground that it has been abandoned.

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

ENTERED: MAY 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12492 The People of the State of New York, Ind. 3665/10
Respondent,

-against-

Jose Santiago,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John S. Moore, J.), rendered on or about October 25, 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 15, 2014

CLERK

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

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12493-
12494 Index 152536/12

Kenechukwu C. Okoli,
Plaintiff-Appellant,

-against-

Paul Hastings LLP, et al.,
Defendants-Respondents.

_____

Law Offices of Nicholas A. Penkovsky, PC, New York (Nicholas A. Penkovsky of counsel), for appellant.

Paul Hastings LLP, New York (Carla R. Walworth of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia Kern, J.), entered September 19, 2012, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs; order, same court and Justice, entered December 14, 2012, which, to the extent appealed from, denied plaintiff's motion for leave to file an amended complaint and to modify the prior order, unanimously affirmed, with costs.

The court properly dismissed the slander per se claim because the alleged defamatory statements were made during a judicial proceeding and may be considered pertinent to that proceeding (*see Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 171-172 [1st Dept 2007]).

The court properly dismissed the claim for civil assault.

The physical conduct alleged by plaintiff, which amounts to finger pointing and generalized yelling in the context of a heated deposition, is inappropriate behavior, not to be condoned, but, without more, is not the type of menacing conduct that may give rise to a reasonable apprehension of imminent harmful conduct needed to state an actionable claim of assault (*see Holtz v Wildenstein & Co.*, 261 AD2d 336 [1st Dept 1999]).

Plaintiff's motion to modify the order and for leave to serve an amended complaint was properly denied since the proposed pleading contained no new allegations to sustain the dismissed causes of action.

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

ENTERED: MAY 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12495 George McDonald, et al., Index 100038/13
Plaintiffs-Appellants,

-against-

New York City Campaign
Finance Board, et al.,
Defendants-Respondents.

_____

Genova Burns Giantomasi Webster LLC, New York (Laurence D. Laufer of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered on or about May 3, 2013, which denied plaintiffs' motion for a declaration that Administrative Code of City of NY § 3-719(2)(b) is preempted by State Election Law article 14, and an injunction against enforcement of the local law provision, and granted defendants' motion to dismiss the complaint, unanimously modified, on the law, to deny defendants' motion, and to declare that Administrative Code § 3-719(2)(b) is not preempted by Election Law article 14, and otherwise affirmed, without costs.

A local law is preempted by state law where either there is a direct conflict or inconsistency between the two laws or the

Legislature has evinced an intent to occupy the field (*Albany Area Bldrs. Assn. v Town of Guilderland*, 74 NY2d 372, 377 [1989]; *Consolidated Edison Co. of N.Y. v Town of Red Hook*, 60 NY2d 99, 107-108 [1983]). We do not find that the Legislature evinced an intent to occupy the field of campaign contribution limits simply by stating, in Election Law § 14-114, that the limits set forth therein "apply to all contributions to candidates for election to any public office or for nomination for any such office, or for election to any party positions, and to all contributions to political committees working . . . with any candidate." This statement only evinces the Legislature's intent to include all such candidates within the law's reach. It is not evident that additional, not inconsistent, legislation regarding contributions is precluded.

Nor do we see any inconsistency in campaign contribution limits between Election Law § 14-114 and the New York City Campaign Finance Act (Administrative Code of City of NY § 3-703[1][f], [1][l]; [1-a]; § 3-719[2][b]). In light of the Election Law's purpose of bolstering public confidence in the

election process by *restricting* contributions, the City Campaign Finance Act's more restrictive contribution and source limits within the maximum set by Election Law § 14-114 are not inconsistent with any legislative objective of the Election Law.

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

ENTERED: MAY 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12496 The Estate of Benjamin Feder, etc., Plaintiff-Appellant, Index 152726/12

-against-

Winne, Banta, Hetherington, Basralian & Kahn, P.C., Defendant-Respondent.

_____

Schwartz, Levine & Kaplan, PLLC, New York (Bianca N. Nicoletti of counsel), for appellant.

Hinshaw & Culbertson, LLP, New York (Joseph Silver of counsel), for respondent.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered March 13, 2013, which granted defendant's motion to dismiss the complaint alleging legal malpractice and breach of fiduciary duty, unanimously affirmed, without costs.

The motion court properly considered the email and correspondence from defendant to plaintiff, as executor of the estate, in dismissing the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) (*David v Hack*, 97 AD3d 437, 438 [1st Dept 2012]; *see also Eighth Ave. Garage Corp. v Kaye Scholer LLP*, 93 AD3d 611, 612 [1st Dept 2012], *lv denied* 19 NY3d 807 [2012]; *Robinson v Robinson*, 303 AD2d 234, 235-236 [1st Dept 2003]).

