SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 18, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

11049 North Star Contracting Corp., Index 150326/11
Plaintiff-Appellant,

-against-

MTA Capital Construction Company,
Defendant-Respondent.

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Welby, Brady & Greenblatt, LLP, White Plains (Gregory J. Spaun of counsel), for appellant.

Wasserman Grubin & Rogers, LLP, New York (John F. Grubin of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 24, 2013, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the first cause of action for negligent misrepresentation and the second cause of action for tortious interference with contract, unanimously modified, on the law, to deny the portion of the motion seeking to dismiss the first cause of action, and otherwise affirmed, without costs.

Defendant MTA Capital Construction Company (MTA-CC) was the construction manager of a project taking place along the 7th

Avenue/Broadway subway line in Manhattan; the MTA-New York City Transit Authority (NYCT), to which MTA-CC is a sister entity, was the project's owner. In connection with the project, MTA-CC entered into a contract with nonparty Judlau Contracting, Inc. under which Judlau became the project's general contractor. Judlau then entered into a contract with plaintiff North Star Contracting Corp., under which North Star became the subcontractor to perform the necessary track work for the project.

As NYCT designed them, the tracks to be installed were to use a vibration dampening system that required the tracks' rails to fasten onto specially designed Low Vibration Track blocks (LVT blocks). According to the complaint, the subcontract between North Star and Judlau required North Star to adhere to NYCT's plans and specifications for the project. NYCT's plans and specifications, in turn, required the use of LVT blocks manufactured by nonparty Permanent Way Corporation (PWC), the exclusive manufacturer and patent holder of these LVT blocks. Thus, on October 24, 2006, North Star entered into a purchase order agreement with PWC to buy all the LVT blocks for the project.

North Star was to use three different types of LVT blocks: Type A, Type GR and Type DXO. The blocks were manufactured with

concrete inserts cast into them; fasteners would then be placed into the concrete inserts to attach the rails to the LVT blocks. Until NYCT designated the LVT blocks for this project, no entity in the United States had ever used them for a track crossover switch – a fact North Star avers it did not know until well after it placed its bid on the project.

North Star alleges that in October 2007, when it began installing Type A LVT blocks, it discovered that the blocks had been defectively made – specifically, that PWC had allegedly incorrectly positioned the concrete inserts during manufacturing. According to the allegations in the complaint, MTA-CC directed North Star to remove and replace some of the Type A blocks, thus delaying the project, creating additional work and imposing unanticipated costs.

North Star further averred that after installation of the defective Type A blocks, MTA-CC represented that it had conducted an investigation of PWC's manufacturing process, and, after that investigation, specifically represented to North Star that PWC had modified its quality control measures so that the Type A LVT blocks would be free from defects. Likewise, as with the Type A blocks, MTA-CC allegedly "specifically represented to North Star that it had reviewed PWC's manufacturing and design processes for the [] DXO blocks to ensure that they would be satisfactory" for

use in the project.

North Star then received a second batch of LVT blocks, this time Type DXO blocks. North Star received those Type DXO blocks around January 23, 2008 and installed them on the tracks until around May 8, 2008. At that time, however, North Star alleges that, as with the Type A blocks, the Type DXO blocks were defective despite MTA-CC's representations that they would be suitable for the project. Specifically, according to North Star, cracks allegedly began to develop in the Type DXO blocks when bolts were tightened into them using the torque that PWC had specified. On July 16, 2008 as a result of the defects, MTA-CC directed North Star to remove and replace the installed DXO blocks. After a further delay of around five months, North Star alleged, it received yet another set of replacement blocks – again, Type DXO – and installed that set of replacement blocks in the fall of 2008.

North Star commenced this action in August 2011, asserting causes of action for negligent misrepresentation, tortious interference with contract and unjust enrichment.[1] The complaint

[1] In September 2009, North Star commenced a separate action against Judlau, asserting claims for breach of contract, unjust enrichment and account stated. North Star cross-moved to consolidate the Judlau action with this one, but the IAS court denied the cross motion as moot.

alleged, among other things, that "during the course of the [p]roject," PWC and MTA-CC represented "on numerous occasions" that PWC's LVT blocks were suitable for their intended purpose and of the highest quality, even though the blocks had never, in fact, been tested. Additionally, the complaint alleges that, unbeknownst to North Star, MTA-CC and PWC had a covert agreement in which MTA-CC "was to direct [North Star] to perform the [subcontract] work free of charge to either MTA-CC or PWC." Thus, North Star concludes, MTA-CC and PWC were, in essence, surreptitiously using North Star as a means to conduct research and development on the LVT blocks.

According to the allegations in the complaint, MTA-CC "was aware that its statements would be used by North Star . . . to induce North Star to install the improperly designed and defective blocks at the [p]roject." North Star further alleged that as a result of MTA-CC's negligent misrepresentations, it incurred more than $800,000 in extra costs and more than $900,000 in delay damages.

The IAS court granted MTA-CC's pre-answer motion to dismiss, finding that the complaint did not support North Star's contention that there was a special relationship of trust and confidence between it and MTA-CC. Rather, the court found, the complaint alleged merely the existence of an ordinary business

relationship between North Star and MTA-CC; therefore, North Star had not pleaded sufficient facts to support a claim for negligent misrepresentation.[2] Similarly, the IAS court dismissed the tortious interference claim, finding that North Star failed adequately to show that MTA-CC had induced an actual breach of the purchase order between North Star and PWC.

As North Star concedes, there is no contractual privity between it and MTA-CC; rather, North Star asserts, the relationship between it and MTA-CC was close enough to be the functional equivalent of privity.

To properly assert a claim on a theory of negligent misrepresentation, a plaintiff must plead: "(1) that the existence of a special or privity-like relationship imposed a duty on the defendant to impart correct information to the plaintiff; (2) that the imparted information was actually incorrect; and (3) that the plaintiff reasonably relied on the information" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011], quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

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[2] North Star has abandoned its third cause of action for unjust enrichment. Thus, the only questions before this Court are whether North Star should be permitted to proceed on its first cause of action for negligent misrepresentation and its second cause of action for tortious interference with contract.

As to the first element, a court will find a special relationship if the record supports "a relationship so close as to approach that of privity" (*Sykes v RFD Third Ave. I Assocs., LLC*, 67 AD3d 162, 164 [1st Dept 2009], *affd* 15 NY3d 370 [2010] [quotation marks omitted]) or, stated another way, the "functional equivalent of contractual privity" (*Ossining Union Free Sch. Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 419 [1989]). Under this standard, before liability for negligent misrepresentation may attach in favor of a third party, there must be: (1) an awareness by the maker of the statement that the statement is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance (*Ossining Union Free Sch. Dist.*, 73 NY2d at 425, citing *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 [1985]).

We find that the complaint adequately alleges, based on representations made during the course of the contract, that the relationship between MTA-CC and North Star approached privity. Notably, MTA-CC was in contractual privity with Judlau and Judlau was in contractual privity with North Star; the purpose of the subcontract between Judlau and North Star was to further the prime contract between MTA-CC and Judlau. The complaint states

that "MTA-CC was aware that its statements would be used by North Star, Judlau's subcontractor, to induce North Star to install the improperly designed and defective blocks on the [p]roject." Likewise, the complaint links MTA-CC to North Star. Indeed, MTA-CC, as the project's construction manager, was the very entity that required North Star's work to be performed with LVT blocks, and those blocks were available only from PWC, the distributor and sole manufacturer. Moreover, the complaint alleges that MTA-CC conducted an investigation of the manufacturing and design process for the blocks, but that North Star was not permitted to conduct an investigation for itself.

In an affidavit submitted in opposition to the motion to dismiss,[3] Joseph Lovece, North Star's president, states that had it not been for MTA-CC's misrepresentations regarding its investigation of the defects in the LVT blocks, North Star would not have installed the second set of blocks without a written change order guaranteeing its payment, but instead would have chosen to breach the contract. However, North Star states, because of MTA-CC's representation that PWC was remedying the

[3] Certain of the allegations are not contained in the complaint, but only in Lovece's affidavit. Under CPLR 3211[c], a trial court may use affidavits in its consideration of a pleading motion to dismiss (*see Rovello v Orofino Realty, Co.*, 40 NY2d 633, 635-636 [1976]).

problems, it chose to work with the defective blocks. At the pleading stage, drawing all inferences in favor of the pleading party (*Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]), these allegations are sufficient to allow the negligent misrepresentation claim to proceed with respect to the allegations about the second set of LVT blocks.

Crucially, North Star alleges that MTA-CC did, in fact, have "unique or specialized expertise" with respect to the suitability of the DXO blocks, as it had conducted an investigation of the manufacturing process and, after that investigation, had assured North Star that the blocks would work as planned. Indeed, North Star also represented at oral argument that MTA-CC had performed an on-site investigation of the blocks' manufacturing process, but that North Star was not permitted to attend that on-site investigation because of "proprietary intellectual property issues."

With respect to any misrepresentations allegedly made before North Star entered into its contract with Judlau, the complaint fails to allege reliance. First, nowhere in the complaint does North Star specify when MTA-CC purportedly made any misrepresentations before the contract commenced; at most, North Star alleges that MTA-CC represented "on numerous occasions" that PWC's LVT blocks were suitable for their intended purpose. Even

though the approximate date of any misrepresentation would, of course, be a fact within North Star's knowledge, never does North Star specifically allege that MTA-CC actually misrepresented any facts before North Star entered into the contract with Judlau.

Although Lovece avers that had North Star known the true facts about the LVT blocks – that is, had North Star known that it was actually bidding on a research and development project – it would have put in a higher bid or would have refrained from entering into the project entirely. But these averments, even taken as true, do not salvage the negligent misrepresentation claim with respect to any purported misrepresentations before the Judlau contract. On the contrary, North Star – a contractor highly and singularly experienced in the track work that Judlau hired it to perform – still could not have reasonably relied, at that juncture on MTA-CC's representations about the LVT blocks' suitability for the project. Further, given its experience and qualifications, North Star does not, and cannot, plead that MTA-CC had superior knowledge (*see e.g. Greentech Research LLC Wissman*, 104 AD3d 540 [1st Dept 2013]).

The complaint fails to state a claim for tortious interference with contract. As noted above, North Star alleges that defendant entered into a "clandestine agreement" with PWC, thereby inducing it to breach its contract with plaintiff.

However, because defendant's alleged inducement occurred after PWC's alleged breaches, it could not have been the "but for" cause of PWC's purported breaches (*see Parrott v Logos Capital Mgt., LLC*, 91 AD3d 488, 489 [1st Dept 2012]; *Wells Fargo Bank, N.A. v ADF Operating Corp.*, 50 AD3d 280, 281 [1st Dept 2008]).

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

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

ENTERED: SEPTEMBER 18, 2014

CLERK

Acosta, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

11239N MSCI Inc., et al., Index 651451/11
Plaintiffs-Appellants,

-against-

Philip Jacob, et al.,
Defendants-Respondents,

John Does, etc., et al.,
Defendants.

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Pryor Cashman LLP, New York (Todd E. Soloway of counsel), for appellants.

