SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 13, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Sweeny, Moskowitz, Kapnick, Kahn, JJ.

2970 Nationwide Mutual Insurance Company as subrogee of Artimus Construction Corp., Inc., et al., Plaintiffs-Appellants,

-against-

U.S. Underwriters Insurance Company, Defendant-Respondent.

Index 161856/14

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Ahmuty, Demers & McManus, Albertson (William J. Mitchell of counsel), for appellants.

Miranda Sambursky Slone Sklarin Verveniotis LLP, Mineola (Steven Verveniotis of counsel), for respondent.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered November 19, 2015, which granted defendant's motion to dismiss the complaint, affirmed, without costs.

Our dissenting colleague has accurately related the facts of this case and the general principles of collateral estoppel and res judicata, and they need not be repeated here. We differ only in how those principles apply to the facts of this case.

There is no dispute that plaintiff Artimus is the subrogee of nonparty Armadillo's rights and thus is in privity with Armadillo. As the subrogee of Artimus, plaintiff Nationwide is

in privity with Artimus. Neither Artimus nor Nationwide can have any greater rights than their subrogors possessed. It is therefore appropriate at this point to review the legal concepts of subrogation and privity.

"Subrogation, an equitable doctrine, allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]). "The insurer's rights against a third party are derivative and limited to the rights the insured would have against that third party" (*Westport Ins. Co. v Altertec Energy Conservation, LLC* 82 AD3d 1207, 1209 [2d Dept 2011], citing *Humbach v Goldstein*, 229 AD2d 64, 67 [2d Dept 1997]). "Therefore, '[an] insurer can only recover if the insured could have recovered and its claim as subrogee is subject to whatever defenses the third party might have asserted against its insured'" (*id.*, quoting *Humbach* at 67).

"Privity, it has been observed, is an amorphous concept not easy of application. Generally, a nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on,

or derivative of, the rights of the party to the prior litigation" (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990])[citation omitted]).

Artimus, as subrogee of Armadillo, and Nationwide, as Artimus's subrogee, are therefore subject to whatever rules of collateral estoppel would be applicable to Armadillo.

The motion court correctly determined that the insurance coverage issues involved in this case were decided in Nationwide's prior action. The parties were the same in both cases and had a full and fair opportunity to be heard on the coverage issues. The doctrine of res judicata "applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). We agree with the dissent that a "transactional analysis" is to be used in analyzing the appropriateness of applying the doctrine of res judicata. This approach has been stated as follows: "'[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (*id.*, quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

The issues raised here were addressed in the prior action. The court in that action held that U.S. Underwriters had no

obligation to provide insurance coverage in the personal injury action because the employer liability exclusion provision in its policy was applicable. In fact, documentary evidence establishes that plaintiffs in this case had a full and fair opportunity to litigate this issue in the prior action, where Nationwide's subrogor, Artimus, was a plaintiff, and Artimus' subrogor, Armadillo, was a named defendant. US Underwriters served its pre-answer motion on Nationwide, Artimus and Armadillo. Nationwide and Artimus submitted opposition; Armadillo chose not to appear or oppose the motion. Neither Nationwide nor Artimus appealed from the prior order. Under New York's transactional approach, any claims Armadillo had could have, and should have, been brought at that time (*Matter of Hunter*, 4 NY3d at 269). Indeed, "a party to a lawsuit cannot sit by idly while a contract, to which [it] is also a party, is judicially construed without being precluded by the result" (*see Buechel v Bain*, 97 NY2d 295, 305 [2001], *cert denied* 535 US 1096 [2002]). To do so would be to reward a defaulting party for its inaction.

Cicero v Great Am. Ins. Co. (53 AD3d 461 [1st Dept 2008], *lv dismissed in part, denied in part*, 11 NY3d 912 [2009]) is not to the contrary. In *Cicero*, the prior declaratory judgment action did not involve coverage issues raised in that action. We determined that coverage was not the same issue as in the prior

action, which involved a question of timely notice. Here, by contrast, the issues involved both claims of untimely notice and whether the underlying personal injury action within a policy exclusion.

Thus, in this case, the parties were afforded a full and fair opportunity to litigate the insurance coverage issues in the prior action. Nationwide is therefore collaterally estopped from litigating the same issues already decided against its subrogor, Artimus, who in turn is estopped from litigating the same issues decided against its subrogor, Armadillo, as a subrogee of the insured.

