SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 12, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Renwick, Clark, JJ.

11145 The People of the State of New York, Respondent, Ind. 594/03

-against-

Ramon Caba,
Defendant-Appellant.

_____

Glenn R. Abolafia, New York, for appellant.

_____

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about February 10, 2011, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of

the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

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

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15060 The People of the State of New York, Ind. 4413/10
Respondent, 480/10

-against-

Jaquim Diaz, etc.,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Paul B. Hershan of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Troy K. Webber, J.), rendered on or about February 19, 2013,

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

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

ENTERED: MAY 12, 2015

CLERK

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

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15061- Index 151811/14
15062-
15063 Terry S. Bienstock,
Petitioner-Respondent,

-against-

Greycroft Partners, L.P.,
Respondent-Appellant.

_____

Dilworth Paxson LLP, New York (Gregory A. Blue of counsel), for appellant.

Herrick, Feinstein LLP, New York (Justin B. Singer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 22, 2014, which granted the petition to turn over funds received by respondent Greycroft Partners, L.P. (Greycroft), as subject to a constructive trust imposed by the Delaware Chancery Court, and granted petitioner's request for attorneys' fees, unanimously modified, on the law, to the extent of denying petitioner's request for attorneys' fees, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered July 14, 2014, unanimously dismissed, without costs, as taken from an order that was superseded by the August 22, 2014 order; and appeal from order, same court and Justice, entered September 18, 2014, which, upon reargument,

adhered to the initial determination, unanimously dismissed, without costs, as academic.

Petitioner Bienstock established his superior right to the proceeds of the asset sale distributed to respondent Greycroft (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Eland Motor Car Co.*, 85 NY2d 725, 729 [1995]; CPLR 5225[b]), a third party transferee of funds that received the funds at issue, which were subject to a constructive trust imposed by the Delaware Chancery Court (*see Schock v Nash*, 732 A2d 217, 232-233 [Del 1999]; *Harris Trust and Sav. Bank v Salomon Smith Barney, Inc.*, 530 US 238, 250 [2000]).

The motion court erred in awarding attorneys' fees since this is a turnover proceeding brought pursuant to CPLR 5225(b) as opposed to an action or proceeding to set aside a fraudulent conveyance (*compare* Debtor and Creditor Law § 276-a).

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15064 In re Melanie C.,

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

Melissa L.,
Respondent-Appellant,

The Administration for
Children's Services,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondent.

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

_____

Appeal from order, Family Court, New York County (Susan K. Knipps, J.), entered on or about June 23, 2014, which denied respondent's application pursuant to Family Court Act § 1028 for the return of the child, unanimously dismissed, without costs, as moot.

Respondent's appeal has been rendered moot by the subsequent fact-finding determination of neglect against her, made on or

about February 23, 2015 (*see Matter of Josee Louise L.H. [DeCarla L.]*, 121 AD3d 492 [1st Dept 2014], *lv denied* 24 NY3d 913 [2015]; *Matter of Charnel T.*, 49 AD3d 427 [1st Dept 2008]).

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15065 Harmit Realties LLC, Index 651931/13
Plaintiff-Appellant-Respondent,

-against-

835 Avenue of the Americas, L.P.,
et al.,
Defendants-Respondents-Appellants,

"XYZ CORPS 1-5," etc., et al.,
Defendants.

_____

Pryor Cashman LLP, New York (Todd E. Soloway, Eric D. Sherman and Jared D. Newman of counsel), for appellant-respondent.

Kasowitz, Benson, Torres & Friedman LLP, New York (Jed I. Bergman of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 5, 2014, which granted in part, and denied in part, defendants' motion to dismiss the complaint pursuant to CPLR 3211, unanimously modified, on the law, the first cause of action, for declaratory judgment, and second cause of action, for breach of contract and monetary damages, reinstated, and otherwise affirmed, without costs.

The court properly rejected defendants' contention that the action was time-barred. As air rights are an interest in real property (*see Macmillan, Inc. v CF Lex Assoc.*, 56 NY2d 386, 392-393 [1982]; *see also El Paso Corp. v New York State Dept. of*

Taxation & Fin., 36 AD3d 655, 657 [2d Dept 2007], *lv denied* 8 NY3d 813 [2007]), the three-year statute of limitations for conversion claims is inapplicable (*see B&C Realty, Co. v 159 Emmut Props. LLC*, 106 AD3d 653, 656 [1st Dept 2013]; *Benn v Benn*, 82 AD3d 548, 550 [1st Dept 2011]). The cases cited by defendant do not involve real property (*see Sporn v MCA Records*, 58 NY2d 482, 488 [1983]), or analyze whether the development rights therein constituted real or personal property (*Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 582 [1st Dept 2010]; *Goulian v Gramercy 29 Apts.*, 199 AD2d 98, 98 [1st Dept 1993]).

Plaintiff's first cause of action, for a declaratory judgment, is reinstated, as the allegations and documentary evidence establish a justiciable controversy concerning the parties' legal rights involving the development rights under the agreements (*see American Ins. Assn. v Chu*, 64 NY2d 379, 383 [1985], *cert denied* 474 US 803 [1985]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99-100 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]).

We also reinstate the second cause of action, for breach of contract and monetary damages, as plaintiff has sufficiently pleaded breach of the agreements by alleging that defendants

overbuilt their building based on their inaccurate reporting of air rights that plaintiff had sold and transferred to them, and the pleadings state allegations from which damages may be inferred (*see CAE Indus. v KPMG Peat Marwick*, 193 AD2d 470, 472-473 [1st Dept 1993]). The complaint alleges that defendants used certain of plaintiff's development rights without proper compensation, and that plaintiff's rights to further development of its building has been negatively affected by defendants' actions. Further, as the complaint alleges direct damages that "directly flow from the breach" (*see generally Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799 [2014]), the court erred in concluding that the waiver of consequential damages provision barred the requested relief at this stage of the proceeding. For these reasons, and because it is unclear at this point whether monetary damages provide an adequate remedy, we affirm the sustaining of the third cause of action, for specific performance.

The court properly dismissed the fourth cause of action, for trespass, as plaintiff failed to show physical encroachment on its property (*cf. Madison 96th Assoc., LLC v 17 E. 96th Owners Corp.*, 120 AD3d 409 [1st Dept 2014]; *Wing Ming Props. (U.S.A.) v*

Mott Operating Corp., 172 AD2d 301 [1st Dept 1991], *affd* 79 NY2d 1021 [1992]). The claim is also duplicative of the breach of contract claims, as it is based on the same allegations, and seeks the same damages (*Eden Roc, LLLP v Marriott Intl., Inc.*, 116 AD3d 486 [1st Dept 2014]).

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15066 In re Donicia King, Index 401151/14
Petitioner-Appellant,

-against-

Gladys Carrion, etc., et al.,
Respondents.

_____

MFY Legal Services, Inc., New York (Sara Baez of counsel), for appellants.

_____

Appeal from order, Supreme Court, New York County (Joan B. Lobis, J.), entered on or about September 23, 2014, which declined to exercise jurisdiction, unanimously dismissed, without costs, as taken from a nonappealable ex parte order, such appeal deemed an application pursuant to CPLR 5704(a) to review the order, and the application denied.