Friedman Kaplan Seiler & Adelman LLP, New York (Lance J. Gotko of counsel), for Philip Jacob, respondent.

Bryan Cave LLP, New York (David P. Kasakove of counsel), for Axioma, Inc., respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 15, 2013, which, to the extent appealed from, denied plaintiffs' motion to compel defendant Axioma, Inc. to produce source code created after April 3, 2012, reversed, on the facts, without costs, and the motion granted.

Plaintiffs, MSCI Inc., Financial Engineering Associates, Inc., RiskMetrics Group, Inc., and RiskMetrics Solutions, Inc. (collectively, MSCI), serve as a provider of investment decision support tools, including indices, risk analytics, and corporate governance products. MSCI provides a multi-asset class (MAC) risk analytics software product called "RiskManager," which

contains several component technologies, including "RiskServer," "Plug and Price," and "StructureTool." MSCI asserts that each one of these technologies constitutes a confidential and proprietary trade secret. MSCI further asserts that because RiskManager leads the market in the risk analytics software field, the source code underlying these technologies is a trade secret that provides MSCI with a competitive advantage in the marketplace.

MSCI commenced this action in 2011, alleging that in January and February 2011, defendants Philip Jacob and John Does I through X, former senior-level employees at MSCI who had been intimately involved in the development of RiskManager, left MSCI to work for defendant Axioma, Inc., a direct competitor. According to MSCI, the individual defendants went to work for Axioma specifically for the purpose of creating a MAC product that would compete with MSCI's RiskManager. Further, MSCI alleges, before the individual defendants resigned, they misappropriated the entire source code underlying RiskServer, Plug and Price, and StructureTool.

Because the trade secrets of both MSCI and Axioma, in the form of the source codes for their MAC software products, were the essential evidence in the case, the parties negotiated a confidentiality stipulation, and Supreme Court so-ordered the

stipulation in September 2011. The confidentiality stipulation and order (CSO) provided that MSCI and Axioma would jointly retain a third-party neutral with whom they would deposit their respective source codes and that only the parties' experts and attorneys would receive or see the material. The CSO specified that the parties would not be allowed to view their adversaries' source codes.

The CSO required the parties to "deliver to [the third-party neutral] two (2) full copies of the source code for each programs/products/components at issue in this action . . . ." It further provided, "The copies of each source code shall include all versions of such source code created from inception in buildable, runnable, native text format and in a file organization that retains the original directory structure of the code and any source code repository; and source code documentation."[1]

During the litigation, defendants contended that MSCI had not sufficiently identified its alleged trade secrets and that

[1] "A source code repository is a place where large amounts of source code are kept, either publicly or privately. [It is] often used by multi-developer projects to handle various versions and handle conflicts arising from developers submitting conflicting modifications" (*see* http://en.wikipedia.org/wiki/Codebase). When the code is in repository format, one can review the code and see its revision history.

the failure to do so rendered useless any attempt to analyze and compare the parties' source codes for any evidence of misappropriation. Hence, defendants moved to compel MSCI to identify its trade secrets with sufficient particularity and for a protective order staying their obligation to deposit their source code until MSCI did so. In a compliance conference order entered March 30, 2012, the court ordered the parties to brief the issue whether MSCI had to affirmatively identify its trade secrets, and also ordered Axioma to deposit its source code with the third-party neutral. Accordingly, on April 4, 2012, Axioma deposited all versions of its source code created from February 24, 2011 through April 3, 2012 — a 14-month period that included four months preceding the action's commencement and 10 months afterward. The deposited material contained 5,552 "unique source code revisions and even substantially more individual source code file versions." After receiving briefing on the matter, by order entered April 23, 2012, the court ordered MSCI to identify the trade-secret components of its source code by June 8, 2012, and precluded it from seeking further discovery until it had done so.

By order entered on or about November 21, 2012, the court adopted the report of a court-appointed expert stating that MSCI had sufficiently identified the trade-secret components of its source code. As a result, MSCI was permitted to review Axioma's

source code.

Upon reviewing the code with MSCI's expert, MSCI's counsel learned that Axioma had not deposited any versions of source code created or modified after April 3, 2012; as a result, counsel sought the versions of the source code created or modified after that date. Defendants state that they denied that request on the ground that nothing in the CSO or any other order mandated that Axioma continually update its source code information. Discovery then proceeded for the next several months, and on or about March 12, 2013, MSCI's counsel again requested that Axioma deposit updated versions of its source code. Axioma, however, declined to provide any updated code.

MSCI moved for an order compelling Axioma to produce to the third-party neutral all versions of its relevant source codes and the underlying source code files and for a protective order staying discovery until Axioma had complied. On the motion, MSCI submitted an affidavit by an expert who stated that it was not possible to evaluate MSCI's misappropriation claims without the updated code, since it was possible that Axioma's later versions of the code underlying its MAC product had been altered to hide or eliminate improper use. Thus, the expert concluded, the post-April 3, 2012 versions were necessary to determine, among other things, whether Axioma's MAC product was created using MSCI's

trade secrets. Relying on its expert's opinion, MSCI asserted that it would not be able to prove a claim of misappropriation if it were not permitted to see the updated version of Axioma's code.[2] Hence, it concluded, defendants had an ongoing obligation to disclose and update the source code as the software was developed.

In opposition, defendants relied on the opinion of an expert who stated that he had seen no evidence to support the theory that Axioma could have used MSCI's source code as a starting point and then altered the code to disguise any misuse. The expert opined that it would not be practical for defendants to disguise any alteration so that it was not detectable. Further, the expert stated, his initial analysis of the source code that Axioma had deposited indicated that it was a complete and usable source code repository created in the normal course of the actual software development at Axioma.

At oral argument, the motion court noted that it had not ordered production of the ongoing version of Axioma's source code. On the contrary, the court stated, MSCI was entitled simply to learn whether defendants had misappropriated its code,

[2] Defendants cross-moved, among other things, to compel MSCI to produce all versions of its source code; MSCI does not appeal from the court's determination on the cross motion.

and it was able to make that determination with the 14 months of code that defendants had already deposited with the third-party neutral. The motion court therefore held that defendants had satisfied their obligation by disclosing 5,552 versions of its source code for the 14-month period. We disagree.

New York strongly encourages open and full disclosure as a matter of policy (*see Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]). To that end, CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action."

A trial court is vested with broad discretion in its supervision of disclosure (*148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 [1st Dept 2009]; *Matter of American Home Prods. Corp. v Shainswit*, 215 AD2d 317 [1st Dept 1995]). Indeed, "deference is afforded to the trial court's discretionary determinations regarding disclosure" (*Don Buchwald & Assoc. v Marber-Rich*, 305 AD2d 338, 338 [1st Dept 2003] [internal quotation marks omitted]). However, "[t]his Court is vested with the power to substitute its own discretion for that of the motion court, even in the absence of abuse" (*Estate of Yaron Ungar v Palestinian Auth.*, 44 AD3d 176, 179 [1st Dept 2007]). We have observed that we "rarely and reluctantly invoke" our power to substitute our own discretion for that of the motion court (*id.*).

We find that this case presents one of those rare instances in which we are compelled to substitute our discretion for that of the motion court.

To begin, the CSO does not provide for merely a single production of source code to the third-party neutral. Rather, it provides that the parties will deposit "all versions" of the relevant source code "created from inception in buildable, runnable" format. Nothing in this language suggests that defendants' obligation will be discharged by a single delivery of source code. Indeed, neither party disputes that counsel for both sides spent several months negotiating the CSO and that the document went through numerous drafts and revisions. Surely, had defendants wished to specify that they would make a single delivery of source code, they could have insisted upon a single delivery date. They did not do so; rather, they agreed to deliver "full copies" and "all versions" of the relevant source code.

In addition, MSCI's expert stated that without versions of the code made after April 3, 2012, he could not provide a meaningful comparison of the parties' respective source codes so as to determine misappropriation, because Axioma's code as of April 3, 2012 was in a nascent state. The expert asserted that as a result he was limited as to the information he could glean

regarding the overall architecture and functionality of Axioma's code. Thus, he stated, later versions of the code were crucial to his analysis, because they reflected a more complete and closer-to-final version of Axioma's MAC product. Indeed, the dissent inaccurately characterizes the affidavits by MCSI's expert. Far from suggesting that he is on a "fishing expedition," the expert makes clear that post-April 3, 2012 versions of defendants' source code are necessary for an accurate analysis of whether defendants misappropriated MSCI's trade secrets. Similarly, the expert's opinion is not based on mere speculation. Rather, he states that the versions of the source code already deposited "strongly suggest[] that the majority of development of Axioma's MAC [p]roduct actually occurred in the versions of source code created or modified after April 3, 2012."

The record provides no basis for summarily rejecting the expert's assertions in that regard. Indeed, defendants' expert affidavit merely stated in a conclusory fashion that MSCI's expert could adequately analyze the misappropriation issue without the updated source code. Our conclusion that Axioma must produce post-April 3, 2012 code holds particularly true in light of the policies underlying discovery — namely, to give parties a reasonable opportunity to uncover any available evidence to

support their claims (*see Member Servs., Inc v Security Mut. Life Ins.*, 2007 WL 2907520, *5, 2007 US Dist LEXIS 74047, *13-14 [ND NY 2007]).

Nonetheless, because we have the discretion to set reasonable parameters on discovery, there shall be disclosure of all versions of the source code created, modified, or maintained between April 3, 2012, and the date that Axioma's MAC product is released to the market. Further, disclosure of the post-April 3, 2012 code shall be subject to the protections set forth in the CSO stating that the deposited source code materials are for attorneys' and experts' eyes only.

All concur except Acosta, J.P. and Andrias, J. who dissent in a memorandum by Andrias, J. as follows:

ANDRIAS, J. (dissenting)

I respectfully disagree with the majority's conclusion "that this case presents one of those rare instances in which we are compelled to substitute our discretion for that of the motion court." Rather, the motion court providently exercised its discretion when it denied, as an unwarranted fishing expedition, plaintiffs' motion to compel the production of additional source code created by defendants more than a year after the alleged misappropriation of plaintiffs' source code took place, where there was only hope and speculation as to what the additional discovery would uncover. Accordingly, I dissent.

In May 2011, plaintiffs commenced this action in which they allege that the individual defendants, while in plaintiffs' employ, misappropriated trade secrets, to wit, the source code underlying several component technologies of their flagship multi-asset class (MAC) risk-analytics software product, and used those secrets to develop a competing MAC software product for defendant Axioma. Among other things, plaintiffs allege that from June to November 2010 the individual defendants developed a plan to take certain intellectual property that they developed while working for plaintiffs to launch a competing business, and that in January and February 2011 they took plaintiffs' source code and algorithms with them to Axioma. Plaintiffs also allege

that the individual defendants contemplated a nine-month time frame for building a valuation platform and that such a short time frame "would be impossible absent the misuse and misappropriation of [plaintiffs'] confidential and propriety information, including algorithms and source code."