Moreover, the principles of res judicata favor defendants herein. Nationwide and Artimus seek to enforce the judgment that they were awarded against Armadillo in the third-party personal injury action. However, as noted above, in the prior action the court found that the coverage exclusion with respect to the personal injury action in U.S. Underwriters policy was applicable. By bringing this action as subrogees of Artimus and Armadillo under Insurance Law § 3420, Nationwide and Artimus are essentially seeking to relitigate Artimus's claims for coverage. "Res judicata is designed to provide finality in the resolution of disputes, recognizing that [c]onsiderations of judicial economy as well as fairness to the parties mandate, at some

point, an end to litigation" (*Matter of Hunter*, 4 NY3d at 269-270 [internal quotation marks omitted] [italics deleted]; *Buechel v Bain*, 97 NY2d at 303*; B.R. DeWitt, Inc. v Hall*, 19 NY2d 141, 144 [1967]).

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

ACOSTA, P.J. (dissenting)

I would deny defendant's motion to dismiss, and reinstate the complaint. Plaintiffs, Nationwide Mutual Insurance Company (as subrogee of Artimus Construction Corp., Inc.) and Artimus Construction Corp., Inc. (as subrogee of Armadillo Construction Corp.), appeal from an order of the Supreme Court, New York County (Robert R. Reed, J.), entered November 19, 2015, to the extent it granted defendant U.S. Underwriters Insurance Company's CPLR 3211 motion to dismiss the complaint as barred by collateral estoppel and res judicata.

On or about July 9, 2001, Kerwin Park, an employee of Armadillo Construction Corp., a demolition contractor, sustained personal injuries while working on a construction site. Park commenced the underlying Labor Law action against the general contractor (Artimus) and others.

Nationwide, Artimus's insurer, tendered the defense of the action to Armadillo and Armadillo's insurer, U.S. Underwriters; Artimus was an additional insured on the U.S. Underwriters policy. By letter dated August 31, 2001, U.S. Underwriters denied coverage to Artimus, copying the broker and Armadillo on the letter, based on late notice of occurrence and various exclusions in the policy.

Nationwide and Artimus then commenced a declaratory judgment

action against U.S. Underwriters and Armadillo, seeking coverage from U.S. Underwriters for Artimus and indemnification from Armadillo. U.S. Underwriters issued a letter dated July 14, 2004 to Armadillo, stating that no coverage was available for Armadillo in the declaratory action, because the claims in the underlying personal injury action were not for bodily injury or property damage and were not a covered "occurrence" within the meaning of the policy, since they alleged conduct that was "intentional" in nature. Artimus also commenced a third-party action for indemnification against Armadillo in the underlying action.

U.S. Underwriters moved to dismiss the declaratory judgment action. The motion court (Cahn, J.) granted the motion, finding that U.S. Underwriters was relieved from providing coverage to Artimus because of (a) late notice of the claim by Artimus to U.S. Underwriters and (b) the policy's exclusion for employee injuries, i.e., injuries covered by the Workers' Compensation Law. Armadillo did not appear in the action. The court noted that, while "U.S. Underwriters is entitled to an order granting its motion to dismiss, it is not entitled to a declaration of its rights vis-a-vis plaintiffs and/or co-defendant Armadillo." In so doing, the court said that granting a declaratory judgment in U.S. Underwriter's favor would be "inappropriate at this juncture

because [U.S.] Underwriters has not interposed an answer affirmatively seeking such relief." The action was severed and continued as to Armadillo.

In or about May 2011, the underlying action settled for approximately $1.55 million. Nationwide contributed to the settlement on Artimus's behalf. Artimus also obtained a default judgment on its third-party indemnification claim against Armadillo. On or about May 12, 2012, Artimus moved to restore its claims against Armadillo to the active calendar in the declaratory judgment action. In granting the motion, the court (Ramos, J.) cited to Justice Cahn's earlier decision in the action and observed that no decision had been made concerning Armadillo's entitlement to coverage. On or about November 21, 2013, the default judgment against Armadillo in the underlying action was referred to a special master for an inquest on damages; on July 16, 2014, judgment was entered against Armadillo, in Artimus's favor, in the amount of $987,051.60. On July 24, 2014, Artimus served the judgment on Armadillo, which did not respond. On October 23, 2014, Artimus forwarded the judgment to U.S. Underwriters for payment in accordance with Insurance Law § 3420(a). On October 24, 2014, U.S. Underwriters, through counsel, acknowledged receipt of the judgment, but declined to pay, citing Justice Cahn's decision in Artimus's

declaratory judgment action.

After 30 days, Nationwide and Artimus, as subrogees of Armadillo, commenced this action against U.S. Underwriters. U.S. Underwriters moved to dismiss, arguing, inter alia, that the doctrines of res judicata and collateral estoppel barred this action, based on Justice Cahn's order in the prior declaratory action. In opposition, Nationwide and Artimus argued that they could not be precluded from pursuing this action because the issue of Armadillo's coverage rights had never been adjudicated. They pointed out that Justice Cahn's order was based on a pre-answer motion to dismiss and that there was no judgment entered in the lawsuit declaring or otherwise determining Armadillo's rights under the U.S. Underwriters policy.