Petitioner sought to commence an article 78 proceeding against respondents through the means of an order to show cause, which Supreme Court refused to sign. The court also issued an order declining to exercise jurisdiction. No appeal as of right lies from an ex parte order or from the refusal to sign an ex parte order to show cause (CPLR 5701[a][2]). However, review may be obtained by way of an application pursuant to CPLR 5704(a).

Upon review of the record, we find that Supreme Court properly declined to sign the order to show cause, as petitioner failed to exhaust her administrative remedies (*see Matter of King v Gregorie*, 90 AD2d 922 [3d Dept 1982], *lv dismissed* 58 NY2d 822 [1983]). Petitioner never sought administrative review of respondents' determination that she was not an appropriate person to be certified or approved as a foster parent for her grandchildren (*see* 18 NYCRR 443.2[b][9], [10]). Nor did petitioner show that administrative review of the determination would be futile, or that pursuing such review would cause her irreparable injury (*see Matter of Community Related Servs., Inc. [CRS] v Novello*, 41 AD3d 323, 323 [1st Dept 2007]). Accordingly, petitioner could not have prevailed in an article 78 proceeding (*see Matter of King*, 90 AD2d at 923).

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15067-
15068 The People of the State of New York, Ind. 6470/04
Respondent,

-against-

Mark Jakubek,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Anthony Fontanetta,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for Mark Jakubek, appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), for Anthony Fontanetta, appellant.

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

_____

Judgments, Supreme Court, New York County (Bruce Allen, J.), rendered September 16, 2011, convicting defendants of enterprise corruption, grand larceny in the second degree and nine counts of offering a false instrument for filing in the first degree, and sentencing each defendant to an aggregate term of one to three years, unanimously affirmed. The matter is remitted to Supreme

Court for further proceedings pursuant to CPL 460.50(5) as to each defendant.

The evidence was legally sufficient to establish both defendants' guilt of enterprise corruption and the underlying criminal acts and substantive counts, and the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 3480349 [2007]). Testimony from cooperating witnesses, recorded telephone conversations and paperwork provided circumstantial proof that defendants not only had knowledge of the main witness's criminal enterprise, but were associated with that enterprise and intentionally participated in its fraudulent activities (*see generally People v Kancharla*, 23 NY3d 294 [2014]). Although neither defendant was directly responsible for approving the invoices or billing documentation underlying the fraudulent payment applications, both defendants were in positions of authority with respect to the work performed and their names appear repeatedly in connection with the applications, as conducting field audits, as the addressees of invoices, as contact persons for questions, or in other capacities. The reasonable inferences drawn from that evidence, in conjunction with the testimony and the recorded telephone calls, established the complicity of both defendants in the

filing of the fraudulent payment applications. Additionally, the prosecution's main witness testified that he provided unlawful benefits to both defendants, thus proving the bribe receiving criminal acts underlying the enterprise corruption count as to each defendant.

The People laid a proper foundation for the admission of the business records at issue (*see* CPLR 4518[a]*; People v Cratsley*, 86 NY2d 81, 89 [1995]). In any event, any error in this regard was harmless.

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15070- Index 100143/10
15071 Angela Pierre, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Mary Manning Walsh Nursing Home, Inc., et al.,
Defendants-Appellants-Respondents.

_____

Bond, Schoeneck & King, PLLC, New York (Louis P. DiLorenzo and Michael P. Collins of counsel), for appellants-respondents.

Lichten & Bright, P.C., New York (Stuart Lichten of counsel), for respondents-appellants.

_____

Order and judgment (one paper), Supreme Court, New York County (Debra A. James, J.), entered on or about February 26, 2014, which granted in part and denied in part plaintiffs' motion for summary judgment and defendants' cross motion for summary judgment, declared that defendant Mary Manning Walsh Nursing Home, Inc.'s (Nursing Home) refusal to credit plaintiffs' services for 2008 due to a one-year freeze of pension benefits was a violation of the Mary Manning Walsh Supplemental Pension Plan (MMWSPP), and that the Nursing Home's decision to offset plaintiffs' benefits was not a violation of the plan, and awarded plaintiff Pierre compensatory damages equal to the benefits denied to her during the one-year freeze, unanimously affirmed,

with costs.

This Court's determination in a prior appeal of this matter is the law of the case with respect to the issues of arbitrability and federal preemption (*see Pierre v Mary Manning Walsh Nursing Home Co., Inc.*, 93 AD3d 541 [1st Dept 2012]). Defendants' citation to other sections of the agreements that were before this Court on the prior appeal is not new evidence sufficient to compel a reexamination of this Court's prior determination (*see NAMA Holdings, LLC v Greenberg Traurig, LLP*, 92 AD3d 614, 614 [1st Dept 2012]). Nor is reexamination necessary based on evidence that two plaintiffs agreed to arbitrate unrelated disputes arising out of agreements other than the MMWSPP.

The court correctly determined that the freeze in pension benefits for 2008 violated the MMWSPP. Pursuant to sections 13.8(E) and 14.1 of that agreement, benefits could not be reduced in any way or adversely affected by later agreements.

The court also correctly determined that the offset did not

violate the MMWSPP. The offset was permitted pursuant to sections 4.1(C) and 15.5(C) of that agreement. Since defendants are required to make a contribution for 2008, those sections are applicable.

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15073 Deidre L. Hargrove, Index 13018/05
Plaintiff-Appellant,

-against-

Riverbay Corporation,
Defendant-Respondent,

John Doe, etc., et al.,
Defendants.

_____

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

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered October 24, 2013, which granted defendant's motion for reargument, and upon reargument, inter alia, vacated that portion of the court's December 5, 2012 decision and order which had directed defendants to provide plaintiff with the names and last known address of all of its employees on July 24, 2004, and with authorizations for payroll tax records for 2004, unanimously affirmed, without costs.

The court did not improvidently exercise its discretion in granting defendant's motion for reargument on the basis that it had overlooked or misapprehended the relevant facts concerning

the breadth of the discovery sought by plaintiff (*see e.g. Corporan v Dennis*, 117 AD3d 601 [1st Dept 2014]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]; CPLR 2221[d]). Plaintiff provided no conceivable justification for the extremely broad discovery request, which was not material and necessary to the prosecution of her slip and fall claim, and would be unduly burdensome (*see Pecile v Titan Capital Group, LLC*, 113 AD3d 526 [1st Dept 2014]; *40 Rector Holdings, LLC v Travelers Indem. Co.*, 40 AD3d 482, 483 [1st Dept 2007].

Plaintiff's request for defendant's payroll tax records for 2004 was also not material and necessary for the prosecution of her claims, and plaintiff failed to demonstrate a strong showing of overriding necessity to overcome the confidentiality of such information (*see Editel, N.Y. v Liberty Studios*, 162 AD2d 345,

346 [1st Dept 1990]; *Lukowsky v Shalit*, 160 AD2d 641, 642 [1st Dept 1990]).