In September 2011, the parties negotiated and executed a confidentiality stipulation, so-ordered by the court (the CSO), which provided:

> "35. MSCI, Axioma and Jacob . . . shall deliver to [a neutral] two (2) full copies of the source code for each programs/products/components at issue in this action . . . [and] in development . . . [which] shall include all versions of such source code created from inception in buildable, runnable, native text format and in a file organization that retains the original directory structure of the code and any source code repository; and source code documentation."

The CSO also provided that only the parties' experts would receive or see the material deposited with the neutral.

Defendants subsequently moved to compel plaintiffs to affirmatively identify their trade secrets with sufficient particularity, as demanded in defendants' interrogatories, and for a protective order relieving defendants of their obligation to produce Axioma's source code until plaintiffs complied. A compliance conference order entered March 30, 2012, directed the

parties to submit briefs on the trade secrets issue and directed Axioma to "deposit source code with [the neutral] as soon as reasonably possible." On April 4, 2012, Axioma deposited with the neutral 5,552 unique historical versions of its source code that had been created or modified during the 14-month period between February 24, 2011 and April 3, 2012.

By orders entered April 23, 2012 and on or about July 9, 2012, the court directed plaintiffs to identify their trade secrets with reasonable particularity. By order entered on or about November 21, 2012, the court adopted the report of a court-appointed expert stating that plaintiffs' second supplemental interrogatory response, served on August 27, 2012, identified certain of their trade secrets with reasonable particularity, and was insufficient in other respects. Meanwhile, by so-ordered stipulation entered on or about September 27, 2012, the parties agreed that the neutral should release each side's source code to the other's expert, which was done on or about October 4, 2012.

In a compliance conference order entered March 21, 2013, the court directed plaintiffs, among other things, to deposit their source code in buildable and runnable form, as required by the CSO; identify those lines of the source code that they claimed Axioma had misappropriated; and respond to defendants' outstanding document demands. Rather than comply, plaintiffs

moved for a protective order and to compel Axioma to produce "all versions" of its source code. Defendants cross-moved to compel plaintiffs to fulfill their outstanding discovery obligations.

At oral argument, the court rejected plaintiffs' contention that it was entitled to a continuous updating of Axioma's source code for the life of the case as contrary to paragraph 35 of the CSO and as nothing more than a "fishing expedition." Thus, the court found that defendants complied with their discovery obligations when Axioma deposited over 5,000 versions of its source code for a 14-month period -- including the four-month period preceding the commencement of this lawsuit and the 10-month period thereafter.

The court then issued the order on appeal, entered August 15, 2013, in which it denied plaintiffs' motion "in regard to directing Axioma to continue to turn over new code beyond the 14 months already turned over"; denied plaintiffs' request for a stay of its discovery obligations; and granted defendants' cross motion by requiring plaintiffs to deposit its source code in buildable, runnable format and to respond to defendants' Interrogatories and discovery requests, as required in the March 21, 2013 order. The court also issued a separate compliance conference order, requiring, among other things, that plaintiffs respond to the Interrogatories and discovery requests by

September 13, 2013, and turn over the buildable, runnable source code by September 30, 2013; that all depositions be completed by January 31, 2014; and that the note of issue be filed by April 4, 2014.

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." In determining when disclosure is appropriate, "[t]he test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). "Although the scope of discovery under CPLR 3101 is to be construed liberally, where discovery of trade secrets is sought, the party seeking disclosure must show that the information demanded appears to be indispensable to the ascertainment of truth and cannot be acquired in any other way" (*CareCore Natl., LLC v New York State Assoc. of Med. Imaging Providers, Inc.*, 24 AD3d 488, 489 [2d Dept 2005] [internal quotation marks omitted]). When viewed in light of these principles, I find that the motion court properly denied plaintiffs' motion to compel the perpetual production of highly sensitive trade secret source code created by Axioma from April 4, 2012 through the life of this action, a time period beyond that alleged in the complaint, which identified the period of misappropriation as from June 2010 through March 2011.

Contrary to the majority's view, the motion court reasonably concluded that paragraph 35 of the CSO required a single production of source code to the neutral, which was to include all of the code's previous versions, and that it did not create a continuing obligation to produce every future iteration of the code. This interpretation is consistent with the court's March 30, 2012 compliance order, which required Axioma to deposit source code with the neutral "as soon as reasonably possible." Defendants complied with this obligation, producing 5,552 versions of its source code, as well as 24,391 "offline" source code documents.

Nor do I agree with the majority's finding that defendants' expert affidavit established the need for production of all versions of defendants' source code made until the date that Axioma's MAC product is released to the market. In seeking additional discovery of source code, plaintiffs' expert only speculated that "in the event Defendants altered Axioma's source code in an effort to disguise its use of MSCI's trade secrets," those changes would appear in later versions of the code. Indeed, with respect to common code in the parties' respective products, the expert acknowledged that his review to date revealed only that "some of these files were third-party created, 'off the shelf,' source code files." The expert could only

speculate that "there may also be source code files created and developed by Axioma's employees outside of Axioma's Subversion system, and then added into the system in final form," and plaintiffs presented no evidence to suggest that this scenario had in fact occurred.

The majority finds that plaintiffs' expert's opinion is not speculative because "he states that the versions of the source code already deposited 'strongly suggest that the majority of development of Axioma's MAC [p]roduct actually occurred in the versions of source created or modified after April 3, 2012.'" However, the expert's conclusion was based on the fact that "the first 140 'versions' Defendants deposited include less than 200 source code files out of the total 2,167 unique source code files Axioma deposited [and] [t]he first 1700 versions contain less than half of all the source code files deposited." Defendants produced 5,552 versions, and the expert did not address what the latter 3,852 versions contained.

Further, although the majority cites plaintiff's expert's statement that the code produced by defendants was in its "nascent state," defendants' expert stated that his "initial analysis of Axioma's Deposited Source Code indicates that it is a complete and usable source code repository that was created in the normal course of the actual software development at Axioma."

While defendants' expert acknowledged that there were occasions where larger than average amounts of new source code were added to the Axioma project in a relatively short period of time, which could indicate that the source code originated in other places, he explained that "[u]pon further inspection, each of these periods of interest related to the introduction and use of third-party, off-the-shelf source code libraries."

In sum, the motion court, which was intimately familiar with the discovery issues in the case, providently balanced plaintiffs' need for production of additional source code against the need to protect defendants from a fishing expedition that would allow plaintiffs to monitor the development of Axioma's new product, after it became apparent that discovery to date did not support plaintiffs' misappropriation claims as alleged in the complaint. As the court stated at oral argument, plaintiffs' theory that updated source code may provide evidence that Axioma somehow successfully concealed its misappropriation in the 5,552 versions of source code already deposited is "a great leap," based upon mere speculation, without a factual predicate for the requested additional discovery (*see Viacom Intl. Inc. v YouTube Inc.*, 253 FRD 256, 260 [SD NY 2008] ["YouTube and Google should not be made to place this vital asset in hazard merely to allay speculation. A plausible showing that YouTube and Google's

denials are false . . . should be required before disclosure of so valuable and vulnerable an asset is compelled"]).

The fact that the CSO calls for production to a neutral and review by plaintiffs does not justify continuous production of Axioma's post-April 3, 2012 source code. Careful and extensive confidentiality provisions are "not as safe as nondisclosure, [and t]here is no occasion to rely on them, without a preliminary proper showing justifying production of the search code" (*Viacom*, 253 FRD at 260).

Accordingly, I would affirm the denial of plaintiffs' motion to compel.

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

ENTERED: SEPTEMBER 18, 2014

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

11492 Lisa Best, Index 16191/07
Plaintiff-Respondent, 86121/07

-against-

Tishman Construction Corporation
of New York, et al.,
Defendants-Respondents-Appellants.

- - - - -

Tishman Construction Corporation
of New York, et al.,
Third-Party Plaintiffs-
Respondents-Appellants,

-against-

Solar Electric Systems, Inc.,
Third-Party Defendant-
Appellant-Respondent,

West-Fair Electrical,
Third-Party Defendant.

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Welby, Brady & Greenblatt, LLP, White Plains (Gregory J. Spaun of counsel), for appellant-respondent.

Blank Rome LLP, New York (William R. Bennett, III of counsel), for respondents-appellants.

O'Dwyer & Bernstien, LLP, New York (Steven Aripotch of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered June 25, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims, denied summary judgment as to the Labor Law § 241(6)

claim predicated on alleged violations of Industrial Code (12 NYCRR) § 23-1.7(e)(1) and (2), denied defendants' motion for summary judgment on their third-party claim for contractual indemnification against third-party defendant Solar Electric Systems, Inc. (Solar), and denied Solar's cross motion for summary judgment dismissing the third-party complaint as against it, unanimously modified, on the law, to grant defendants conditional summary judgment on their third-party claim for contractual indemnification against Solar, and otherwise affirmed, without costs.

Supreme Court properly denied the motions for summary judgment dismissing plaintiff's cause of action under Labor Law § 241(6). Defendants failed to demonstrate, with respect to the Labor Law § 241(6) claim, that 12 NYCRR 23-1.7(e)(1) is inapplicable to this case, given plaintiff's testimony that the she tripped over the electrical cord in the passageway (*see Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421 [1st Dept 2013]). Contrary to defendants' contention that the accident occurred in an open working area rather than a passageway, plaintiff and a Solar supervisor described the area as a small hallway or corridor. Defendants also failed to show that the cord did not constitute scattered materials for purposes of 12 NYCRR 23-1.7(e)(2). Contrary to defendants' argument, the

evidence does not show that the cord was not left there by another trade that had departed before the accident occurred (*see Kutza v Bovis Lend Lease LMB, Inc.*, 95 AD3d 590 [1st Dept 2012]). Supreme Court also properly granted summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action to the direct defendants (the project's owner and construction manager), which did not exercise supervisory control over the work.

Third-party defendant Solar is obligated by its contract to indemnify defendants, among others, for suits or costs arising from its work, except to the extent the damage in question was attributable to defendants' fault. While Supreme Court properly denied Solar's cross motion for summary judgment dismissing the third-party complaint, it erred to the extent it denied defendants conditional summary judgment on their third-party claim for contractual indemnity for any judgment plaintiff may recover. In view of the dismissal of the common-law negligence and Labor Law § 200 causes of action, any liability that may be imposed on defendants in this action will be vicarious pursuant to Labor Law § 241(6), and there will be no bar to their recovery of complete indemnification pursuant to Solar's contract. Contrary to Solar's argument, Supreme Court's March 5, 2010 order in the action brought by defendants for, inter alia, a

declaration that Solar had a duty to indemnify and defend them (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Great Am. E&S Ins. Co.*, 86 AD3d 425 [1st Dept 2011]) is not res judicata as to defendants' third-party claims against Solar, since the prior order did not address those claims on the merits (*see Langhorst v Guzzardo*, 156 AD2d 272 [1st Dept 1989]).

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

ENTERED: SEPTEMBER 18, 2014

CLERK

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

11869-
11869A Wally G., an Infant by his Mother and Natural Guardian, Yoselin T., Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation (Metropolitan Hospital), Defendant-Respondent.