Justice Reed granted U.S. Underwriters' motion to dismiss the complaint, concluding that Artimus, as Armadillo's subrogee, was collaterally estopped from bringing the instant action, because it was in privity with Armadillo, and whatever rules of collateral estoppel applied to Armadillo would also apply to Artimus (and its subrogee, Nationwide). The court found that as a consequence, Artimus was bound by Justice Cahn's order. The court also found that the action was barred by the doctrine of res judicata. I disagree.

Collateral estoppel, also referred to as issue preclusion,

prevents a party, or one in privity with a party, from being able to relitigate an issue that has already been decided against it. For the doctrine to apply, (1) the issue had to have been necessarily decided in the prior action, and (2) the party to be precluded from re-litigating the issue must have had a full and fair opportunity to contest the prior determination, whether or not the causes of action are the same (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]). A nonparty to a prior lawsuit may be collaterally estopped by a determination in that lawsuit if its relationship to a party in that lawsuit is such that its own rights or obligations in the subsequent proceeding are conditioned on or derivative of the rights of the party in the prior lawsuit (*id.* at 664).

Here, neither Artimus nor Armadillo had a full and fair opportunity to litigate the issue of whether Armadillo would be covered under the U.S. Underwriters policy. Armadillo's default in the declaratory judgment action means its rights were never fully adjudicated. To be sure, Armadillo did not appear in the proceeding. However, instead of granting a default, Justice Cahn stated that the issuance of any declaration concerning Armadillo's rights under the U.S. Underwriters policy was inappropriate because U.S. Underwriters had not interposed an answer affirmatively seeking that relief. In addition, when the

court (Ramos, J.) restored the action to the calendar, it acknowledged that Armadillo's rights vis-a-vis the policy had not been adjudicated. Under these circumstances, I cannot rationally conclude that Armadillo had a full and fair opportunity to have its rights adjudicated (*see Zimmerman v Tower Ins. Co. of N.Y.*, 13 AD3d 137, 140 [1st Dept 2014]).

Second, even assuming that Armadillo's rights were adjudicated or a binding final determination was reached, the determination would only apply to Armadillo and its rights to coverage as an insured under the policy. Armadillo's rights are separate and distinct from the right of a claim by a judgment creditor (*Cicero v Great Am. Ins. Co.*, 53 AD3d 461 [1st Dept 2008], *lv dismissed in part, denied in part* 11 NY3d 912 [2009]).

This is not to say that plaintiffs will ultimately be successful in collecting on Artimus's judgment claim for indemnification. It may indeed be determined that the same employee injury exclusion that served, in part, to preclude coverage for Artimus may preclude coverage for Artimus's indemnification claim against Armadillo. Nonetheless, the indemnification claim is a separate claim, from the direct personal injury claim which must be adjudicated on its own merits, particularly because no party to the prior transaction sought to have its rights determined vis-a-vis Armadillo. The

record should be more fully developed prior to a determination that the claims are one and the same.

In my opinion, there is also no basis for precluding this action on res judicata grounds. Res judicata, also referred to as claim preclusion, applies when a party to a prior action, or one in privity with a party, attempts to re-litigate a claim "where a judgment on the merits existfrom a prior action between the same parties involving the same subject matter" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). The rule applies both to claims that were actually litigated and to claims that could have been raised in the prior litigation (*id.*). New York uses a transactional analysis approach to determine whether res judicata bars a claim. Under this analysis, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or if seeking a different remedy" (*id.* [internal quotation marks omitted]). For purposes of determining whether a claim is grounded in the same transaction, the crucial issue is whether the transaction arises out of the same factual grouping, which depends on how the facts are "related in time, space, origin, or motivation" (*Smith v Russell Sage Coll.*, 54 NY2d 185, 192-193 [1981] [internal quotation marks omitted]).

As noted above, the instant action involves a separate and

distinct claim from the question of whether Artimus could recover as an additional insured under the U.S. Underwriters policy. The question is whether U.S. Underwriters must provide coverage for Armadillo's contractually mandated indemnification of Artimus. Moreover, on the issue of res judicata, it is instructive to recall the precise posture of Artimus in this action. Artimus is an Insurance Law § 3420 judgment creditor that had no right to commence a direct action against U.S. Underwriters. *Lang v Hanover Ins. Co.* (3 NY3d 350, 352-353 [2004]) makes clear that "a judgment is a statutory condition precedent to a direct suit against [a] tortfeasor's insurer" and that "Insurance Law § 3420 precludes a direct action by an injured party against a tortfeasor's insurance company until a judgment has been secured against the tortfeasor and that judgment has been served on the insurance company but has remained unpaid for 30 days." Artimus could not have litigated these claims in the prior action in the absence of the condition precedent that was necessary to do so.

Indeed, that Artimus had no right to commence a direct action against U.S. Underwriters may explain why neither U.S. Underwriters nor Artimus actively sought a declaration of rights in the prior action.