The motion court properly dismissed the legal malpractice

claim. Plaintiff, the wife of decedent, failed to adequately allege that defendant acted negligently in advising her to pay the estate tax out of decedent's estate, rather than making a qualified terminable interest property (QTIP) election (*see* IRC § 2056[b][7]). Such a QTIP election would have deferred payment of any estate taxes until plaintiff's death, at which time they would be paid out of her estate. Defendant explained that while a QTIP election might have resulted in an immediate tax savings during plaintiff's lifetime, it could have left significantly less to the residuary beneficiaries of decedent's estate. Defendant's legal obligation was to the estate, not to plaintiff. Thus, as the motion court concluded, defendant selected one among several reasonable courses of action (*see Rosner v Paley*, 65 NY2d 736, 738 [1985]; *Rodriguez v Lipsig, Shapey, Manus & Moverman, P.C.*, 81 AD3d 551, 552 [1st Dept 2011]). Indeed, another firm with whom plaintiff consulted stated that defendant's analysis was correct. To the extent plaintiff argues that defendant failed to consider other alternatives, such as gifts or other trusts, those options would have contradicted the decedent's apparent testamentary intent to retain control and distribute the remainder of his assets to his children upon plaintiff's death.

The court also correctly concluded that plaintiff failed to adequately allege that defendant's conduct proximately caused any

ascertainable damages. Plaintiff's damages claim was based largely on speculation that the estate tax payment could have been avoided in the future, which, as plaintiff itself acknowledged in her motion papers, depended on too many uncertainties, including future tax laws, tax rates, and the future value of the trust property (*see e.g. Brooks v Lewin*, 21 AD3d 731, 734-735 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]).

The court properly dismissed the breach of fiduciary duty claim, as plaintiff failed to adequately allege that defendant's conduct caused any ascertainable damages (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271-272 [1st Dept 2004]).

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

ENTERED: MAY 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12497 Uptown Healthcare Management Inc., doing business as East Tremont Medical Center, et al., Plaintiffs-Appellants, Index 306322/11

-against-

Allstate Insurance Company, Defendant,

Robert P. Macchia, et al., Defendants-Respondents.

_____

Blodnick Fazio & Associates, P.C., Garden City (Edward K. Blodnick of counsel), for appellants.

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 24, 2012, which granted the motions of defendants Allstate Insurance Company, Robert P. Macchia, and Mehmet F. Gokce to dismiss the complaint, and denied plaintiffs' cross motion for summary judgment, unanimously affirmed, with costs.

Where an amended pleading is submitted in response to a pre-answer motion to dismiss, the provident course of action for the motion court is to include the amended complaint in the record on the pending motion, which should then be granted or denied based

on the sufficiency of the amended pleading (*see e.g. Polish Am. Immigration Relief Comm. v Relax*, 172 AD2d 374, 375 [1st Dept 1991]; *see also* Weinstein-Korn-Miller, NY Civ Prac ¶ 3025.7 [2d ed 2011]).

Here, the amended complaint, like the original complaint, was insufficient to state a cause of action upon which relief could be granted. Plaintiffs asserted that defendant Allstate had no right to investigate whether they were fraudulently licensed under Public Health Law article 28 and therefore ineligible to receive no-fault reimbursements. Allstate plainly has that right (*see e.g. State Farm Mut. Auto. Ins. Co. v Mallela*, 4 NY3d 313 [2005]; *One Beacon Ins. Group, LLC v Midland Med. Care, P.C.*, 54 AD3d 738, 740 [2nd Dept 2008]). Plaintiffs also attempted to assert causes of action against Allstate's counsel, defendants Robert P. Macchia and Mehmet P. Gokce for undertaking a legitimate investigation at Allstate's behest. It

is well settled that no such cause of action lies (*Hahn v Wylie*, 54 AD2d 629, 629 [1st Dept 1976]).

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

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

ENTERED: MAY 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12498 In re Asia Sabrina N.,

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

Olu N.,
Respondent-Appellant,

Catholic Guardian Society
and Home Bureau,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), attorney for the child.

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about July 10, 2013, which terminated respondent father's parental rights to the subject child after a fact-finding determination of abandonment, and committed the child's custody and guardianship to petitioner agency and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

Petitioner established by clear and convincing evidence that respondent abandoned his daughter, within the meaning of Social Services Law § 384-b(5)(a). Respondent admitted that, during the

statutorily relevant period, he did not attempt to contact his daughter or the agency (*see Matter of Christie A.M.*, 57 AD3d 225, 226 [1st Dept 2008]). Respondent's incarceration does not excuse him from establishing and maintaining contact with his daughter, because he failed to show that contact with the child was not feasible (*see Matter of Alicia M.*, 22 AD3d 384, 385 [1st Dept 2005]).