Index 110543/08

The Fitzgerald Law Firm, P.C., Yonkers (Mitchell Gittin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered on or about November 21, 2012, which granted plaintiff's motion to reargue, and upon reargument, adhered to its prior order, entered on or about January 26, 2012, denying plaintiff's motion for leave to serve a late notice of claim, and granting defendant's cross motion to dismiss the complaint, affirmed, without costs. Appeal from the January 26, 2012 order, dismissed, without costs.

In this action for medical malpractice, in which the infant plaintiff seeks to recover for injuries he suffered after being born at 27 weeks' gestation, the motion court considered the

pertinent statutory factors and properly exercised its discretion in denying plaintiff's motion (General Municipal Law § 50-e[5]). The infant plaintiff's mother's excuses that she was unfamiliar with the requirement that she file a notice of claim, and that she was unaware that her son's injuries were caused by defendant Health and Hospital Corporation's (HHC) malpractice, are not reasonable. Nor is her attorney's assertion that he waited to make the motion until approximately three years and ten months after filing the untimely notice of claim because he needed to receive the medical records from HHC (*see Basualdo v Guzman*, 110 AD3d 610, 610 [1st Dept 2013]).

Further, the medical records demonstrate that the infant plaintiff's condition and prognosis are consistent with his premature birth and do not suggest any injury attributable to the hospital staff's malpractice (*see Torres v New York City Health & Hosps. Corp. [Lincoln Hosp.]*, 101 AD3d 463, 463 [1st Dept 2012], *lv denied* 21 NY3d 860 [2013]). Moreover, plaintiff failed to demonstrate that the medical records put HHC on notice that the alleged malpractice would subsequently give rise to brain damage as a result of birth trauma and hypoxia or that he would

subsequently develop other deficits, delays, and disorders (*see Rodriguez v New York City Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 78 AD3d 538, 538-539 [1st Dept 2010], *lv denied* 17 NY3d 718 [2011]).

Significantly, plaintiff's experts do not claim that the extreme prematurity of his delivery (during the seventh month of gestation) was attributable to any fault on HHC's part. In fact, plaintiff's experts opine that the cesarean section delivery should have been performed even earlier than it was. In view of the fact that plaintiff's injuries are typical of children born as prematurely as he was, as well as HHC's undisputed lack of fault for the necessity of a preterm delivery, we, like the motion court, are not persuaded by plaintiff's argument, accepted by the dissent, that the medical records put HHC on notice that plaintiff's injuries may have been caused by the alleged deviations from the standard of care that plaintiff's experts perceive to be documented in the record, rather than by the unavoidable necessity of delivering the child only 27 weeks into the pregnancy. Plaintiff's experts, although claiming to identify deviations from the standard of care in the record, fail to articulate any basis for determining the extent to which plaintiff's deficits were caused by the alleged deviations, as opposed to the unavoidable preterm delivery. Given that the

medical records, even as interpreted by plaintiff's experts, do not yield a nonspeculative basis for determining whether the deficits of this prematurely born child would have been less severe absent the alleged deviations, it cannot be said that the medical records put HHC on notice of the claim. As the motion court correctly stated: "There is insufficient evidence to support the finding that the infant's condition upon delivery and the subsequent issues that developed during his admission to the [neonatal intensive care unit] were caused by any malpractice as opposed to the infant's extremely premature birth, which could not have been avoided."

Finally, plaintiff's infancy carries little weight since there is no connection between the infancy and the delay (*see Rodriguez*, 78 AD3d at 539).

All concur except Acosta and Richter, JJ. who dissent in a memorandum by Acosta, J. as follows:

ACOSTA, J. (dissenting)

This appeal involves the propriety of denying a motion for leave to file a late notice of claim, made pursuant to General Municipal Law § 50-e(5) in a medical malpractice action against defendant New York City Health and Hospitals Corporation (HHC or Metropolitan Hospital), in which it is alleged that the medical staff failed to properly render both prenatal and postnatal care to the infant plaintiff and to properly manage his mother's labor and delivery at 27 weeks' gestation. Plaintiff argued that HHC acquired actual knowledge of the essential facts constituting the claim within 90 days of the alleged malpractice, or a reasonable time thereafter, because the facts constituting the alleged departures from good and accepted standards of care were explicitly documented in the medical records. In particular, plaintiff asserted that the mother had a labor and delivery complicated by placental abruption,[1] chorioamnionitis,[2] and fetal tachycardia,[3] and that after the infant suffered a grade III

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[1] Placental abruption is the premature separation of the placenta from the uterine wall prior to delivery, which compromises the ability of the placenta to supply the fetus with oxygenated blood.

[2] Chorioamnionitis is an infection of the placental membranes which compromises the ability of the placenta to supply oxygen to the fetus.

[3] Tachycardia is defined as an excessively rapid heartbeat.

intraventricular hemorrhage, he "was referred directly to the developmental clinic and early intervention," explicitly demonstrating that the hospital staff was on notice of the injury. I agree with plaintiff and would therefore reverse.

Background

The infant plaintiff was born on June 15, 2005. Pursuant to General Municipal Law (GML) § 50-e(1), plaintiff was required to serve a notice of claim on HHC by November 8, 2005 (90 days after the child's discharge from the hospital). Plaintiff served an untimely notice of claim by letter dated January 16, 2007. This action was commenced when plaintiff filed the summons and complaint on August 4, 2008, which was within the statute of limitations, as tolled by CPLR 208. On December 9, 2010, plaintiff sought an order deeming his previously served notice of claim timely nunc pro tunc, or for leave to file a late notice of claim. The motion court denied plaintiff's request and granted defendant's cross motion to dismiss.

The infant plaintiff suffers from cerebral palsy, seizures, hemiparesis, and speech and cognitive defects. His mother avers that his current condition is the result of defendant's failure to both timely deliver the infant in the face of evidence of placental abruption, infection, and fetal distress, and to properly monitor and treat respiratory distress in the newborn.

Specifically, the infant's mother stated that, prior to her son's birth, she had been bleeding vaginally for weeks and was "passing large clots of blood." Although her doctors had mentioned that it might be due to an abruption, they decided that it was not and told her to return if the bleeding became worse.

Dr. Stuart Edelberg averred, to a reasonable degree of medical certainty, that after reviewing the infant plaintiff's medical records it was his opinion that departures from good and accepted medical practice by HHC's hospital staff were a proximate cause of the infant plaintiff sustaining hypoxic-ischemic brain injury by placental abruption and chorioamnionitis. He also opined that the child's "[p]rolonged exposure to cytokines in utero further contributed to [his] fetal brain injury."

Dr. Edelberg averred that the medical records demonstrated that the mother's prenatal care "was complicated by the fact that she was a type 1 diabetic with a history of prior preterm birth in March of 2002 at 29 weeks and a miscarriage at 5 weeks in October of 2003." He also stated that the hospital staff was on notice that the mother "was at risk for complication by excessive bleeding," because her "prior preterm delivery was associated with 'bleeding complications.'"

Hospital records indicate that on May 24, 2005, the mother

went to HHC, and according to a triage note, "bleeding ha[d] been ongoing for two days and [wa]s significant for bright red blood with small pink clumps of tissue." The staff discharged the mother after determining that the "vaginal spotting" was "most likely [secondary] to [a] low-lying placenta" and that she should "return to [the] hospital if [there was] increased bleeding." The mother returned to the hospital seven hours later, after experiencing "pelvic pain and a gush of red blood at home." A "sterile speculum examination" was performed, which revealed that "the cervical os appeared closed and [that there was] a small 5 cc clot . . . in the vault" with "a subsequent rush of clear fluid which was interpreted as [a] rupture of [the] membranes." The admission assessment was "vaginal bleeding, rule out placental abruption, preterm premature rupture of membranes," and the plan included "antibiotics and dexamethasone to facilitate fetal lung maturity."

A subsequent attending note taken that same day, however, set forth a differential diagnosis of a partial abruption. According to Dr. Edelberg, since placenta previa was effectively ruled out by sonogram on May 24, 2005, the cause of the bleeding and passage of clots was a placental abruption, which was confirmed on the day the infant plaintiff was born, as noted, June 15, 2005. Although the consulting physician's opinion was

that there was no abruption, the consult does not set forth the reasoning for that opinion other than by reference to a sonogram, which, according to Dr. Edelburg, is insufficient to rule out an abruption and "ignored the clear clinical evidence of abruption in the form of chronic bleeding and passage of clots" and the fact that the mother complained of back and abdominal pain. Based "on the symptoms," Dr. Edelburg opined that the mother had been exhibiting "an ongoing worsening chronic abruption" since May 24, 2005.

Dr. Edelberg averred that on May 25, 2005, blood clots were observed and the mother reported pelvic and back pain, which are symptoms of placental abruption. A sterile speculum exam revealed that the cervix was not dilating. The neonatologist discussed the risks of premature birth with the mother.

On May 26, 2005, the mother "reported a loss of fluid and [a] foul smelling discharge, indicative of infection, while she continued to complain of back pain." On May 29, 2005, the mother was stable enough that hospital staff contemplated transferring her to the labor and delivery unit. However, the mother "left the hospital against medical advice" and staff "advised [her] to return in 48 hours for evaluation."

On May 31, 2005, the mother returned to the hospital and reported that she had been vaginally bleeding since the previous

afternoon. A speculum examination revealed blood in the vaginal vault; the cervical os appeared closed and long. A sonogram revealed that placenta previa was not the cause of the mother's bleeding, and the fetus appeared to be doing well. A perinatal consult opined "that there was no evidence of abruption" and the mother "was discharged on ampicillin for [a] possible urinary tract infection, with instructions to return to the clinic in 2 weeks, or if symptoms recur."

According to Dr. Edelberg, given the mother's history and clinical signs of abruption, hospital staff departed from good and accepted standards of care, by discharging her on May 31, 2005, and that instead she should have been admitted to the hospital for close monitoring and observation. Moreover, "[v]aginal infection can and in this instance did lead to premature labor and the development of chorioamnionitis."

On June 4, 2005, the mother appeared at the hospital and told staff that she had been bleeding vaginally for one week. There was decreased fetal movement, and positive maternal weakness and dizziness. Although a vaginal exam did not reveal any active bleeding, clots were found in the mother's vagina. Although "[t]he diagnosis of the hospital staff was intrauterine pregnancy at 25 weeks with possible chronic placental abruption," Dr. Edelburg opined that the hospital departed from good and

accepted practice by sending the mother home and telling her to follow up with the clinic, because her "presenting symptoms indicated placental abruption and maternal infection, both of which required close monitoring, particularly at 25 weeks gestation." Moreover, the doctor asserted that at "some point[,] chronic placental abruption will result in a reduced flow of oxygenated blood" from the mother to the fetus, "causing a hypoxic ischemic event," which "the labor and delivery record reveals . . . was the case."

On June 14, 2005, the mother returned to the hospital and "presented with a history of vaginal bleeding and clots in the vagina and a history of chronic bleeding." However, she was sent home with an instruction to return if the bleeding increased.