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

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15075 The People of the State of New York, Ind. 1788/12
Respondent,

-against-

Victor Perez,
Defendant-Appellant.

_____

Luis O. Diaz, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J. at suppression hearing; Thomas Farber, J. at jury trial and sentencing), rendered August 6, 2013, as amended August 28, 2013, convicting defendant of robbery in the first degree and two counts of robbery in the second degree, and sentencing him to concurrent terms of eight years, unanimously affirmed.

The court properly denied defendant's motion to suppress lineup identifications by two witnesses. Although the People conceded that one witness had been shown an unduly suggestive photo array, the lineup occurred 20 days later, and the record supports the court's finding of attenuation (*see e.g. People v Allah*, 158 AD2d 605 [2d Dept 1990], *lv denied* 76 NY2d 730 [1990]). The lineup was not unduly suggestive. Defendant and

the fillers were all reasonably similar in appearance, and there was no substantial likelihood that defendant would be singled out (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. Defendant was identified by two witnesses, one of whom was familiar with defendant from prior occasions. In addition, defendant was connected to the crime through a surveillance videotape and circumstantial evidence.

The court properly admitted photographic evidence tending to show defendant's connection with an alleged accomplice. The People established a sufficient foundation for introduction of the photographs. Defendant's remaining arguments concerning the photos are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them

on the merits. To the extent that one of the photos could be viewed as prejudicial, the court provided a sufficient remedy, upon defendant's belated objection, by removing it from evidence and delivering a curative instruction.

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15076-
15076A In re Joshua Manuel G., and Another,

Children Under Eighteen Years
of Age, etc.,

Cathy C.,
Respondent-Appellant,

Edwin Gould Services for Children,
and Families,
Petitioner-Respondent,

Miguel G.,
Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

John R. Eyerman, New York, for Edwin Gould Services for Children and Families, respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the children.

_____

Orders of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about November 25, 2013, which, to the extent appealed from as limited by the briefs, upon fact-finding determinations of permanent neglect, terminated respondent mother's parental rights to the subject children, and committed the children's custody and guardianship to petitioner agency and the Commissioner of the Administration for Children's Services

for the purpose of adoption, unanimously affirmed, without costs.

The findings of permanent neglect were supported by clear and convincing evidence that despite the agency's diligent efforts, the mother failed to plan for the future of the children (*see* Social Services Law § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368, 373 [1984]). The record demonstrates that the agency exerted diligent efforts to strengthen the mother's relationship with the children by referring her to, among other things, parenting skills, anger management, and domestic violence programs, and by scheduling and supervising visitation and therapy (*see* § 384-b[7][f]; *Matter of Julian Raul S. [Oscar S.]*, 111 AD3d 456, 457 [1st Dept 2013]). Despite the mother's completion of numerous programs, she failed to demonstrate that she had overcome her problem with anger management (*see* 111 AD3d at 457).

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15077 In re State of New York, Ind. 560/12
Petitioner-Respondent,

-against-

Gen C.,
Respondent-Appellant.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Diane G. Temkin of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered January 24, 2014, which, upon a jury verdict that respondent suffers from a mental abnormality, determined, after a dispositional hearing, that he is a dangerous sex offender requiring confinement in a secure treatment facility, unanimously reversed, on the law, without costs, and the petition dismissed.

The verdict that respondent suffers from a mental abnormality is based on legally insufficient evidence.

The State seeks civil commitment of respondent under Mental Hygiene Law article 10 based on a mental abnormality diagnosis of anti-social personality disorder (ASPD) and hypersexuality/sexual preoccupation. A mental abnormality within the meaning of Mental Hygiene Law (MHL) article 10 is a "condition, disease or disorder

that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (MHL § 10.03[i]). A diagnosis of ASPD, together with testimony concerning a respondent's sex crimes but without evidence of an independent mental abnormality diagnosis, is insufficient to establish a mental abnormality within the meaning of article 10 (*see Matter of State of New York v Donald DD.*, 24 NY3d 174, 190-191 [2014]). Thus, the issue is whether the State showed that hypersexuality/sexual preoccupation is an independent mental abnormality within the meaning of article 10.

We find that no rational factfinder could conclude based on the trial evidence that hypersexuality/sexual preoccupation is an independent mental abnormality within the meaning of article 10. The evidence shows, at most, that hypersexuality/sexual preoccupation is a recognized mental condition; the State presented no evidence that hypersexuality/sexual preoccupation is a condition that predisposes one to commit a sex offense and results in serious difficulty in controlling the sexually offending conduct.

Nor did the State present evidence legally sufficient to support the conclusion that respondent's mental condition resulted in his having serious difficulty in controlling conduct constituting a sex offense (*see Matter of State of New York v Frank P.*, __ AD3d __, 2015 NY Slip Op 01551 [1st Dept Feb. 19, 2015]).

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15078 TOT Payments, LLC, et al., Index 652663/13
Plaintiffs-Appellants,

-against-

First Data Corporation,
Defendant-Respondent.

_____

MCShapiro Law Group, PLLC, New York (Mitchell C. Shapiro of counsel), for appellants.

Fox Rothschild LLP, New York (John A. Wait of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about February 7, 2014, which granted defendant's motion to dismiss the complaint, unanimously modified, on the law, to deny the motion as to the causes of action for breach of contract and unjust enrichment, and otherwise affirmed, without costs.

In support of the breach of contract causes of action, the complaint adequately alleges that plaintiffs are successors in interest to one of the signatories to the Independent Sales Organization (ISO) Agreement and the Tri-Party Agreement. While the recitation of the series of corporate transactions that purportedly demonstrates the transfer and assignment of the agreements from Money Movers to plaintiffs could not have been

written more confusingly, on its face, it establishes that the agreements were transferred to plaintiffs. The allegation is neither inherently incredible nor flatly refuted by documentary evidence (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Kaisman v Hernandez*, 61 AD3d 565 [1st Dept 2009]).

It is not dispositive that plaintiffs have not produced any written consents for the assignments of the ISO agreement, which contains an anti-assignment clause stating that plaintiff's alleged predecessor in interest "shall not assign, subcontract, license, franchise, or in any manner attempt to extend to any third party any right or obligation under this Agreement, without the prior written consent of Paymentech [defendant's predecessor in interest], which may be granted or withheld at the sole discretion of Paymentech." Even assuming that this clause is sufficient to render an assignment void in the absence of written consent (*compare Macklowe v 42nd Street Dev. Corp*, 170 AD2d 388 [1st Dept 1991] *and C.U. Annuity Serv. Corp. v Young*, 281 AD2d 292 [1st Dept 2001]), issues of fact exist whether defendant waived written consent.

For example, it is uncontested that the parties have carried on a business relationship for some time; plaintiffs allege that the relationship is pursuant to the ISO and Tri-Party agreements.

In addition, a letter submitted by defendant purporting to terminate the ISO agreement prior to plaintiffs' alleged acquisition of interest in it was not mailed to the address designated in the agreement for notice of termination. Moreover, it was addressed to "Process Pink," which may or not have been plaintiff Process Pink, LLC; at this stage, that cannot be determined conclusively. A reasonable inference is that, at some point, notwithstanding the absence from the record of written consents to assignment, the ISO agreement was assigned to one or more entities eventually leading to plaintiff Process Pink, LLC.