Contrary to respondent's contention, the agency was not required to prove diligent efforts, because it proceeded on the ground of abandonment (*see Matter of Bibianamiet L.-M. [Miledy L.N.]*, 71 AD3d 402, 403 [1st Dept 2010]). Moreover, the Family Court providently exercised its discretion in denying respondent's request for a dispositional hearing after the finding of abandonment (*see Matter of Keyevon Justice P. [Lativia Denice P.]*, 90 AD3d 477 [1st Dept 2011]).

Respondent failed to sustain his burden of demonstrating that he was denied meaningful representation and that the deficient representation resulted in actual prejudice (*see Matter of Michael C.*, 82 AD3d 1651, 1652 [4th Dept 2011], *lv denied* 17 NY3d 704 [2011]). Given respondent's admission that he had no contact with the subject child or the agency during the relevant time period, he could not have been prejudiced by any failing on the

part of his trial counsel (*see Matter of Cassandra Tammy S.* [*Babbah S.*], 89 AD3d 540, 541 [1st Dept 2011]).

The court properly determined that the termination of respondent's parental rights to allow for adoption was in the best interests of the child.

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

ENTERED: MAY 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12499 The People of the State of New York, Respondent, Ind. 5687/11

-against-

Nicole Phillips, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered May 10, 2012, convicting defendant, upon her plea of guilty, of attempted assault in the first degree, and sentencing her to a term of eight years, unanimously modified, on the law, to the extent of amending the sentence and commitment sheet to reflect that defendant was convicted of attempted assault in the first degree rather than assault in the first degree, and otherwise affirmed.

Regardless of whether defendant validly waived her right to appeal, we perceive no basis for reducing the sentence.

The People concede that the sentence and commitment sheet should be amended to the extent indicated in order to correct a clerical error.

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

ENTERED: MAY 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12500-
12500A Frederick B. Whittemore,
Plaintiff-Respondent,

-against-

Edwin H. Yeo, III,
Defendant-Appellant,

Endurance Capital Management
Company, L.P., et al.,
Defendants.

Index 600742/10

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Olga L. Fuentes-Skinner of counsel), for appellant.

Bushell, Sovak, Ozer & Gulmi, LLP, New York (Christopher J. Sovak of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered April 4, 2013, awarding plaintiff the total sum of $11,900,345.18 as against defendant Edwin H. Yeo, III (defendant) on his fraudulent inducement cause of action, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered December 20, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff established a prima facie fraud claim in support of the default judgment. Although his complaint was not verified by him, a review of the record shows that the affidavit he submitted on his motion for a default judgment provided "first

hand confirmation" of the facts alleged (*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]; *see Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]; *Mullins v DiLorenzo*, 199 AD2d 218, 219-220 [1st Dept 1993]), which sufficiently states a claim for fraudulent inducement (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Defendant's contention that plaintiff could not claim justifiable reliance as a sophisticated investor who could have conducted due diligence is unavailing. As this Court has previously noted in this matter, plaintiff "was not precluded from reasonably relying on defendants' misrepresentations in light of the alleged failure to disclose certain diversions and defendants' failure to provide requested information regarding the allocation of plaintiff's investment in the limited partnership" (99 AD3d 496, 497 [1st Dept 2012]). To the extent defendant contends that the evidence presented during inquest showed no misrepresentation made by him, by defaulting, he is deemed to have admitted all traversable allegations in the complaint and "will not be allowed to introduce evidence tending to defeat the plaintiff's cause of action" during inquest (*Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]; *Conteh v Hand*, 234 AD2d 96 [1st Dept 1996]).

Plaintiff also established a sum certain on damages owed by showing "out-of-pocket" losses in the amount awarded as a result

of defendant's conduct (*see Lama Holding Co.*, 88 NY2d at 421). Defendant's contention that some of plaintiff's capital contributions had in fact been used for legitimate business purposes overlooks that fact that plaintiff made all his contributions in reliance on defendant's misrepresentations and that any use of the funds was a part of the overall fraud scheme. As plaintiff had no knowledge of defendant's diversion of funds, he could not have mitigated damages (*see LaSalle Bank N.A. v Nomura Asset Capital Corp.*, 47 AD3d 103, 108-109 [1st Dept 2007]). The court properly awarded prejudgment interest (CPLR 5001[a]), as defendant had the advantage of using the money that plaintiff was fraudulently induced to contribute (*Manufacturer's & Traders Trust Co. v Reliance Ins. Co.*, 8 NY3d 583, 589 [2007]) and plaintiff was deprived of his use thereof (*J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 117-118 [2012]).