On June 15, 2005, the day the infant plaintiff was born, the mother was admitted to the hospital at 1:00 p.m., and "presented with a history of abdominal pain with vaginal bleeding with passage of clots for one day." The mother was noted as being "a class D diabetic since age 6 being treated with glyburide." "A speculum exam was conducted and large clots were noted; a pelvic exam revealed [that the mother] was 4 cm dilated, 50% effaced and at -3 station." The mother's temperature was "elevated" at 100.7 degrees, and the fetal heart rate was at 150 to 160 beats per minute, both of which are "symptomatic of choroamnionitis."

Dr. Edelberg averred that fetal tachycardia was evidence of fetal distress and that it was documented in the records on June 15, 2005, because the heart rate was "at the level of 180 beats per minute." There was also evidence of fetal distress in the form of decelerations of the fetal heart rate and "[a]ll of these findings are caused by an ongoing and worsening hypoxic ischemic insult to the fetal brain as a result of the placental abruption and chorioamnionit[i]s."

After the infant plaintiff was born, he was assigned Apgar scores of 5 at one minute and 7 at five minutes, but no breakdown of those scores was provided. Testing indicated "a chronic hypoxic ischemic process requiring the exhaustion of the body's reserves to counteract acidosis" and "a depressed neonate . . . as a result of chorioanmionitis and placental abruption, both of which affect the ability of the placenta to oxygenate the fetus, superimposed on prematurity (the infant being approximately 27 weeks gestation)."

Dr. Edelberg opined that the mother should have been prepared for emergency cesarean section and her infant delivered no later than 1:30 p.m., given her obstetrical history, the tentative diagnosis arrived at on June 4, 2005, and her presentation on June 15, 2005 with increased symptoms such as passing large blood clots. Although, "the decision to deliver by

cesarean section due to placental abruption and probable chorioamnionitis was made at 3:45 p.m., . . . delivery was not accomplished until 4:38 p.m.," which "[p]rolonged exposure to cytokines in utero [and] further contributed to [the child's] fetal brain injury."

Dr. Rosario R. Trifiletti averred that on June 23, 2005, the infant plaintiff was diagnosed with an intraventricular hemorrhage (IVH), which was "consistent with a significant hypoxic ischemic insult." "The clinical and radiological observations, particularly the intraventricular hemorrhage observed in the first days of life, established conclusively the existence of a neonatal neurological syndrome as a result of hypoxia/ischemia and hypocarbia." Moreover, according to Dr. Trifiletti, the child's lack of spontaneous respiratory effort indicated that the Apgar scores were inaccurate and overly optimistic, because the clinical picture indicated a severely depressed neonate with no ability to breathe on his own, which is also consistent with in utero hypoxic ischemic insult. At roughly seven months of age, the child was diagnosed with seizures at HHC.

Dr. Trifiletti opined that to a reasonable degree of medical certainty, the infant plaintiff "suffers from neurological and cognitive deficits," which "were the result of hypoxia/ischemia,

or oxygen deprivation, in utero and exposure to cytokines" and that he had "a form of cerebral palsy known as hemiparesis." According to Dr. Trifiletti, since the "causal relationship between chorioamnionitis and brain injury is well established," "the Metropolitan Hospital staff, who made an explicit diagnosis of chorioamnionitis, were absolutely on notice that the infant had a significantly increased likelihood of having suffered brain injury." He also opined that "[i]n view of the severe intraventricular hemorrhage, there is no doubt that the Metropolitan staff was on notice that this infant had suffered a significant neurological injury," and that "the issue of subsequent neurological sequelae was explicitly discussed with the parents after the diagnosis of the grade III IVH." He additionally opined that the child's seizures were "caused by the hypoxic ischemic insults to the brain."

Dr. Trifiletti opined that the infant plaintiff's cytokine exposure and in utero hypoxia ischemia were the result of HHC's staff's negligent failure to timely deliver the infant by cesarean section, despite the presence of chorioamnionitis and placental abruption. The further hypoxic ischemic insult, which occurred during the newborn period, was the result of the staff's negligent failure to provide immediate adequate respiratory support by ventilation through intubation. Thereafter, the child

was overventillated, causing him to develop hypocarbia and associated decreased cerebral blood flow, and the medical records document facts that put the hospital staff on notice that he had suffered an injury to the brain during the perinatal and neonatal period and that his injuries would lead him to suffer from motor and cognitive deficits.

Dr. Stuart Danoff opined, to a reasonable degree of medical certainty, that there were departures from good and accepted medical practice by HHC's staff that were a proximate cause of infant plaintiff sustaining a brain injury.

Dr. Danoff averred that the infant plaintiff's "Apgar scores are variously described as 5 at one minute and 7 at five minutes in the obstetrical record . . . and 6 at one minute and 8 at five minutes in the newborn record," which are "contradictory on its face." Moreover, "no breakdown is provided as to what scores were assigned for individual categories in either the obstetrical or newborn record," which was "a departure from good and accepted standards of care [and] contributed to the inadequate resuscitative measures undertaken."

According to Dr. Danoff, when the infant plaintiff was born, given his "prematurity and fetal distress, it was extremely likely that [he] would require a significant degree of resuscitative intervention," and "he should have been intubated

within one minute and placed on mechanical ventilation as quickly as practicable." However, when the baby was born with "a complete absence of respiration," hospital staff improperly oxygenated him, and he was not placed on a mechanical ventilator until 22 minutes after his birth (i.e., 5:00 p.m.), after they twice attempted and failed to resuscitate him with efforts they should have known would fail.

Dr. Danoff averred that the failure of HHC's staff to timely intubate the infant plaintiff caused him "to suffer [from] a . . . lack of oxygen," and that at birth, the child "was suffering from a metabolic acidosis as a result of an in utero hypoxic event." He opined that "minutes of hypoxia can and did cause brain damage" to the child.

According to Dr. Danoff, after HHC's staff "fail[ed] to adequately oxygenate and resuscitate" the infant plaintiff following his delivery, they further departed "from good and accepted standards of care by overventilating" him, "causing him to suffer hypocarbia and diffuse brain injury." The medical records demonstrate that by June 23, 2005, HHC was "plainly aware that the infant had likely suffered a brain injury," because "a repeat sonogram show[ed] a bilateral ventricular hemorrhage with post hemorrhagic ventriculomegaly," which "was characterized as a grade III intraventricular hemorrhage." Moreover, the June 27,

2005 attending note stated that the "[c]ondition of the baby [was] discussed with both parents about the IVH which the baby has and the possible outcome and [possible] neurological sequelae."

In its cross motion to dismiss, HHC argued, among other things, that plaintiff's expert affidavits should be disregarded, because they failed to address whether the infant plaintiff's medical records provided HHC with actual notice of negligent conduct, but rather simply claimed that HHC's records showed that it inflicted injury upon the child. HHC additionally argued that the child's medical records documented that his premature delivery could not have been avoided and that his condition upon delivery and the subsequent issues that developed during his admission to the NICU were caused by his extremely premature birth.

In support of its motion, HHC annexed the expert affidavits of Dr. Adiel Fleischer and Dr. Walter Molofsky. Dr. Fleischer opined that the infant plaintiff's medical records demonstrated to a reasonable degree of medical certainty that Metropolitan Hospital's staff rendered care and treatment that was at all times within accepted standards of medical care and that no acts or omissions caused any of the child's alleged injuries. He also opined that the medical records do not provide HHC with notice

that its staff was negligent in providing the child with medical treatment. He additionally opined that it was not a departure from good and accepted medical practice to discharge the mother in light of her episodes of vaginal bleeding and that everything had been done to rule out a possible placental abruption prior to her delivery.

According to Dr. Fleischer, even assuming there was an abruption, admitting the mother to the hospital would not have stopped it from occurring. There was no specific treatment mandated prior to delivery and even if the mother was admitted, she would have undergone the same course. At all times the infant plaintiff's "condition was being monitored and at no time was there any indication of fetal distress." Moreover, "[t]he tracings do not demonstrate any ominous signs and they [we]re overall reassuring."

According to Dr. Fleischer, "[s]ince there was absolutely no signs of fetal distress, a cesarean section did not need to be performed on a 'STAT' basis." Once there was a suspicion of chorioamnionitis and once tachycardia was evident, the staff appropriately scheduled and performed a timely cesarean section and the infant plaintiff "delivered with Apgars of 6 and 8 (or 5 and 7 as also noted), weighing 990 grams," which is "not abnormal for a fetus born at approximately 26 weeks."

Dr. Fleischer opined that the hospital records do not indicate that the infant suffered injury due to "placental abruption, fetal distress or a delay in delivery" and that there are no indications of any negligent act or omission by HHC's staff.

Dr. Molofsky opined that there were no departures from good and accepted medical practice in the management of the mother's labor, delivery care, and treatment, and that there was no documentation in the hospital chart that provided HHC with notice that its staff had negligently provided treatment to the child.

Dr. Molofsky averred that although the child "was born small, he was appropriate for his gestational age." The child's Apgar scores "were also acceptable as most premature babies will not be vigorous or pink." Moreover, "[a]lmost every premature baby has apnea, regardless of the propriety of care rendered, because the last system to fully develop in a fetus is the control of breathing," and apnea "is expected in premature infants."

Dr. Molofsky averred that the infant plaintiff was diagnosed with a grade III intraventricular hemorrhage and that "almost every premature baby of this size develops some degree of bleeding and it is not indicative of fetal distress," and it "cannot be prevented" and "usually develops within 96 hours of

life" (emphasis omitted). When the child was diagnosed with autism on July 8, 2008 by one of his physicians, the diagnosis was "not secondary to a brain injury" and his "functional level is not related to his diagnosis of autism" (emphasis omitted).

Dr. Molofsky opined that "the infant experienced complications due to his premature birth and that this does not serve to alert [HHC] that he would develop any conditions now alleged to be the result of negligence in his perinatal care and treatment." The child's "developmental delays and resultant deficits were related to him being born at approximately 26+ weeks and . . . there was no evidence that the infant sustained hypoxic ischemic encephalopathy," nor was there evidence that any of the infant's respiratory issues or development of an IVH were related to placental abruption.

In reply, Dr. Edelberg opined, among other things, that the chronic bleeding the mother experienced between May 31, 2005 and June 15, 2005 "was caused by and evidence of a chronic placental abruption." Although the abruption itself may not have been treatable or preventable, the injury to the fetus caused in part by the abruption was preventable by timely delivery.

Dr. Trifiletti averred that Apgar scores of 6 and 8 are not normal findings for a newborn, even a premature newborn, and indicated neonatal depression as a result of fetal distress, as

did the cord blood gas analysis, which indicated acidosis as a result of in utero hypoxia/ischemia. Further, the doctor asserted, the child's prematurity made it predictable that resuscitation by "PEEP and PPV" would be ineffective, and such efforts caused the staff to delay intubation until 4:55 p.m. According to Dr. Trifiletti, Dr. Molfosky's opinion that intubation was timely ignores the facts preserved in the medical record.

Dr. Trifiletti averred that his experience did not support the assertion that almost every infant of the infant plaintiff's size experiences some degree of bleeding, nor did the medical literature, which states that the vast majority of infants born prior to 35 to 36 weeks do not experience bleeding in the brain and that appropriate intervention after delivery could have prevented or reduced the injury to the child's brain.