The unjust enrichment causes of action were properly pleaded in the alternative (*see IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 404-405 [1st Dept 2007]).

The causes of action for conversion and breach of the implied covenant of good faith and fair dealing were correctly

dismissed since they merely restate claims for damages under the breach of contract theory (*see Peters Griffin Woodward, Inc v WCSC, Inc.*, 88 AD2d 883 [1st Dept 1982]).

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15079 In re Platinum Towing, Inc., Index 101141/13
Petitioner-Appellant,

-against-

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

_____

Edelstein & Grossman, New York (Jonathan Edelstein of counsel), for appellant.

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

_____

Order and judgment (one paper), Supreme Court, New York County (Peter H. Moulton, J.), entered March 11, 2014, insofar as appealed from as limited by the briefs, denying the petition for an annulment of a determination of respondent (DCA), dated July 8, 2013, which restricted petitioner's participation in the Directed Accident Response Program (DARP) to the single DARP zone in which its business is located, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DCA's determination limiting petitioner's DARP participation to the zone in which its business is located is rationally based in the record and not arbitrary and capricious (*see Matter of*

Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222 [1974]). In January 1995, DCA amended the DARP rules to limit towing companies to participating only in the DARP zone in which their business was located (*see* 6 RCNY 2-371[c]; 2-374[a]). Under a "grandfather" exception, however, DCA permitted companies that had been authorized to participate in multiple DARP zones to continue to participate in those zones. In 2001, petitioner filed a license application on the basis of a name change, i.e. from Verrazano Auto Collision, Inc., an existing licensee with grandfathered multiple DARP zone status. However, the record demonstrates that petitioner was not Verrazano with a new name, but a new corporate entity; thus, it did not succeed to Verrazano's grandfather status. Even assuming that petitioner had succeeded to Verrazano's grandfather status, that would not avail it, since the transfer of 100% ownership in petitioner from Verrazano's principal to petitioner's principal, in two transactions in 2002 and 2003, was effected without DCA's prior written approval (*see* Administrative Code of City of NY § 20-110).

Petitioner's arguments notwithstanding, this is not one of those "rarest cases" in which an estoppel is applicable to a

local government agency (*see Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 130 [1990]). The risk of fraud in subjecting DCA to the defense of estoppel is readily perceived. Nor has petitioner shown misconduct on DCA's part to support an estoppel based on "misleading nonfeasance"(*see Matter of Emporium Mgt. Corp. v City of New York*, 121 AD3d 981, 983 [2d Dept 2014] [internal quotation marks omitted]).

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15081 The People of the State of New York, Ind. 119/11
Respondent,

-against-

Albert Harriott,
Defendant-Appellant.

_____

Law Office of Deron Castro, Forest Hills (Patrick Michael Megaro of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered June 27, 2012, convicting defendant, after a jury trial, of kidnapping in the second degree, criminal possession of a weapon in the second degree and assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 13 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence established that defendant and his accomplices (*see* Penal Law § 20.00) restrained the victim by threatening to use deadly force, and struck him with several dangerous instruments, causing physical injury.

The court properly exercised its discretion in denying defendant's motion to strike, as unresponsive, the victim's answer to a question on cross-examination. The answer was essentially responsive, even though it went somewhat beyond the scope of the question. Defendant did not preserve his claim that the court should have struck two previous responses, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. Defendant was not prejudiced by any of the allegedly unresponsive answers.

Defendant was not deprived of a fair trial when, based on concerns about the conduct of some spectators, the District Attorney's Office placed approximately eight plainclothes investigators, only two of whom had their shields displayed, in the spectator section. The presence of these officers was unobtrusive, and there was no risk of prejudice (*see Holbrook v Flynn*, 474 US 560 [1986]).

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15082N HSBC Bank USA, etc., Index 109886/07
Plaintiff-Respondent,

-against-

Christine Carvalho,
Defendant-Appellant.

_____

Jeffrey I. Klein, White Plains, for appellant.

Jeffrey H. Ward, New York, for Cadlerock Joint Venture, L.P., as assignee of HSBC Bank USA, respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 14, 2014, which, to the extent appealed from, granted the motion of Cadlerock Joint Venture, L.P., the purported assignee of plaintiff, to the extent of extending the time to serve the summons and complaint upon defendant by 45 days, unanimously reversed, on the law, with costs, and the motion denied.

In this action to enforce a guaranty executed by defendant for a loan she obtained from plaintiff, plaintiff served a summons, complaint, and motion for a default judgment at defendant's old address, even though defendant had previously notified plaintiff of her new address. After plaintiff obtained a default judgment against defendant in 2008, Cadlerock, as the

purported assignee of plaintiff, notified defendant at her correct address that it had purchased her loan from plaintiff. However, Cadlerock did not inform defendant that a judgment had been obtained against her. Defendant did not learn about the judgment against her until February 2013, five years after the entry of the judgment.

Given the extreme lack of diligence shown by plaintiff and Cadlerock, and the long delay (more than five years after the claim accrued) before defendant received any notice of the action, the court below abused its discretion in granting Cadlerock an extension of time to serve defendant (*see Slate v Schiavone Constr. Co.*, 4 NY3d 816, 817 [2005]). Cadlerock has not shown good cause for such an extension, nor is an extension warranted in the interest of justice (*see id.*; *see also* CPLR 306-b). In addition to the long delay and lack of diligence, Cadlerock failed to address in its motion papers questions surrounding the merits of the claim — namely, whether the Small Business Administration had purchased the loan prior to Cadlerock's purported acquisition of it (*see Leader v Maroney*,

Ponzini & Spencer, 97 NY2d 95, 105-106 [2001]). Cadlerock's fact-based arguments regarding the validity of its claim are improperly raised for the first time on appeal (*see Kohn v City of New York*, 69 AD3d 463, 463-464 [1st Dept 2010]).

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15083N Frank Darabont, et al., Index 654328/13
Plaintiffs,

Creative Artists Agency, LLC,
Plaintiff-Respondent,

-against-

AMC Network Entertainment LLC, et al.,
Defendants-Appellants,

Does 1 through 10,
Defendants.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Aaron H. Marks of counsel), for appellants.

Blank Rome LLP, New York (Jerry D. Bernstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 20, 2014, which denied defendants-appellants' (defendants) motion to compel plaintiff Creative Artists Agency, LLC (CAA) to produce certain documents, or, in the alternative, to preclude certain claims and allegations made in the complaint, unanimously affirmed, with costs.

Plaintiff Darabont, the creator and former executive producer of a highly successful cable television series, his companies, and CAA, the talent agency that represents him, allege that defendants, the broadcaster and producer of the series,

breached the parties' 2010 contract, which requires defendants' payment of contingent compensation on terms that are comparable to defendants' dealings with unrelated distributors of similar programs. Plaintiffs also allege, among other things, that defendants breached the covenant of good faith and fair dealing set forth in the parties' 2011 amendment to the agreement, which requires defendants to negotiate contingent compensation in good faith and "within customary basic cable television industry parameters consistent with [defendants'] business practices and [Darabont's] stature in the basic cable television industry."