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

ENTERED: MAY 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12501 Ajet Delaj, et al., Index 302593/10
Plaintiffs-Appellants,

-against-

Bronx Park East Housing, Inc.,
Defendant-Respondent.

_____

The Price Law Firm, LLC, New York (Joshua C. Price of counsel), for appellants.

Matthew D. Kasper, White Plains, for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about July 15, 2013, which, insofar as appealed from, denied plaintiffs' motion for treble damages upon the finding of a rent overcharge, unanimously reversed, on the law, without costs, the motion granted, and the case remanded for the imposition of treble damages.

Defendant made no effort to rebut the presumption of wilfulness arising from the finding that it overcharged plaintiffs for rent during the 30 months ending July 31, 2012 (*see* Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-516[a]; *see e.g. Matter of 10th St. Assoc., LLC v New York State Div. of Hous. & Community Renewal*, 110 AD3d 605, 605 [1st Dept 2013]). Indeed, defendant did not deny that it

continued to overcharge plaintiffs after a prior court order had determined the correct legal rent.

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

ENTERED: MAY 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12502 Allstate Insurance Company, et al., Plaintiffs-Respondents, Index 651840/11

-against-

Morgan Stanley, et al., Defendants-Appellants.

_____

Davis Polk & Wardwell LLP, New York (James P. Rouhandeh of counsel), for appellants.

Bernstein Litowitz Berger & Grossmann LLP, New York (Timothy A. DeLange of the bar of the State of California, admitted pro hac vice, and Rebecca E. Boon, of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered March 15, 2013, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the first, second and third causes of action, unanimously affirmed, with costs.

As the parties agree, the applicable statute of limitations for plaintiffs' claims is determined by the law of Illinois, where the claims arose (CPLR 202; *Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525 [1999]). While no Illinois court has ruled on the issue, we agree with the IAS court that the better reading of the tolling provisions of 815 ILCS 5/13(D) is that § (2) requires *actual notice* of facts to trigger a duty to inquire as to the

existence of an alleged violation (*see Putnam Bank v Countrywide Fin. Corp. [In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.]*, 860 F Supp 2d 1062, 1076 [CD Cal 2012]). Applying this standard, it cannot be said as a matter of law that plaintiffs had *actual knowledge* sufficient to end the tolling of the limitations period, prior to 2008 (three years before the commencement of this action). Defendants' argument that the general collapse of the residential mortgage-backed securities market bars plaintiffs from proving loss causation is not ripe for determination at the pleading stage (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 296 [1st Dept 2011]).

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

ENTERED: MAY 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12503 The People of the State of New York, Respondent, Ind. 4580/12

-against-

Timothy Minnerly, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered on or about January 2, 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 [1st Dept 1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

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

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

ENTERED: MAY 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12504 Thomas Barr, IV, Index 400755/11
Plaintiff-Appellant,

-against-

Lydia Denton,
Defendant-Respondent.

_____

Thomas Barr, IV, Sag Harbor, appellant pro se.

Peter F. Edelman, New York, for respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered February 14, 2013, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

Supreme Court properly concluded that plaintiff's breach of contract claim was barred by the doctrine of res judicata. Plaintiff could have raised this claim in the prior litigation in which he sought to terminate his child support obligations (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]; *see also O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

The court also correctly found the claim to be barred by the applicable six-year statute of limitations (CPLR 213[2]), and not viable based upon the documentary evidence. Specifically, this action was commenced in 2010 and plaintiff's allegations of breach prior to 2004 are not timely. Nor are his allegations of

breach post 2007 viable, as the parties' son turned 21 in that year, and it is reasonably inferred that the parties' intent was that the defendant's obligations in the stipulation of settlement concerning informing and consulting plaintiff about their son terminated, at the latest, at that time. Furthermore, during the majority of the interim years (2004-2007), plaintiff was prohibited from contacting or communicating with defendant and his son, and he failed to set forth any specific allegations as to the window of time in which contact was permitted.

The court also properly determined that plaintiff's claim for counsel fees pursuant to a 2007 order issued in the Family Court proceeding between the parties was not viable based on subsequent orders in that proceeding, including from this Court (*see* 69 AD3d 24 [1st Dept 2009]).

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 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12505 UBS Securities LLC, Index 650062/11
Plaintiff-Respondent,

-against-

Angioblast Systems, Inc.,
Defendant-Appellant.

[And Another Action]

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Eileen Bransten, J.), entered on or about March 18, 2013,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated April 18, 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 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12506 The People of the State of New York, Ind. 6365/10
Respondent,

-against-

Tremaine Thomason-Rose,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered October 11, 2011, convicting defendant, upon his plea of guilty, of three counts of robbery in the second degree, and sentencing him to concurrent terms of 3½ years, unanimously affirmed.