Analysis

"In determining whether to grant [an] extension [to file a late notice of claim], the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of [GML] section [50-e] or within a reasonable time thereafter" (GML § 50-e(5); *see also Perez v New York City Health*

& Hosps. Corp., 81 AD3d 448 [2011]). In addition to actual knowledge of essential facts, the court should also consider "whether the claimant is an infant, whether there exists a reasonable excuse for the failure to serve the notice timely and whether the delay in serving the notice would substantially prejudice the municipality in its defense" (*Perez,* 81 AD3d at 448, citing *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 535 [2006] and *Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [2003]; *see also* GML § 50-e[5]). "[T]he presence or absence of any one factor is not determinative" (*Dubowy*, 305 AD2d at 321), and since the notice statute is remedial in nature, it should be "liberally construed" (*id.*).

Here, contrary to the majority's opinion, the hospital chart demonstrates that HHC had actual notice of the essential facts constituting the claim within 90 days of accrual or a reasonable time thereafter, as required by GML § 50-e(5). Notably, the medical records need not conclusively document that malpractice caused the injury. Rather, they merely need to *suggest* injury attributable to malpractice (*Williams*, 6 NY3d at 537). The medical records in the present case document that the infant plaintiff's mother suffered a placental abruption and chorioamnionitis, and that the infant plaintiff suffered a grade III intraventricular hemorrhage. After reviewing the medical

records, plaintiff's experts averred that the hospital staff deviated from the standard of care. There was, according to plaintiff's experts, an obvious urgency to deliver by emergency cesarean section.

The defendant's delay in performing an emergency cesarean section and in providing immediate ventilation through intubation, and its discussion of subsequent neurological sequelae with the parents after the diagnosis of the grade III IVH, while not dispositive, suggest injury attributable to medical malpractice (*see Castaneda v Nassau Health Care Corp.*, 89 AD3d 782, 783 [2011] [holding that the defendants had actual knowledge of the essential facts constituting the claim because the medical records provided knowledge of the facts and suggested injury attributable to malpractice]). Thus, contrary to the majority's opinion, plaintiff's experts showed that plaintiff's injuries resulted from medical malpractice notwithstanding the premature birth.

The fact that defendant's experts have provided a different interpretation of the medical records does not show that the hospital lacked actual knowledge of the records. Instead, it shows that there is an issue as to the merits of the claim. Indeed, the motion court acknowledged that the conflicting expert testimony would have precluded a motion for summary judgment.

In addition, defendant was not substantially prejudiced by the delay. Indeed, unlike the defendant in *Williams*, who was prejudiced by a 10-year delay (6 NY3d at 539), defendant in the present case was not substantially prejudiced by a 14-month delay. Once a municipal body receives a notice of claim, it has actual notice that a lawsuit is likely to follow and it should begin its investigation and preserve evidence, even if the notice of claim is served late and without leave of court (*see Pearson v New York City Health & Hosps. Corp., [Harlem Hosp. Ctr.]*, 43 AD3d 92, 94 [1st Dept 2007], *aff'd* 10 NY3d 852 [2008]; *cf. Alvarez v New York City Health & Hosps. Corp, [North Cent. Bronx Hosp.]*, 101 AD3d 464, 464 [1st Dept 2012] [no prejudice where "hospital records, which evidence an investigation in the case of the infant's condition, provide an extensive paper trail and preserve all of the essential facts relating to this claim"] [internal quotation marks omitted]). The statute "should not operate as a device to defeat the rights of persons with legitimate claims" (*Matter of Annis v New York City Tr. Auth.*, 108 AD2d 643, 644 [1st Dept 1985]).

Defendant asserts that it has been prejudiced by the untimely notice of claim because if it had received timely notice, it would have been able to interview the staff involved while the treatment was "still fresh in their minds." This claim

of prejudice is speculative at best, since the hospital has not illustrated specifically how it has been prejudiced. This court has repeatedly held that assertions of prejudice based solely on the delay in serving the notice of claim are insufficient (*Matter of Lopez v City of New York*, 103 AD3d 567, 568 [1st Dept 2013]; *see also Young v New York City Health & Hosps. Corp.*, 90 AD3d 517, 518 [1st Dept 2011] [holding that the "[d]efendant's claim that the memories of its employees are no longer at their 'most fresh' does not evidence substantial prejudice attributable to the delay"]).

Plaintiff's infancy also militates in his favor. Although a court is not precluded from examining whether infancy caused the delay in serving the notice, the Court in *Williams* noted that the "Legislature deleted the causation language" in GML § 50-e(5) and added the simple fact of infancy as one of the considerations that should be considered (*Williams*, 6 NY3d at 538; *see also Bayo v Burnside Mews Assoc.*, 45 AD3d 495, 495 [1st Dept 2007] [where the record demonstrates that the defendant's possession of the medical records provided actual notice of the facts constituting a claim of medical malpractice, the infant plaintiff should not be deprived of a remedy]). Thus, although a "delay of service caused by infancy would make a more compelling argument to justify an extension," the lack of a "causative nexus" is not

fatally deficient (*Williams*, 6 NY3d at 538; *see also De La Cruz v New York City Health & Hosps. Corp.*, 13 AD3d 130, 130 [1st Dept 2004] [infant plaintiff should not be penalized for mother's delay, "where defendant has been in possession of plaintiff's medical records since the time of the alleged acts of malpractice, and does not show how it has been prejudiced by these delays"]).

Lastly, this Court has repeatedly ruled that lack of a reasonable excuse is not determinative in considering a motion for leave to serve a late notice of claim (*see Alvarez,* 101 AD3d at 465). This is particularly so where the defendant had actual notice of the essential facts and was not prejudiced by the delay (*Matter of Lopez*, 103 AD3d at 568; *Renelique v New York City Hous. Auth.*, 72 AD3d 595,596 [1st Dept 2010]; *see also Perez*, 81 AD3d at 449 ["The absence of a reasonable excuse for the delay is not, standing alone, fatal to the application, particularly in light of the lack of prejudice to [the] defendant"] [internal citation omitted]).

Accordingly, I would reverse and remand for further proceedings.

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

ENTERED: SEPTEMBER 18, 2014

CLERK

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

12269 David Lichtenstein, et al., Index 652092/12
Plaintiffs-Appellants,

-against-

Willkie Farr & Gallagher LLP,
Defendant-Respondent,

Marc Abrams, et al.,
Defendants.

_____

Emery Celli Brinckerhoff & Abady LLP, New York (Andrew G. Celli, Jr. of counsel), for appellants.

Cahill Gordon & Reindel LLP, New York (Thomas J. Kavaler of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about April 25, 2013, which, to the extent appealed from as limited by the briefs, granted the motion by defendant Willkie Farr & Gallagher LP to dismiss the legal malpractice cause of action pursuant to CPLR 3211(a)(7), unanimously affirmed, with costs.

Plaintiff David Lichtenstein owns and manages real estate through his entities, plaintiffs The Lightstone Group, LLC and Lightstone Holdings, LLC. In 2007, Lichtenstein and a consortium of investors purchased Extended Stay, Inc. (ESI), which owns and manages hotels. Most of the purchase price was financed through a combination of $4.1 billion in mortgage loans to ESI and $3.3

billion in 10 mezzanine loan tranches to its subsidiaries. As part of the loan transaction, Lichtenstein and Lightstone Holdings executed 11 guarantees that subjected them to $100 million in personal liability in the event of particular "bad boy" acts which included the voluntary filing of a bankruptcy petition by ESI. Lichtenstein managed ESI and became its president, CEO and chairperson. The majority of ESI's board of directors was comprised of Lichtenstein and representatives of entities he controlled.

The following year, ESI was faced with a liquidity crisis as its financial situation declined. ESI retained nonparty Weil, Gotshal & Manges as its restructuring counsel. As stated in the complaint, Weil Gotshal could not represent both ESI and Lichtenstein. As further alleged in the complaint, Lichtenstein retained Wilkie Farr in December 2008, "to advise and represent [him] in his role as an officer and director of ESI, particularly as to the liability of him and his entities in any restructuring, as well as to advise and represent affiliates of the Lightstone Group regarding their interests in ESI." Acting as ESI's counsel, Weil Gotshal recommended that ESI file for bankruptcy and advised that its board members, including Lichtenstein, were obligated as fiduciaries to achieve that result. Plaintiffs allege that their counsel, Willkie Farr, embraced Weil Gotshal's

position although it was allegedly erroneous and would have exposed plaintiffs to $100 million in liability on the guarantees.

According to the complaint, ESI's financial condition continued to deteriorate, leaving Lichtenstein with a choice to either a) have the company file for bankruptcy, exposing Lichtenstein to liability on the guarantees or, "b) seek an alternative, including to refuse, or at least delay, and force the Lenders' hand to file a petition for involuntary bankruptcy or foreclose on the collateral (in which case Lichtenstein would risk a lawsuit under a breach of fiduciary claim [sic])." The complaint further alleges that Willkie Farr insisted that Lichtenstein had a fiduciary obligation to put ESI into bankruptcy for the benefit of the lenders. Willkie Farr warned that Lichtenstein otherwise faced the prospect of unequivocal and uncapped personal liability in any subsequent action by the lenders absent a bankruptcy filing by ESI. Before having ESI file for bankruptcy, Lichtenstein offered to surrender the collateral to the lenders as a group. Some of the lenders, however, balked and went to court to block any such surrender in what plaintiffs describe as a likely effort to force ESI into voluntary bankruptcy and trigger the "bad boy" guarantee. On Willkie Farr's advice, Lichtenstein caused ESI to file its

bankruptcy petition on June 15, 2009. The lenders brought actions on the guarantees and a judgment was subsequently entered against Lichtenstein and Lightstone Holdings in the sum of $100 million.

This action was filed in June 2012. In making the instant motion to dismiss, Willkie Farr argued that its advice was reasonable and consistent with controlling Delaware law which imposed upon Lichtenstein, a director of an insolvent corporation, a fiduciary duty to maximize the company's long-term value for the benefit of its creditors and other constituencies such as equity holders and employees. Willkie Farr further asserted that the complaint is deficient because it does not allege that absent ESI's bankruptcy filing, Lichtenstein's liability would not have been triggered. The motion court granted Willkie Farr's motion, finding that the complaint contains no allegation of a failure "to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to []plaintiff" (*see Ambase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). We affirm.

On this appeal, plaintiffs argue that Willkie Farr's advice did not meet the requisite standard of professional skill because a derivative suit by the lenders against Lichtenstein for breach

of fiduciary duty would not have been successful. In making the argument, plaintiffs recognize that under Delaware law, the exposure Lichtenstein faced by reason of ESI's insolvency differed from the exposure that would be faced by the officers and directors of a traditional stock-issuing corporation. For example, when a corporation is solvent its directors' fiduciary duties may be enforced by its shareholders, who have standing to bring derivative actions on behalf of the corporation because they are the ultimate beneficiaries of the corporation's growth and increased value (*North Am. Catholic Educ. Programming Found., Inc. v Gheewalla*, 930 A2d 92, 101 [Del 2007]). On the other hand, when a corporation is insolvent, "its creditors take the place of the shareholders as the residual beneficiaries of any increase in value. Consequently, the creditors of an *insolvent* corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties" (*id.*).