The motion court providently exercised its discretion by denying defendants' motion to compel the production of documents concerning contingent compensation owed to CAA or its clients pursuant to their agreements with nonparty cable television studios (*see 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]). Those documents, and CAA's and its clients' dealings with nonparty studios, have no bearing on the issues in this action and will not sharpen those issues, as the only relevant inquiry is the monetary terms of defendants' transactions with nonparty distributors of comparable programs (*see Zohar v Hair Club for Men*, 200 AD2d 453, 453-454 [1st Dept 1994]). To the extent defendants allege that the requested

documents are necessary to defend against any claims that they breached industry-wide standards, the motion court has stated that it will preclude plaintiffs from raising such claims.

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

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

ENTERED: MAY 12, 2015

CLERK

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

12822 The People of the State of New York, Ind. 3618N/08
Respondent,

-against-

Lillian Rivera,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered June 23, 2010, convicting defendant, after a jury trial, of conspiracy in the second degree, criminal possession of a controlled substance in the first and third degrees, and five counts of criminal sale of a controlled substance in the third degree, and sentencing her to an aggregate term of 25 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its resolution of issues regarding police paperwork. The evidence, including intercepted communications and circumstantial proof,

amply demonstrates that defendant, the leader of a large-scale drug trafficking operation, personally acquired a kilogram of cocaine. Accordingly, her arguments concerning her alleged lack of connection to the apartment where this cocaine was recovered, and the presence of other persons at that location, are unavailing.

The court properly denied defendant's suppression motion without granting a hearing. With regard to the search of defendant's person, the issues are similar to those raised on the codefendant's unsuccessful appeal to this Court (*People v Garay*, 107 AD3d 580, 581 [1st Dept 2013], *affd* __ NY3d __, 2015 NY Slip Op 02672 [2015]), and we similarly reject defendant's arguments. With respect to the execution of a search warrant at the apartment where the kilogram of cocaine was found, the motion court correctly determined that defendant did not establish standing, and alternatively did not establish any legal basis for challenging the validity of the warrant.

The court properly denied defendant's motion to suppress evidence obtained as a result of eavesdropping warrants. The application for those warrants established that normal investigative procedures had been tried and had failed, or reasonably appeared to be unlikely to succeed or too dangerous to

employ (*see* CPL 700.15[4]; *People v Rabb*, 16 NY3d 145, 152, [2011]).

The court properly exercised its discretion in denying defendant's end-of-trial motion for a severance based on allegedly antagonistic defenses. The motion was untimely, and defendant failed to show good cause for her failure to make a timely motion, or good cause for the trial court to nevertheless entertain the motion in the exercise of its discretion (CPL 255.10[1][g]; 255.20[1],[3]). Defendant had made a severance motion on other grounds, and the record indicates she was in a position to ascertain the codefendant's planned defense long before trial (*see e.g. People v Funches*, 4 AD3d 206, 207 [2004], *lv denied* 3 NY3d 640 [2004]). At the very least, defendant could have made the motion after hearing the codefendant's opening statement. However, she made no such motion, and merely suggested to the court that a severance might hypothetically prove to be necessary. After the codefendant's summation, defendant finally moved for a severance that would have necessitated a mistrial at the end of a five-week trial. There is no merit to defendant's claim that she was surprised by the codefendant's summation. In any event, defendant failed to demonstrate that her defense and that of her codefendant had

become so antagonistic as to require separate trials *(see People v Cardwell*, 78 NY2d 996 [1991]; *People v Mahboubian*, 74 NY2d 174, 183 [1989]). Moreover, the references to defendant in the codefendant's summation were not so prejudicial as to deny defendant a fair trial, and any error in denying the severance motion was harmless.

The court properly exercised its discretion in receiving the various items of evidence challenged by defendant, and none of this evidence deprived her of a fair trial.

Defendant has not established that she was prejudiced by any late disclosure of discovery material.

With regard to closure of the courtroom during the testimony of undercover officers, we reach the same conclusions as we did on the codefendant's appeal (*Garay*, 107 AD3d at 581-582), both as to preservation and alternatively as to the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 12, 2015

CLERK

Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13254 Sulay L., an Infant by her Mother and Natural Guardian Janny Paulino, et al., Plaintiffs-Appellants,

-against-

New York City Transit Authority, et al., Defendants-Respondents.

Index 20416/05

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Philip Russotti of counsel), for appellants.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Harriet Wong of counsel), for respondents.

Order, Supreme Court, Bronx County (Kibbie F. Payne, J.), entered July 3, 2012, which granted defendants' motion for judgment during trial, unanimously reversed, on the law, without costs, and the verdict reinstated.

The Court notes at the outset that, as a practical matter, it was unnecessary for the trial court to issue its decision granting defendants' CPLR 4401 motion, after the jury had returned a verdict in defendants' favor (*see* Siegel NY Prac § 405 at 709-710 [5th ed 2011]). Nevertheless, upon a review of the motion on its merits, viewing the evidence presented in a light most favorable to plaintiffs (*see Szczerbiak v Pilat*, 90 NY2d

553, 556 [1997]), we cannot say that there was no rational basis on which the jury could have found in plaintiffs' favor (*see e.g. Vera v Knolls Ambulance Serv.*, 160 AD2d 494, 495 [1st Dept 1990]). It was improper for the trial court to resolve an issue of fact as to whether the infant plaintiff so suddenly or immediately entered the path of the bus that it was too close to avoid striking her, when plaintiffs' expert testified to the contrary. If the jury believed plaintiffs' expert's testimony, the jury could have rationally found that defendant bus operator had enough time from when infant plaintiff entered his view to stop the bus before striking her leg.

As to whether a new trial should be granted because the verdict was against the weight of the evidence, "[t]he standard for making th[is] determination . . . [is] whether the evidence so preponderated in favor of the plaintiff that the verdict could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks and brackets omitted]). Here, there was sufficient evidence from which the jury could conclude that the driver was not negligent. Defendant bus operator testified that the infant plaintiff darted into the street in a "split second" before the impact occurred. The infant plaintiff's grandmother

testified that the infant ran into the street at a point where defendants' bus was nearly "on top of her" and two nonparty witnesses confirmed that the infant darted out in front of the bus seconds before it hit her. Issues raised by plaintiffs as to the witnesses' credibility "are for the jury and its resolution of such issues is entitled to deference" (*Haiyan Lu v Spinelli*, 44 AD3d 546, 546 [1st Dept 2007], *lv denied* 10 NY3d 716 [2008]).

The trial court did not err in failing to instruct the jury that there can be more than one proximate cause of an accident or injury (PJI 2:70 [second sentence]; PJI 2:71). Although the court mistakenly stated that it was prohibited from making any changes to the charge after summations had begun (CPLR 4110-b clearly states "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto *before the jury retires* . . ." [emphasis added]), it cannot be said that the concurrent causes charge was required in this case.