The determination of youthful offender status is a matter of discretion (*People v Drayton*, 39 NY2d 580, 584 [1976]). Here, the record demonstrates that the court fully considered all of the mitigating factors set forth in a pre-pleading memorandum and denied defense counsel's request to adjudicate defendant a youthful offender. We discern no reason to disturb the court's exercise of its discretion in denying youthful offender treatment for two separate incidents, involving three different victims. In the first robbery, defendant and his co-defendant followed an

elderly couple onto an elevator, and proceeded to repeatedly punch both victims in the face, causing them both to suffer extensive bruising, before stealing the husband's cell phone and wallet and the wife's purse. In the second robbery, just three hours later, the victim was kicked and punched, and sustained a puncture wound in his back, cuts to his arms and bruises, before his wallet and cell phone were stolen. The police recovered a folding knife and a razor blade at the scene. We note that defendant proceeded with this extensively negotiated plea bargain, even after being made aware that he would not be sentenced as a youthful offender (*see People v Xue*, 30 AD 3d 166 [1st Dept 2006]). Nor do we find the imposition of a five year period of post-release supervision to be excessive.

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

ENTERED: MAY 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12507N Armani Williams, an Infant by his Mother and Natural Guardian, Tamiko Gordon, et al., Plaintiffs-Appellants, Index 23244/12E

-against-

Karen Robinson, et al., Defendants,

1815 Morris Realty Corp., Defendant-Respondent.

_____

C. Robinson & Associates, LLC, New York (W. Charles Robinson of counsel), for appellants.

Gambeski & Frum, Elmsford (H. Malcolm Stewart of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered on or about November 18, 2013, which granted the motion of defendant 1815 Morris Realty Corp. (Morris Realty) to vacate its default, permitted it to file a late answer, and directed plaintiff to accept service upon Morris Realty's payment of any costs, unanimously reversed, on the law, without costs, and the motion denied.

In this action seeking to recover damages for injuries caused by a dog bite, the building owner Morris Realty does not deny having received service of the summons and complaint, and of plaintiffs' subsequent motion for entry of a default judgment.

Approximately six months after being served with two notices of entry of an order granting the default motion, Morris Realty moved to vacate its default and for leave to file a late answer. However, the assertion by Morris Realty's manager that he forwarded the summons and complaint to the insurance broker at an unspecified time and manner, and to an unidentified person, is insufficient to constitute a reasonable excuse for Morris Realty's defaults in answering the complaint and in responding to plaintiffs' motion for entry of a default judgment (*see Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789 [1st Dept 2012]; *Sanchez v Avuben Realty LLC*, 78 AD3d 589 [1st Dept 2010]).

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

ENTERED: MAY 15, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12508N- File 3314/02
12508NA- 3668/05B
12508NB In re the Estate of Godwin Ajala, 3669/05A
Deceased. 3670/05A

- - - - -

In re the Former Guardianship of
Uchechukwu A., et al.,
Infants,

Sebastian Ibezim, Esq., et al.,
Petitioners-Appellants,

-against-

Victoria Ajala,
Respondent-Respondent.

_____

Nnebe & Associates, P.C., Brooklyn (O. Valentine Nnebe of counsel), for appellants.

LePatner & Associates, LLP, New York (Harry J. Petchesky of counsel), for respondent.

_____

Orders, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about September 19, 2012, which denied the petitions of Sebastian Ibezim, Jr., Esq. and Okechukwu Valentine Nnebe, Esq. (appellants) for attorneys' fees and expenses pursuant to Surrogate's Court Procedure Act § 2110, unanimously affirmed, without costs, and without prejudice to bringing a future petition if Surrogate's Court decides that Victoria Ajala is not a distributee.

It was not an improvident exercise of the Surrogate's

discretion (*see Matter of Hyde*, 15 NY3d 179, 186 n 5 [2010]) to deny the subject petitions. An award of counsel fees and expenses is "dependent upon a finding that [counsel's] services were necessary and beneficial to the estate" (*Matter of Hofmann*, 284 AD2d 92, 95 [1st Dept 2001]). It is true that "benefit is not limited solely to a monetary increase in the estate value. For example, establishing the kinship of distributees of the decedent has been considered a benefit to the estate" (*Matter of Poletto*, 31 Misc 3d 1206[A], 2011 NY Slip Op 50504[U], *4 [Sur Ct, Monroe County 2011]). However, up to this point, the Surrogate's Court has made no order establishing whether or not Victoria Ajala is a distributee. Accordingly, appellants' arguments about whether comity should be accorded the Nigerian court decisions about Victoria's marriage to decedent are premature.

In light of our finding that appellants have not established

that their services benefited the estate, it is unnecessary to consider their contention that their client did not act in bad faith.