Citing *CML V, LLC v Bax* (28 A3d 1037 [Del 2011], plaintiffs argue that the landscape is different with respect to Lichtenstein's fiduciary duty because the constituent entities that made up ESI were Delaware limited liability companies (LLCs) as opposed to corporations. In *CML*, the Supreme Court of Delaware held that under the Delaware Limited Liability Company

Act (6 Del Code Ann tit 6, ch 18) § 18-1002, derivative standing is limited to "member[s]" or "assignee[s]" and unavailable to creditors of LLCs (*id.* at 1046). Plaintiffs' argument is not persuasive because the Supreme Court of Delaware's opinion in *CML* as well as the Delaware Chancery Court's opinion, which it affirmed (6 A3d 238 [Del Ch 2010]), were decided after Willkie Farr gave the advice described in the complaint. In fact, the Chancery Court observed that "virtually no one has construed the derivative standing provisions [of § 18-1002] as barring creditors of an insolvent LLC from filing suit" (*id.* at 242). The Chancery Court further noted that "[m]any commentators . . . have assumed that creditors of an insolvent LLC can sue derivatively" (*id.* at 243 [citations omitted]).

In a legal malpractice action, what constitutes ordinary and reasonable skill and knowledge should be measured at the time of representation (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 313 [2000]). In this case, the time of Willkie Farr's representation preceded the Chancery Court's decision in *CML* by approximately two years. Accordingly, the complaint fails to allege that Willkie Farr's advice was wanting by reason of its failure to advise Lichtenstein that the creditors of the ESI constituent entities lacked standing to bring derivative actions.

Plaintiffs also argue that Lichtenstein would have been

insulated from liability by the business judgment rule had he declined to have ESI file for bankruptcy protection. In support of the argument, plaintiffs cite *Mukamal v Bakes* (378 F Appx 890 [11th Cir 2010, *cert denied* __ US __, 131 S Ct 1785 [2011]), for the proposition that under Delaware law, "officers and directors do not breach the duty of loyalty by exercising their business judgment and continuing to operate an insolvent corporation rather than entering bankruptcy and preserving assets to pay creditors" (*id.* at 901). The business judgment rule, however, protects only directors who are disinterested, meaning they do not, for example, stand to gain any personal financial benefit in the sense of self-dealing "as opposed to a benefit which devolves upon the corporation or all stockholders generally" (*Aronson v Lewis*, 473 A2d 805, 812 [Del 1984], *overruled on other grounds Brehm v Eisner*, 746 A2d 244 [Del 2000]). The complaint in this case makes it plain that Lichtenstein was not disinterested, because his stewardship of ESI was affected by a conflict between his fiduciary duties as a director of the company and his personal exposure to $100 million in liability on the guarantees in the event of ESI's voluntary bankruptcy. As disclosed by the complaint, Lichtenstein's conflict was the reason why Weil Gotshal, ESI's restructuring counsel, advised him to retain separate counsel. Had Lichtenstein failed to authorize or

delayed ESI's bankruptcy filing, he would have been faced with uncapped personal liability on the basis of a breach of his duty to act in good faith. Such a breach occurs "when a director 'intentionally acts with a purpose other than that of advancing the best interests of the corporation' . . ." (*In re USA Detergents, Inc.*, 418 BR 533, 545 [D Del 2009] [citation omitted]).

There is no merit to plaintiffs' argument that Willkie Farr overlooked the availability of an equitable defense under the doctrine of in pari delicto. By operation of the doctrine, the position of a party defending against a claim is better than that of the party asserting the claim in a case of equal or mutual fault (*see In re Oakwood Homes Corp.*, 389 BR 357, 365 [D Del 2008], *affd* 356 F Appx 622 [3rd Cir 2009]). Here, plaintiffs argue that the lenders could have been faulted for structuring the loan transactions in a way that prevented ESI from declaring bankruptcy. Plaintiffs' argument is flawed because they allege

no wrongdoing that the lenders have committed in negotiating the guarantees in the course of an arms length transaction. We have considered plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: SEPTEMBER 18, 2014

CLERK

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

12658 Wojciech Rzymski, Index 104591/07
Plaintiff-Respondent,

-against-

Metropolitan Tower Life Insurance Company, et al.,
Defendants-Appellants.

[And a Third-Party Action]

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An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about June 10, 2013,

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 July 29, 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: SEPTEMBER 18, 2014

CLERK

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

12780- Index 350768/02
12781N-
12782N- Nancy Waldbaum Nimkoff,
Plaintiff-Respondent,

-against-

Ronald A. Nimkoff,
Defendant-Appellant.

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The Nimkoff Firm, Syosset (Ronald A. Nimkoff of counsel), for appellant.

Katsky Korins LLP, New York (Dennis C. Krieger of counsel), for respondent.

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Order, Supreme Court, New York County (Laura E. Drager, J.), entered October 9, 2012, which, to the extent appealed from as limited by the briefs, confirmed the Special Referee's recommendations as to the allocation of the parties' 2001 federal and state tax refunds and the distribution of their JP Morgan bank account and their wedding gifts, and denied defendant's motion to reject the Referee's denial of his motion to vacate his default, and order, same court and Justice, entered October 8, 2013, to the extent it rejected the Special Referee's recommendation as to defendant's obligations for basic child support and statutory add-on expenses and determined those obligations anew, unanimously affirmed, without costs. Appeal from so much of the October 8, 2013 order as denied defendant's

request for reconsideration of his motion to vacate his default, deemed a motion to reargue, unanimously dismissed, without costs, as nonappealable. Order, same court and Justice, entered December 4, 2012, to the extent it sanctioned defendant, unanimously reversed, on the law, without costs, and the order vacated.

Assuming, without determining, that defendant had a reasonable excuse for his default in appearing at the hearing on equitable distribution and child support, vacatur of the default is nonetheless unwarranted because defendant failed to adduce sufficient evidence to demonstrate a meritorious claim (*see Atwater v Mace*, 39 AD3d 573, 574 [2d Dept 2007]).

The court also correctly determined that the filing of the parties' 2001 joint federal and state tax returns should not be regarded as creating a joint tenancy with a right of survivorship in the resulting refunds (*see Angelo v Angelo*, 74 AD2d 327, 330-334 [2d Dept 1980]). Under the terms of the parties' prenuptial agreement, since the tax refunds are not specifically identified as marital property, they must be regarded as separate property of which each party is entitled to a pro rata share.

However, the court improperly imposed on defendant, "as sanctions," plaintiff's costs in responding to his motion for sanctions against her, since it set forth no finding that

defendant's conduct was frivolous (*see* 22 NYCRR 130-1.2). Nor, assuming it intended to award costs, rather than sanctions, did the court provide the requisite explanation why the amount awarded was appropriate (*see id.*).

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

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

ENTERED: SEPTEMBER 18, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12906 Wilfred Griffiths, Index 307285/09
Plaintiff-Appellant,

-against-

FC-Canal, LLC, et al.,
Defendants-Respondents.

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Blank & Star, PLLC, Brooklyn (Scott Star of counsel), for appellant.

Zaremba Brownell & Brown PLLC, New York (Erica P. Anderson of counsel), for respondents.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered May 9, 2013, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the Labor Law §§ 200 and 241(6) causes of action, and denied plaintiff's cross motion for partial summary judgment on the issue of liability on those claims, unanimously affirmed, without costs.

Plaintiff was injured when he slipped an fell on ice that he was removing from the top floor of a hotel under construction. Defendant FC-Canal, LLC owned the property, and defendant Tritel Construction Group, LLC (Tritel) was the general contractor on the project. Plaintiff was an employee of nonparty IBK Construction Group (IBK), with which Tritel had entered into a subcontract for concrete superstructure work.

The motion court properly dismissed plaintiff's Labor Law § 200 claim. The record shows that plaintiff slipped on ice that his supervisor had instructed him to remove. The ice was a dangerous condition that plaintiff was directed to remedy. As such, he cannot recover under Labor Law § 200 since the condition for which he would hold defendants accountable was the exact condition he had undertaken to remedy (*see Gaisor v Gregory Madison Ave., LLC*, 13 AD3d 58, 60 [1st Dept 2004]; *Applebaum v 100 Church L.L.C.*, 6 AD3d 310, 311 [1st Dept 2004]).

Upon our review of the record, we find that plaintiff's deposition testimony and affidavit, and the contract between FC-Canal and Tritel, do not raise a triable issue of fact as to whether Tritel supervised and controlled plaintiff's work. Although plaintiff alleges that "some guy from another company" directed his supervisor to remove the ice in order to put down cement, he testified that the only person who gave him any instruction over his work was his supervisor. To the extent that someone directed plaintiff's supervisor, this only establishes that the general contractor coordinated the work of the subcontractor. In fact, the contract between FC-Canal and Tritel provides for Tritel to have general supervisory authority over subcontractors. This general supervisory authority does not "rise to the level of supervision or control necessary to hold

the general contractor liable for plaintiff's injuries under Labor Law § 200" (*Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]).

As to plaintiff's argument that it was the general contractor's obligation, not the job of the subcontractor, to remove the ice, section 2.02 of the contract between FC-Canal and Tritel states that the "General Contractor shall perform and furnish, or cause to be performed and furnished all labor, supervision . . . and all other requirements of governmental agencies including . . . winter and inclement weather protections." The contract's provisions regarding weather does not impose a strict duty on Tritel itself to perform the ice removal. Thus, if Tritel directed the subcontractor to perform the ice removal before pouring concrete, it remains consistent with the contract's provisions for "winter and inclement weather protections."

We find that the court properly dismissed the Labor Law § 241(6) claim insofar as it was predicated on 12 NYCRR 23-1.7(d), since plaintiff slipped on "the very condition he was charged with removing" (*Gaisor v Gregory Madison Ave., LLC*, 13 AD3d 58, 60 [1st Dept 2004]). The court also properly dismissed the claim insofar as it was predicated on 12 NYCRR 23-1.8(c)(2), since plaintiff does not allege a violation of this provision in his

complaint or bill of particulars (*see Reilly v Newireen Assoc.*, 303 AD2d 214, 218 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]), and, in any event, it is inapplicable to the circumstances presented.

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

ENTERED: SEPTEMBER 18, 2014

CLERK

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

12412 Guiseppe D'Alessandro, Index 100135/11
Plaintiff-Respondent,

-against-

John Carro, et al.,
Defendants-Appellants.

_____

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman of counsel), for appellants.

Sullivan Gardner PC, New York (Brian Gardner of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered July 30, 2013, dismissed, without costs, as taken from a nonappealable order.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

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

12412
Index 100135/11

_____x

Guiseppe D'Alessandro,
Plaintiff-Respondent,

-against-

John Carro, et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of the Supreme Court, New York County (Shlomo S. Hagler, J.), entered July 30, 2013, which, to the extent appealed from, denied their motion to reargue, improperly denominated a motion to renew, their motion to dismiss plaintiff's claims for nonpecuniary damages.

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman and Younie J. Choi of counsel), for appellants.

Sullivan Gardner PC, New York (Brian Gardner of counsel), for respondent.