Defendants' argument in summation that the infant plaintiff's grandmother (a nonparty) was a proximate cause of the accident because she let go of the child's hand and/or did not have the child in a stroller,[1] is not a sufficient basis, on its

[1] The grandmother testified to these facts on cross-examination without objection from plaintiffs' counsel.

own, to find that the failure to charge concurrent causes constitutes reversible error. There is no evidence in the record of juror confusion or any indication that the jury wanted to apportion fault between the driver and the grandmother, but was unable to do so because of the specific questions presented on the verdict sheet (*see Rodriguez v Budget Rent-A-Car Sys., Inc.*, 44 AD3d 216, 221 [1st Dept 2007] [citing juror confusion as a consideration in deciding adequacy of charge]). In fact, the record reflects that the jury did not send out any notes during its deliberations. The jury only reached the first question on the verdict sheet, which asked whether defendant bus operator was negligent in operating his bus. The jury unanimously answered, "No."

Plaintiffs' argument that the jury was misled to believe that the grandmother was negligent, but that it was not permitted to apportion fault between the grandmother and the driver, is speculative at best. To the extent that the jury may have been influenced by defendants' argument, during summation, regarding the grandmother's role in the accident, plaintiffs' counsel was afforded wide latitude in his summation to rebut defendants' argument and point out that the grandmother's negligence, if any, was not at issue in this case. *Kalam v K-Metal Fabrications* (286

AD2d 603 [1st Dept 2001]), cited by plaintiffs, does not warrant a different result. Although the *Kalam* Court found that the failure to charge PJI 2:71 (concurrent causes) was reversible error, in that case, unlike here, the trial court had given the jury a charge on apportionment (PJI 2:275), as there was more than one defendant on the verdict sheet.

With regard to plaintiffs' *Batson* challenge, the record fails to create an "inference sufficient to establish a prima facie case of discrimination" (*People v Bolling*, 79 NY2d 317, 323-324 [1992]).

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: MAY 12, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14445 Angela Streeter, Index 101164/12
Plaintiff-Appellant,

-against-

Juanita Stanley, et al.,
Defendants-Respondents.

_____

Meagher & Meagher, White Plains (Merryl F. Weiner of counsel), for appellant.

Adams, Hanson, Rego, Carlin, Kaplan & Fishbein, Yonkers (Joan Reyes of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered March 18, 2014, which granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to plaintiff's claims of permanent consequential or significant limitation of use of plaintiff's left knee, and otherwise affirmed, without costs.

Defendants satisfied their prima facie burden by submitting, inter alia, the affirmed report of an orthopedist, who, upon examining plaintiff, found no objective evidence of injury and full range of motion in the cervical spine, lumbar spine, and left knee (*see Kone v Rodriguez*, 107 AD3d 537 [1st Dept 2013]).

Defendants also submitted plaintiff's deposition testimony that she was confined to home for just two days after the accident.

In opposing the motion, plaintiff raised a triable issue of fact with respect to whether she suffered a serious injury to her left knee. Defendants contend that it is irrelevant that the affirmed report of Dr. Neuman, plaintiff's expert, noted range of motion limitations in the knee, because the report was based on an examination performed three years after the accident. However, there is no requirement that, to defeat summary judgment, a plaintiff must show quantitative measurements suggesting serious injury that are recorded contemporaneous to the accident (*see Perl v Meher,* 18 NY3d 208, 217 [2011]). While some contemporaneous report of a plaintiff's condition may be necessary to establish causation (*id.* at 217-218), defendants did not raise causation in their prima facie summary judgment showing.

Further, plaintiff's verified bill of particulars, in alleging "left knee contusions, pain and stiffness," adequately placed defendants on notice as to the nature of that injury. Although Dr. Neuman's report was somewhat more specific in stating that, with respect to the knee, plaintiff suffered persistent chondromalacia and synovitis, internal derangement and

atrophy, defendants do not assert that these conditions are qualitatively different from what was particularized by plaintiff. Moreover, defendants' expert issued a report that reflected a full examination of plaintiff's left knee. Accordingly, defendants have suffered no prejudice or surprise (*see Valenti v Camins*, 95 AD3d 519, 521-522 [1st Dept 2012]). We note that if the jury determines that plaintiff sustained a serious injury to the left knee, it may award damages for all of plaintiff's injuries causally related to the accident (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]). Plaintiff raised an issue of fact as to whether her cessation in treatment was indicative of a lack of serious injury, since she testified that her no-fault benefits ran out and that she did not have private insurance to pay for further treatment.

Finally, the court properly dismissed plaintiff's 90/180-day

claim, as she failed to allege in her bill of particulars that she was incapacitated for at least 90 of the first 180 days following the accident (*see Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

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

ENTERED: MAY 12, 2015

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Kapnick, JJ.

15069 In re Deirdre Randles, Index 101066/13
Petitioner-Appellant,

-against-

State of New York Unified Court System,
Respondent-Respondent.

_____

Fulbright & Jaworski LLP, New York (Douglas P. Catalano of counsel), for appellant.

John W. McConnell, New York, for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered March 11, 2014, which granted respondent's motion to dismiss the proceeding, denied the petition seeking to annul respondent's determination dated March 7, 2011, which terminated petitioner's employment as a Principal Court Reporter, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Supreme Court correctly dismissed the proceeding as time-barred. Petitioner failed to commence this proceeding within four months of receiving notice of respondent's determination (CPLR § 217[1]; *Matter of Vadell v City of New York Health & Hosps. Corp.*, 233 AD2d 224, 225 [1st Dept 1996]). The tolling provision set forth in CPLR § 204(b) does not avail petitioner,

since she did not make her demand for arbitration until after the expiration of the four-month statute of limitations (*cf. Joseph Francese, Inc. v Enlarged City School Dist. of Troy*, 95 NY2d 59, 61-62 [2000] [toll applied where the plaintiff served a demand for arbitration within the applicable statute of limitations]).

We find no basis for applying the doctrine of equitable estoppel to toll the period between petitioner's termination and her demand for arbitration. The record shows that, before the expiration of the statute of limitations, petitioner knew or should have known of the proper mechanisms to challenge respondent's determination (*see Zumpano v Quinn*, 6 NY3d 666, 674 [2006] [equitable estoppel did not apply where the plaintiff had sufficient knowledge to bring a timely action]).

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

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

ENTERED: MAY 12, 2015

CLERK

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14091- Index 653896/12
14092-
14092A CT Investment Management Co.,
LLC, etc.,
Plaintiff-Respondent-Appellant,

-against-

Chartis Specialty Insurance Company,
formerly known as American International
Specialty Lines Insurance Company,
Defendant-Appellant-Respondent.

_____

Cahill Gordon & Reindel LLP, New York (Edward P. Krugman of counsel), for appellant-respondent.

Dickstein Shapiro LLP, New York (Jared Zola of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 6, 2013, modified, on the law, to grant the motion in its entirety, and to declare in defendant's favor that it has no duty to provide coverage under the political risk insurance policy at issue, and otherwise affirmed, without costs. Orders, same court and Justice, entered April 22, 2014, and July 2, 2014, dismissed, without costs, as academic.