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

ENTERED: MAY 15, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Andrias, Saxe, JJ.

11927 National Union Fire Insurance Company of Pittsburgh, PA, Plaintiff-Respondent, Index 651954/11

-against-

Turner Construction Company, et al., Defendants-Appellants,

GSJC 30 Hudson Urban Renewal, LLC, Defendant.

_____

Saxe Doernberger & Vita, P.C., New York (Edwin L. Doernberger of counsel), for Turner Construction Company, appellant.

Saxe Doernberger & Vita, P.C., New York (Jeffrey J. Vita of counsel), for Permasteelisa North America Corporation, appellant.

Lindabury, McCormick Estabrook & Cooper, PC, New York (Jay Lavroff of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 19, 2012, modified, on the law, to vacate the direction to reimburse plaintiff its defense costs, and otherwise affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
David Friedman
Richard T. Andrias
David B. Saxe, JJ.

11927
Index 651954/11

_____x

National Union Fire Insurance
Company of Pittsburgh, PA,
Plaintiff-Respondent,

-against-

Turner Construction Company,
et al.,
Defendants-Appellants,

GSJC 30 Hudson Urban Renewal, LLC,
Defendant.

_____x

Defendants Turner Construction Company and Permasteelisa North America Corporation appeal from the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 19, 2012, which granted plaintiff's motion for summary judgment declaring that it has no duty to defend or indemnify them in the underlying action, and directed them to reimburse plaintiff the defense fees and costs it paid in that action.

Saxe Doernberger & Vita, P.C., New York (Edwin L. Doernberger of counsel), for Turner Construction Company, appellant.

Saxe Doernberger & Vita, P.C., New York (Jeffrey J. Vita of counsel), for Permasteelisa North America Corporation, appellant.

Lindabury, McCormick Estabrook & Cooper, PC, New York (Jay Lavroff, Steven Bakfisch, Jeffrey R. Merlino and Scott D. Zucker of counsel), for respondent.

SAXE, J.

This declaratory judgment action involving insurance coverage arises out of an underlying action brought by a building owner against its contractors after a piece of the exterior wall of its 42-story office building under construction in Jersey City fell to the street from the eighth-story level.

Defendant GSJC 30 Hudson Urban Renewal, LLC (GSJC) is the owner of the Jersey City property. GSJC retained defendant Turner Construction to serve as general contractor for a construction project on the property, and Turner subcontracted with defendant Permasteelisa North America Corporation to design and build the exterior wall, known as the "curtain wall," which consisted of granite and glass, with an attached network of decorative horizontal and vertical pipe rails.

On January 25, 2010, a segment of the pipe rail system fell to the street from the eighth floor of the building. The outside consultant hired by GSJC to investigate and inspect the curtain wall determined that more than 20% of the pipe rail connections surveyed did not conform to the building plans. It reported additional problems: inconsistencies in the method of rail attachment; loose shear block connections; missing, sheared, or otherwise variably-sized screws; cracked or deformed shear block screw chases; an inability of some rails to accommodate thermal

and building movements; bent brackets on the pipe rail system; cracked glass louvers; cracked glass panels; and water infiltration.

GSJC sued Turner and Permasteelisa in New Jersey Superior Court for breach of contract, breach of warranty, and negligence, based on allegations of "defects in the design, fabrication and/or installation of components of the Pipe-Rail Network," which was responsible for the damage to the building façade and the continuing danger that the remainder of the pipe rail system would fall to the street.

The project was insured by plaintiff, National Union Fire Insurance Company of Pittsburgh, PA, through an Owner Controlled Insurance Program (OCIP), under which the construction project owner procures insurance on behalf of all parties performing work on the project or site. The insurance covered the owner, GSJC, the general contractor, Turner, and on-site project subcontractors, including Permasteelisa. Under the OCIP, National Union issued commercial general liability insurance policies and an umbrella policy (referred to hereafter collectively as the policy).

The policy, as amended by an endorsement, defines "[o]ccurrence" as "an accident, event, or happening, including continuous or repeated exposure to substantially the same general

harmful conditions." The policy contains various exclusions, including one for professional services, also known as a professional liability exclusion.

Turner and Permasteelisa tendered notice of the underlying action to National Union, which agreed to provide a defense, subject to a reservation of rights, based on several policy provisions that could preclude or limit insurance coverage, including the fact that the policy provides coverage only for property damage caused by an "occurrence" and that the claim of defective design and workmanship does not constitute "property damage."