TOM, J.P.

Defendants again ask this Court to overturn an order denying their motion to dismiss so much of the complaint, sounding in legal malpractice, as seeks nonpecuniary damages. Review of the initial Supreme Court order entered March 6, 2012 was precluded upon our grant of plaintiff's motion to dismiss defendants' appeal for failure to prosecute. Defendants then sought to be relieved from their default in perfecting the appeal by interposing a motion to vacate our order of dismissal, which we denied (2013 NY Slip Op 84113[U] [1st Dept 2013]). On this appeal, defendants seek review of an order denying what is represented to be a motion to renew their original application to strike plaintiff's nonpecuniary damages claim, on the ground that there has been an intervening change in the law. Because the law in this Department remains what it was when the original order was issued, the predicate for a motion to renew is lacking, and the motion is one to reargue. Because no appeal lies from the denial of a motion to reargue, there is nothing for us to review at this juncture.

This controversy arises out of defendants' representation of plaintiff on appeal from his conviction for holding a former restaurant employee captive for a 24-hour period, resulting in plaintiff's conviction of kidnapping, assault and other charges.

Plaintiff was sentenced to an aggregate term of 15 years to life (*People v D'Alessandro*, 230 AD2d 656 [1st Dept 1996], *lv denied* 89 NY2d 863 [1996]) and served 14½ years of his sentence before being released in November 2007.

In June 2010, this Court granted plaintiff's application for a writ of error coram nobis, reversing the judgment of conviction and dismissing the indictment (*People v D'Alessandro*, 2010 NY Slip Op 75591[U] [1st Dept 2010]). We held that appellate counsel's failure to raise a clear-cut speedy trial issue was dispositive of the question of effective assistance of counsel (*id.*). In particular, we held that the period of 196 days between the filing of plaintiff's omnibus motion seeking dismissal of the indictment and the time the People produced the grand jury minutes in response to the motion alone would have exceeded the 184 days during which the People were required to be ready for trial (CPL 30.30[1][a]). We noted that the issue of whether the time was chargeable to the People was settled law (*see People v McKenna*, 76 NY2d 59 [1990]) and had counsel raised the issue, his client would have prevailed (*D'Alessandro*, 2010 NY Slip Op 75591[U]).

Plaintiff then commenced the instant legal malpractice action in January 2011. The complaint alleges that defendants' failure to raise the speedy trial issue on appeal caused

plaintiff to needlessly remain incarcerated for over 13 years. He seeks damages of $26 million, including loss of income, as well as nonpecuniary damages for emotional and physical distress, damage to reputation and loss of consortium.

In response, defendants moved to dismiss the complaint for failure to state a cause of action based on the documentary evidence (CPLR 3211[a][1], [7]). In the alternative, the motion sought dismissal of the claims for nonpecuniary damages on the ground that such damages are unavailable in legal malpractice cases. In their memorandum of law in support of the motion, defendants relied upon this Court's ruling in *Wilson v City of New York* (294 AD2d 290 [1st Dept 2002]), which likewise involved a claim arising out of the plaintiff's conviction on criminal charges and resulting incarceration. As defendants noted, *Wilson* holds that the bar against recovery of nonpecuniary damages in a legal malpractice action is a matter of policy not limited to the civil context (*id.* at 292-293).

However, the Supreme Court (Emily Jane Goodman, J.), on February 29, 2012, denied the motion in its entirety and allowed the claims for nonpecuniary damages to remain (34 Misc 2d 1242[A], 2012 NY Slip Op 50508[U], *6 [Sup Ct, NY, County 2012]). In doing so, the motion court rejected this Court's rule in *Wilson* that nonpecuniary damages may not be sought in malpractice

cases, even in the criminal context (*id.* at *5-6). The court noted that the "ten year old *Wilson* theory of damages was not adopted by the Fourth Department" in the more recent decision of *Dombrowski v Bulson* (79 AD3d 1587 [4th Dept 2010], *revd* 19 NY3d 347 [2012]), which held that non-pecuniary damages may be recovered in criminal malpractice cases. Noting that D'Alessandro would have been spared 10 years of incarceration if the direct appeal had challenged the speedy trial ruling, the court reasoned, "[I]f the . . . First Department had the occasion to revisit the instant case, or a similar one where malpractice has been established and the issue of damages central, perhaps it would be viewed differently" (2012 NY Slip Op 50508[U], *5). *Dombrowski* was subsequently overturned on May 31, 2012 (19 NY3d 347 [2012]).

As reflected in their preargument statement (Rules of App Div 1st Dept [22 NYCRR] 8600.17), defendants were obviously aware of the error in Supreme Court's order, which was inconsistent with this Department's holding in *Wilson*. Defendants filed a notice of appeal in February 2012 but failed to perfect within the nine months prescribed by the rules of this Court (22 NYCRR 600.11[a][3]). Upon plaintiff's motion, the appeal was dismissed on February 28, 2013 for failure to prosecute (*id.* at § 600.12[b]). In the interim, defendants moved before Supreme

Court on January 7, 2013, purportedly pursuant to CPLR 2221(e), to renew their application to dismiss so much of the complaint as seeks nonpecuniary damages. Defendants noted that, the Fourth Department case relied upon by the motion court in the initial order which permitted recovery of nonpecuniary damages in instances of malpractice regarding criminal cases, had been reversed by the Court of Appeals (*Dombrowski* 19 NY3d 347). Accordingly, defendants maintained that there had been a change in the law that warranted revisiting their original application to dismiss the complaint (CPLR 2221[e][2]). In denying the motion to renew, the motion court made no ruling on its procedural foundation. Rather, the court based its decision upon the substantive ground that this Court's dismissal of the appeal from the prior order operates as a disposition on the merits, thereby precluding any reconsideration of the merits by Supreme Court (citing *Bray v Cox*, 38 NY2d 350 [1976]; *see Brown v Brown*, 169 AD2d 487 [1st Dept 1991]; *Maracina v Schirrmeister*, 152 AD2d 502 [1st Dept 1989]).[1]

[1] It should be emphasized that this matter arises in a procedural context similar to that confronted by the Court of Appeals in *Bray*, which culminated in the ruling that no review could be undertaken of the *same* order that had been the subject of the dismissed appeal for lack of prosecution.

On appeal, defendants, citing *Faricelli v TSS Seedman's* (94 NY2d 772, 774 [1999]), argue that this Court should exercise its discretion to entertain the appeal to correct an error in the motion court's initial ruling. In *Faricelli*, the defendant appealed from the denial of a motion to dismiss an action for personal injury on the ground that the plaintiff could not establish constructive notice of a hazardous condition as a matter of law (94 NY2d at 773-774). As here, the defendant's appeal was dismissed for failure to prosecute (*id.* at 774). The plaintiff was awarded damages at trial, the defendant appealed from the judgment, and the Second Department reversed, holding that the verdict was not sufficiently supported by evidence of constructive notice (*id.*). The Court of Appeals affirmed and acknowledged that the Second Department had discretion to entertain the second appeal even though the prior appeal on the same issue had been dismissed for failure to prosecute (*id.* at 773-774). The Court cited to *Aridas v Caserta* (41 NY2d 1059, 1061 [1977]), which states, "Every court retains a continuing jurisdiction generally to reconsider any prior intermediate determination it has made."

Defendants' right to appellate review is entirely dependent on the basis of their application to the motion court for

reconsideration of its previous order (CPLR 2221[d], [e]; *compare Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 173 AD2d 203, 204 [1st Dept 1991], *with Kasem v Price-Rite Off. & Home Furniture*, 21 AD3d 799, 801 [1st Dept 2005]). Before the 1999 amendment of CPLR 2221 (L 1999, ch 281 [effective July 20, 1999]), a motion seeking to amend a prior order due to a change effected by statutory or case law was entertained as a motion to reargue (*see e.g. Miller v Schreyer*, 257 AD2d 358 [1st Dept 1999]) as an exception to the general rule that reargument must be sought within the time specified for taking an appeal from the prior order (*see Foley v Roche*, 86 AD2d 887 [2d Dept 1982], *lv denied* 56 NY2d 507 [1982]). With the statutory amendment, the application has been designated a motion to renew (CPLR 2221[e][2]).

While defendants have denominated their motion as one seeking renewal, they identify no change in law warranting reexamination of their arguments. It is axiomatic that Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department (McKinney's Cons Laws of NY, Book 1, Statutes § 72[b]), and where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule

is established by the Appellate Division in its own Department or by the Court of Appeals (*Mountain View Coach Lines v Storms*, 12 AD2d 663, 664 [2d Dept 1984]; *see also People v Turner*, 5 NY3d 476, 481-482 [2005]; *United States Gypsum Co. v Riley-Stoker Corp.*, 11 Misc 2d 572, 575 [Sup Ct, Genesee County 1958] ["The doctrine of stare decisis does not compel a judge at Special Term to follow a decision of a Special Term in another judicial district; nevertheless, he shall follow a decision made by the Appellate Division of another department, unless his own Appellate Division or the Court of Appeals holds otherwise"] [emphasis omitted]), *affd* 7 AD2d 894 [4th Dept 1959], *revd on other grounds* 6 NY2d 188 [1959]. Thus, a particular Appellate Division will require the lower courts within its Department to follow its rulings, despite contrary authority from another Department, until the Court of Appeals makes a dispositive ruling on the issue (*see e.g. Ross v Curtis-Palmer Hydro-Elec. Co.*, 180 AD2d 385, 390 [3d Dept 1992], *mod* 81 NY2d 494 [1993]).

In this case, the applicable law was established by our ruling in *Wilson v City of New York* (294 AD2d at 292-293), which holds that nonpecuniary damages are unrecoverable in a legal malpractice action whether the malpractice is civil or criminal in nature. The law in this Department was unaltered by the ensuing Court of Appeals' decision in *Dombrowski*. Indeed, in

following *Wilson* and rejecting the Fourth Department's contrary position, the Court of Appeals stated, "We see no compelling reason to depart from the established rule limiting recovery in legal malpractice actions to pecuniary damages" (19 NY3d at 352). While Supreme Court did not decide the procedural issue, it is clear that defendants have advanced no grounds for renewal of their motion to dismiss. Indeed, an intervening ruling that merely clarifies existing law does not afford a basis for renewal attributed to a change in the law (*Philips Intl. Invs., LLC v Pektor*, 117 AD3d 1 [1st Dept 2014]). While this Court has the discretion to reconsider an issue on an appeal previously dismissed for failure to prosecute, "even if it could have dismissed the appeal under *Bray*" (*Faricelli* at 794), the instant appeal must be dismissed since defendants' motion before the motion court was one to reargue, the denial of which is not appealable (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007]). We have considered defendants' remaining contentions and find them unavailing.

Accordingly, the appeal from the order of the Supreme Court, New York County (Shlomo S. Hagler, J.), entered July 30, 2013, which, to the extent appealed from, denied defendants' motion to reargue, improperly denominated a motion to renew, their motion

to dismiss plaintiff's claims for nonpecuniary damages, should be dismissed, without costs, as taken from a nonappealable order.

All concur.

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

ENTERED: SEPTEMBER 18, 2014

CLERK