Opinion by Gonzalez, P.J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David Friedman
Richard T. Andrias
Judith J. Gische
Barbara R. Kapnick, JJ.

14091-14092-14092A
Index 653896/12

_____x

CT Investment Management Co., LLC, etc.,
Plaintiff-Respondent-Appellant,

-against-

Chartis Specialty Insurance Company, formerly known as American International Specialty Lines Insurance Company,
Defendant-Appellant-Respondent.

_____x

Cross appeals from the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 6, 2013, which to the extent appealed from as limited by the briefs, denied that portion of defendant's motion to dismiss seeking dismissal of plaintiff's currency clause claim, and granted that portion of the motion seeking dismissal of plaintiff's expropriation claim. Defendant appeals from the orders of the same court and Justice, entered April 22, 2014 and July 2, 2014, which, respectively, denied defendant's motion to renew the motion to dismiss, and, to the extent appealable, denied defendant's motion to renew.

Cahill Gordon & Reindel LLP, New York (Edward P. Krugman, Philip V. Tisne and Abigail Shectman of counsel), for appellant-respondent.

Dickstein Shapiro LLP, New York (Jared Zola and Kirk A Pasich and Sandra S. Thayer of the bar of the State of California, admitted pro hace vice, of counsel), for respondent-appellant.

GONZALEZ, P.J.

In October 2006, a group of entities now represented by plaintiff agreed to lend $103 million to eight Mexican companies that sought assistance in the financing of timeshares at resort properties in Mexico (the borrowers). The borrowers executed a Note Indenture Agreement (NIA) for $103 million and two promissory notes for $90,900,000 and $12,100,000. They also executed a "Cash Management Agreement," which, along with the NIA, required them to make daily deposits of hotel revenue into specified accounts including: (i) an account in the United States for dollar-denominated rents from all properties (the Dollar Lockbox Account) and (ii) an account in Mexico, for all pesos-denominated rents and over-the-counter rents (the Pesos Lockbox Account). Funds from both the Dollar and Pesos Lockbox Accounts were swept daily into a centralized account (the Cash Management Account) in New York and disbursed pursuant to the terms of the Cash Management Agreement. A specific sub-account was set up within the Cash Management Account, denominated the debt service sub-account, to cover the borrowers' obligations under the loan. The Cash Management Account is controlled by plaintiff.

Two of the borrowers executed a Guaranty Agreement for the loan. By that agreement, the two agreed to assume full

responsibility for payment and performance of the promissory notes and the NIA in the event, among other contingencies, of bankruptcy. Plaintiff has attempted unsuccessfully to recover its losses from the guarantors. This is because a stay issued on May 27, 2010, discussed *infra*, which froze the Cash Management Account, also suspended the enforcement of the Guaranty Agreement (*In re Cozumel Caribe S.A. de C.V.*, 508 BR 330, 334, n 5 [SD NY 2014]; *CT Inv. Mgt. Co. v Carbonell*, 2012 WL 92359, 2012 US Dist LEXIS 3356 [SD NY 2012]).

In conjunction with the loan transaction, plaintiff's predecessors in interest obtained a Political Risk Insurance Policy from defendant that provided coverage for two types of losses: (1) losses caused by expropriatory acts by a foreign government; and (2) losses stemming from frozen currency transfers or fixed or limited currency conversions.[1] The policy had an express exclusion for losses "caused by or resulting from . . . insolvency, bankruptcy or financial default . . . except where such financial default is directly caused by an Insured Event."

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[1]Defendant Chartis Specialty Insurance Company, formerly known as American International Specialty Lines Insurance Company, issued the Political Risk Policy to LaSalle Bank. The Policy Identifies the "Initial Insured" as Bear Sterns, which was succeeded by U.S. Bank. Plaintiff has authority to bring this action against Chartis on behalf of U.S. Bank.

"Expropriatory Act" is defined in section 2.1 as:

> "[A]n act . . . whether characterized as expropriation, confiscation, nationalization, requisition, or sequestration by law, order, military or administrative action of the Government of the Host Country . . . which:
>
> > "(a) prevents the Insured from receiving a Scheduled Payment from the Issuer; or
> >
> > . . .
> >
> > "(c) causes the Issuer to fail to make a Scheduled Payment; or
> >
> > "(d) effectively deprives the Insured of its fundamental rights as a creditor in respect of all or part of a Scheduled Payment that is otherwise in default for commercial reasons, including rights against collateral security and/or commercial guarant[e]es or repayment; or
> >
> > "(e) effectively deprives the Issuer or the Insured of the use and control of funds . . . causing the Issuer to fail to make the Scheduled Payment."

The Policy provides that such acts must be "violations of international law" or "if purported to be in accordance with local law, such local law has been *materially altered* to permit the Expropriatory Act since the inception date of the Policy" (emphasis added).

"Currency Inconvertibility and Non-Transfer" is defined in section 2.2 as:

> "(a) any action or series of actions by the [Mexican Government] that prevents the Insured or the Issuer from directly or indirectly:
>
> > "(ii) legally transferring outside of [Mexico] *the amount of [U.S. Dollars] which constitutes a Scheduled Payment*" (emphasis added).

The term "Scheduled Payment" is defined as "the principal and earned interest amount due on the original repayment dates in accordance with the terms of the Indenture and/or, as the context may require, any part thereof."

As indicated, the policy contains an express exclusion, at section 4.12, for losses "caused by or resulting from . . . insolvency, bankruptcy or financial default of the Issuer, except where such financial default is directly caused by an Insured Event."

In April 2010, one of the borrowers, Cozumel Caribe, S.A. de C.V. (Cozumel), initiated a voluntary insolvency proceeding (the Mexican Bankruptcy Proceeding) pursuant to the provisions of the Ley de Concursos Mercantiles (the Mexican Business Reorganization Act [MBRA]) in the Mexican District Court (the Concurso Court). Cozumel petitioned for, among other things, court approval of measures to protect it as well as certain other parties. On May 27, 2010, the Concurso Court approved Cozumel's application and entered an order, inter alia, imposing a stay and restricting plaintiff's access to the Lockbox Accounts and the Cash Management Account (the May 27 Stay), accounts that were used to make payments under the loan agreements. Before the May 27 Stay (which remains in place), the borrowers had made every payment required under the terms of the loan agreement. However, on June

11, 2010, they defaulted on a payment under the NIA. On June 25, 2010, plaintiff sent the borrowers a notice of default on the loan.

Plaintiff's attempts to obtain a temporary and immediate suspension of the May 27 Stay were unsuccessful. On September 30, 2010, the Concurso Court issued a resolution declaring Cozumel in concurso mercantil (in bankruptcy proceedings).

In November 2012, the United States Bankruptcy Court for the Southern District of New York issued an injunction freezing Cozumel's property in the United States, including all funds in the Dollar Lockbox Account and the Cash Management Account (*see In re Cozumel Caribe de C.V.*, 482 BR 96, 99 [SD NY 2012]). The court cited to its prior unpublished opinion, dated October 20, 2010, granting recognition of the Mexican Bankruptcy Proceeding under Chapter 15 of Title 11 of the Bankruptcy Code (11 USC § 1521) (*see In re Cozumel Caribe de C.V.*, 482 BR at 99 [describing terms of October 20, 2010 "Recognition Order"]). On November 11, 2010, the Federal Bankruptcy Institute appointed a mediator to facilitate either reorganization or a bankruptcy adjudication for Cozumel. The initial mediation or reconciliation period of 185 days under the MBRA began on April 1, 2011.