National Union commenced this action for a judgment declaring that the policy did not cover the underlying claims against Turner and Permasteelisa, and for reimbursement of defense costs paid on Turner's and Permasteelisa's behalf. It then moved for summary judgment declaring that there was no coverage as a matter of law, because (1) GSJC's claims did not constitute "property damage" or an "occurrence" within the meaning of the policy; (2) the CGL policy did not cover the claims for breach of contract, breach of warranty, or breach of fiduciary duty; (3) Turner and Permasteelisa had breached the notice provision of the policy; and (4) there was no coverage for defective design-related claims because of the professional

liability exclusion.

In opposition, Permasteelisa and Turner argued that the parties had negotiated an "expanded" version of the definition of "occurrence," and that, based on dictionary definitions of the terms "event" and "happening," the subject loss should be covered.

The motion court held that the policy did not cover GSJC's claims against Turner and Permasteelisa, granted the requested declaration, and directed that National Union be reimbursed the costs and fees it paid for its defense of Turner and Permasteelisa in the underlying action.

Discussion

Initially, it is undisputed that the law of New Jersey governs this action, which turns on insurance policy interpretation, and that New Jersey and New York law are consistent as to the issues in dispute here.

Under both New York and New Jersey law, construction defects such as those asserted in the underlying action – faulty design, fabrication or installation – do not constitute "occurrences" under a commercial general liability insurance policy (*see Firemen's Ins. Co. of Newark v National Union Fire Ins. Co.*, 387 NJ Super 434, 445, 904 A2d 754, 760 [NJ App Div 2006]; *George A. Fuller Co. v United States Fid. & Guar. Co.*, 200 AD2d 255, 260-

261 [1st Dept 1994], *lv denied* 84 NY2d 806 [1994]). The general rule is that a commercial general liability insurance policy does not afford coverage for breach of contract, breach of fiduciary duty, or breach of warranty, but rather for bodily injury and property damage (*see Grand Cove II Condominium Assn., Inc. v Ginsberg*, 291 NJ Super 58, 72, 676 A2d 1123, 1130 [NJ App Div 1996]; *Fuller*, 200 AD2d at 259-260).

Under New Jersey law, commercial liability insurance does not provide coverage for faulty workmanship that results in damage to the insured's work; a commercial general liability policy "does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident" (*Weedo v Stone-E-Brick, Inc.*, 81 NJ 233, 249, 405 A2d 788, 796 [1979]). "While *Weedo* addressed 'business risk' in the context of whether certain exclusions applied, the *Weedo* principle has been extended to the threshold issue of whether the risk was within the scope of the standard insurance clause" (*Firemen's Ins. Co.*, 387 NJ Super at 443, 904 A2d at 759).

There is no "occurrence" under a commercial general liability policy where faulty construction only damages the insured's own work (*see Pennsylvania Gen. Ins. Co. v Menk Corp.*, 2011 WL 5864109, *4-5 [D NJ Nov. 21, 2011]), and faulty workmanship by subcontractors hired by the insured does not

constitute covered property damage caused by an "occurrence" for purposes of coverage under commercial liability insurance policies issued to the general contractor, since the entire project is the general contractor's work (*see Firemen's Ins. Co.*, 387 NJ Super at 446, 449, 904 A2d at 760-761, 762-763). In *Baker Residential v Travelers Ins. Co.* (10 AD3d 586, 587 [1st Dept 2004]), where a developer delivered and installed defective structural beams that deteriorated from water penetration due to improper installation, flashing and waterproofing, this Court held that the damages sought by the developer did not arise from an "occurrence" resulting in damage to third-party property distinct from the developers' own "work product." And in *Direct Travel v Aetna Cas. & Sur. Co.*, 214 AD2d 484, 485 [1st Dept 1995]), this Court explained that "[s]ince the claims asserted in the underlying action were for economic loss resulting from the plaintiff's purported breach of contract, coverage was also properly disclaimed under the umbrella policy which covered only 'damages because of 'bodily injury' [or] 'property damage' . . . [c]aused by an 'occurrence'" (*see also Pavarini Constr. Co. v Continental Ins. Co.*, 304 AD2d 501, 502 [1st Dept 2003]).

Despite the foregoing settled case law, Turner and Permasteelisa argue that with the expansion of the definition of "occurrence" to include "an accident, event, or happening," the

policy covers GSJC's claims against them, or, at least, that the amended definition of "occurrence" in the policy is ambiguous. We disagree, and hold that the motion court was correct in concluding that the negotiated amendment of the definition of "occurrence" in the subject commercial liability policies to include the words "event, or happening" along with the word "accident" did not expand the definition so as to encompass faulty workmanship.

"[T]he requirement of a fortuitous loss is a necessary element of insurance policies based on either an 'accident' or 'occurrence'" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 220 [2002]; Insurance Law § 1101[a][1]; *see also Victory Peach Group, Inc. v Greater New York Mut. Ins. Co.*, 310 NJ Super 82, 87, 707 A2d 1383, 1385 [1998]). As the motion court recognized, the addition of "event" or "happening" to the definition of "occurrence" did not alter the legal requirement that the "occurrence" triggering the coverage must be fortuitous. "[T]he requirement of a fortuitous loss is a necessary element of insurance policies based on either an 'accident' or 'occurrence'" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 220 [2002]; *see also Victory Peach Group, Inc. v Greater New York Mutual Ins. Co.*, 310 NJ Super 81, 87, 707 A2d 1383, 1385 n1 [NJ App Div 1998]). "[A] claim for faulty workmanship, in and of

itself, is not an occurrence under a commercial general liability policy because a failure of workmanship does not involve the fortuity required to constitute an accident" (9A Couch On Insurance § 129:4 [3d ed 2008]; *Pennsylvania Natl. Mut. Cas. Ins. Co. v Parkshore Dev. Corp.*, 2008 US Dist LEXIS 71318, 2008 WL 4276917, at *4 [D NJ 2008], *affd* 403 Fed Appx 770 [3d Cir 2010]).

In *Uniroyal, Inc. v Home Ins. Co.* (707 F Supp 1368, 1381 [ED NY 1988]), the United States District Court for the Eastern District of New York explained that a definition of "occurrence" that includes a "happening" or "event" as well as an "accident" was developed by the insurance industry "to provide clearly for coverage of gradual, continuous, and prolonged events that might have been excluded by the instantaneous connotation of 'accident.'" Thus, the addition of "happening" or "event" to the definition of "occurrence" does not change the fact that fortuity is still an essential consideration under New Jersey and New York law when determining whether there is coverage under such a policy, and a claim for faulty workmanship simply does not involve fortuity.

We decline defendants' suggestion that instead of applying the foregoing New Jersey and New York case law, we apply the reasoning adopted in other jurisdictions under which faulty work may be treated as an "occurrence." Adopting the definition of

"occurrence" propounded by Turner and Permasteelisa to cover the breach of contract and poor workmanship claims against them would essentially transform National Union's policy into a surety or performance bond. That is not the nature of the coverage GSJC obtained.

We therefore affirm the grant of summary judgment declaring that National Union is not obligated to defend or indemnify Turner and Permasteelisa in the underlying action.

Having granted summary judgment on the coverage issue, the motion court also, without discussion, directed that National Union be reimbursed the cost of defending these claims, which additional relief, although asked for in National Union's complaint, was not mentioned in its motion.

New Jersey law permits reimbursement of costs incurred in defending claims that are later determined not to be covered. Where "an insurer, having honored its duty to defend, sought reimbursement from an insured for those fees incurred in defending uncovered claims, . . . the right of reimbursement exists because the insured would be unjustly enriched in benefitting by, without paying for, the defense of a non-covered claim" (*see Hebela v Healthcare Ins. Co.*, 370 NJ Super 260, 279, 851 A2d 75, 86 [NJ App Div 2004], citing *Buss v Superior Court*, 16 Cal 4th 35, 939 P2d 766, 776-778 [1997]).

However, an insurer's entitlement to recoup its defense costs from its insured must not contravene the terms of the policy, since "[c]ourts must determine the rights and obligations of parties under an insurance contract based on the policy's specific language" (*Pepper v Allstate Ins. Co.*, 20 AD3d 633, 634 [3d Dept 2005]; *see Webb v Witt*, 379 NJ Super 18, 33, 876 A2d 858, 866 [NJ App Div 2005]).

Policy endorsement MS #00004 provides, "This policy is primary coverage and the insurance carrier agrees not to take action or recourse against any insured for loss paid or expenses incurred because of any claims made against this policy." The insurer argues that this provision only precludes it from seeking to recoup from its insured the cost of defending against *covered* claims. However, there is nothing in the endorsement's language that differentiates between covered and uncovered claims; the endorsement precludes the insurer from seeking "recourse against any insured for . . . expenses incurred because of *any claims* made against this policy," without reference to whether those claims were ultimately found to be covered by the policy. Therefore, we hold that the reimbursement of defense costs sought by the insurer is unambiguously precluded by the policy, and the provision of the order on appeal that directs the reimbursement of those costs is vacated.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 19, 2012, which granted plaintiff's motion for summary judgment declaring that it has no duty to defend or indemnify defendants Turner Construction Company and Permasteelisa North America Corporation in the underlying action, and directed Turner and Permasteelisa to reimburse plaintiff the defense fees and costs it paid in that action, should be modified, on the law, to vacate the direction to reimburse plaintiff its defense costs, and otherwise affirmed, without costs.

All concur.

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

ENTERED: MAY 15, 2014

CLERK