On February 24, 2012, plaintiff made a formal claim for benefits under the policy. Defendant requested proof of loss,

which was sent on April 26, 2012. On May 3, 2012, defendant denied the claim. The policy expired in October 2012. Cozumel remains in concurso mercantil.

By this action, plaintiff seeks a declaration that it is entitled to coverage under the policy. It also asserts causes of action for breach of Section 2.1 of the policy (Expropriation Clause) and of Section 2.2 of the policy (Currency Clause). We find that defendant has no duty to provide coverage to plaintiff because plaintiff's claims fall squarely within the bankruptcy exclusion set forth in Section 4.12 of the policy.

Section 4.12 excludes from coverage any losses "caused by or resulting from . . . *insolvency, bankruptcy or financial default* . . ." (emphasis added). Plaintiff argues that the exclusion is inapplicable because the term "bankruptcy" refers to a final adjudication liquidating or reorganizing an entity under the Bankruptcy Code. It contends that the concurso proceeding is not "bankruptcy," that the Mexican court has not declared Cozumel bankrupt, and that it can therefore assert claims for its losses under both the Expropriation and Currency clauses of the policy based upon the events that have taken place in Mexico.

We agree with defendant that plaintiff's definition of bankruptcy (a final judgment of reorganization or liquidation) is overly narrow. Bankruptcy is generally understood to include

being under the judicial protection of a bankruptcy court - or, according to dictionary definition - "a statutory procedure by which a (usu[ally] insolvent) debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation . . . for the benefit of creditors" (Black's Law Dictionary 175 [10th ed 2014]; *see* Compact Oxford English Dictionary 934-935 [2d ed 1999][same]).[2]

Plaintiff contends that since the parties have conflicting interpretations of the term "bankruptcy," the policy must be ambiguous on this point, and points out that settled principles of interpretation of insurance contracts require resolution of any ambiguity in favor of the insured (*Lavanant v General Acc. Ins. Co. Of Am.*, 79 NY2d 623, 629 [1992]; *MDW Enters., Inc. v CNA Ins. Co.*, 4 AD3d 338, 340 [2d Dept 2004]). However, "provisions in a contract are not ambiguous merely because the parties interpret them differently" (*Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 352 [1996]). Here, common understanding supports interpreting the term bankruptcy as the court proceeding in which the debtor is afforded judicial protection while it reorganizes or liquidates.

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[2]"It is common practice for the courts of this State to refer to the dictionary to determine the plain and ordinary meaning of words to a contract" (*2619 Realty v Fidelity & Guar. Ins. Co.*, 303 AD2d 299, 300-301 [1st Dept 2003][internal quotation marks omitted]).

Further, settled law requires that the terms of a contract be read in context (*see e.g. Northville Indus. Corp. v National Union Fire Ins. Co. Of Pittsburgh Pa.*, 89 NY2d 621, 632-633 [1997]). Plaintiff's definition of bankruptcy, i.e. the state of having been declared bankrupt, would render the accompanying alternatives in Section 4.12 of the policy (insolvency and financial default) superfluous. The redundancy can be eliminated only by accepting defendant's definition, an interpretation that gives meaning to every "sentence, clause, and word of [the] contract of insurance" (*id.* at 633 [internal quotation marks omitted]; 68A NY Jur 2d, Insurance § 859 at 399-400; *see also Hartford Acc. & Indem. Co. v U. S. Fid. & Guar. Co.*, 962 F2d 1484, 1489 [10th Cir 1992], *cert denied* 506 US 955 [1992]).

The policy at issue is a Political Risk Insurance Policy, not a Credit Insurance policy. If the lenders were concerned about the financial stability of one or more of the borrowers, they could have purchased credit insurance to protect them from the risk of a borrower's bankruptcy (*see e.g. Starlo Fashions v Continental Ins. Co.*, 185 AD2d 114, 115 [1st Dept 1992]). The parties, and their predecessors, are all sophisticated business people, and the concern prompting the purchase of this insurance policy was the risk of lending in a foreign jurisdiction. The coverage clauses detail issues specific to the risks of lending

in Mexico, and a "reasonable expectation" of the parties to this contract was that losses caused by bankruptcy were not covered under the policy.

Had we concluded that the bankruptcy exclusion did not preclude recovery, we would nevertheless find that plaintiff could not recover, since the events that occurred in Mexico do not trigger the Expropriation Clause or the Currency Clause of the policy. With regard to the Expropriation Clause, the application of Mexican law to Cozumel's case was not an "alteration" of local law to permit an Expropriatory Act. The Concurso Court's stay was not an alteration of Mexican law. The outcome of the proceeding may have had unfavorable repercussions for plaintiff, but it was not analogous to the passing of a new law by a foreign legislative body or the nationalization of a private company by the executive. Moreover, in the Mexican legal system, which has its origins in the civil law system, judicial decisions do not have precedential effect except in very limited circumstances, not present here (*see* 1 Vargas, Mexican Law: A Treatise for Legal Practitioners and International Investors § 2.31, at 58 [1998]).

Section 2.2, the Currency Clause, covers losses caused by prohibitions on transfers of an "amount" of currency. The Mexican court did not impose any such limitations; it merely

placed restrictions on certain accounts and suspended certain agreements surrounding the loan transaction. None of the borrowers are forbidden to transfer out of Mexico currency, in any amount, from any account that is not frozen. The stay does not constitute a government act prohibiting the transfer of "the amount of Policy Currency which constitutes a Scheduled Payment." As the Bankruptcy Court observed, "[N]othing in the [May 27 Order] relieved the [other borrowers] from the obligation to continue making debt servicing payments on the $103 million loan. Nevertheless, . . . [they] have simply stopped paying" (*In re Cozumel Caribe de C.V.*, 482 BR at 112, n 14).

Finally, in view of our conclusion that the Bankruptcy exclusion precludes plaintiff's claims, we make no determinations with respect to timeliness of the action or the sufficiency of plaintiff's proof of loss.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 6, 2013, which to the extent appealed from as limited by the briefs, denied that portion of defendant's motion to dismiss seeking dismissal of plaintiff's currency clause claim, and granted that portion of the motion seeking dismissal of plaintiff's expropriation claim, should be modified, on the law, to grant the motion in its entirety, and to declare in defendant's favor that it has no duty

to provide coverage under the political risk insurance policy at issue, and otherwise affirmed, without costs. The appeals from the orders of the same court and Justice, entered April 22, 2014, and July 2, 2014, which, respectively, denied defendant's motion to renew the motion to dismiss, and, to the extent appealable, denied defendant's motion to renew, should be dismissed, without costs, as academic.

All concur.

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

ENTERED: MAY 12, 2015

CLERK