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Richter, Andrias, Kahn, Gesmer, JJ.

3590-
3591 Index 653414/14

Ironshore Indemnity, Inc. as Subrogee of The Related Companies, L.P., etc.,
Plaintiff-Appellant,

-against-

W&W Glass, LLC, et al.,
Defendants-Respondents.

The Related Companies, L.P., et al.,
Nonparty Respondents.

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Vogrin & Frimet, LLP, New York (George J. Vogrin of counsel), for appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for W&W Glass, LLC and Metal Sales Co., Inc., respondents.

Cornell Grace, PC, New York (Keith D. Grace of counsel), for The Related Companies, L.P., 42nd and 10th Associates, LLC and Tishman Construction Corporation, respondents.

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 25, 2016, dismissing the action, pursuant to an order, same court and Justice, entered February 11, 2016, which granted the motion of nonparty respondents (Related Companies) to quash subpoenas, intervene in this action, and dismiss the complaint, unanimously affirmed, with costs. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court properly permitted the intervention of the

Related Companies, as they have a strong interest in this litigation, given that plaintiff purports to sue as their subrogee (*Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010]). Plaintiff did not preserve its argument that the Related Companies' motion was defective for failing to submit a proposed pleading, and we decline to review it (*Ronen v Cohen*, 126 AD3d 487, 487 [1st Dept 2015]). Were we to review it, we would find it unavailing (*see id.*, citing *Ryder v Travelers Ins. Co.*, 37 AD2d 797, 797 [4th Dept 1971]).

The motion court correctly dismissed the complaint, because plaintiff has no subrogation rights. Notwithstanding its current claims, plaintiff Ironshore did not accept the Related Companies as an additional insured, as it never made any payment in the underlying personal injury action on its behalf (*see generally Hartford Acc. & Indem. Co. v CNA Ins. Cos.*, 99 AD2d 310, 312 [1st Dept 1984]). Neither did Ironshore pay the Related Companies' defense costs in that action.

Plaintiff's subrogation claims for common-law indemnification, contribution, and equitable contribution are barred by Workers' Compensation Law § 11. Plaintiff did not allege a "grave injury" under that statute, nor did it present a bill of particulars or any other pleading that could evince a

"grave injury" within the meaning of the statute (*Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511, 512 [1st Dept 2012]; *see Aramburu v Midtown W.B., LLC*, 126 AD3d 498, 501 [1st Dept 2015]).

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

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

3724 Cohen Brothers Realty Corp., Index 652037/11
Plaintiff-Respondent,

-against-

RLI Insurance Company,
Defendant-Appellant,

American Guarantee & Liability
Insurance Company, et al.,
Defendants.

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Kenney Shelton Liptak Nowak LLP, Buffalo (Timothy E. Delahunt of counsel), for appellant.

Harwood Reiff LLC, New York (Simon W. Reiff of counsel), for respondent.

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Order, Supreme Court, New York County (Robert D. Kalish, J.), entered August 8, 2016, which granted plaintiff's motion for summary judgment declaring that defendant RLI Insurance Company (RLI) is required to indemnify it for its damages and pay any outstanding reasonable attorneys' fees and defense costs it incurred in defending an underlying action in excess of those legal fees and costs already paid by nonparty New York State Insurance Fund (SIF), and denied RLI's cross motion for summary judgment, affirmed, without costs.

Plaintiff is the managing agent of a commercial office building located at 622 Third Avenue. Defendant RLI is plaintiff's primary commercial general liability (CGL) insurance

carrier.

On October 3, 2008, nonparty engineer David Vasquez fell and fatally hit his head while replacing tile in the drop ceiling of the building's loading dock. On the date of the accident, plaintiff's vice president of management contacted plaintiff's insurance broker for the CGL policy. She was advised by the broker that the accident was a work-related fatality, and thus, a workers' compensation matter. She was assured that the CGL policy was inapplicable and that "nothing further needs to be done." (The CGL policy expressly excluded from coverage "[a]ny obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law," as well as bodily injury to "[a]n employee of the insured arising out of and in the course of: (a) [e]mployment by the insured; or (b) [p]erforming duties related to the conduct of the insured's business.") Neither the broker nor plaintiff notified RLI of the incident.

Plaintiff promptly notified its workers' compensation carrier, the State Insurance Fund (SIF). SIF agreed to defend and indemnify plaintiff.

On March 6, 2009, the decedent's administratrix obtained an order to show cause to conduct discovery for the purposes of "framing a complaint" against plaintiff sounding in negligence

and violations of the Labor Law. Plaintiff gave notice to RLI.

By letter dated April 1, 2009, RLI denied coverage on grounds of late notice and Vasquez's status as an "employee" at the time of the accident.

In May 2009, the decedent's administratrix commenced an action against plaintiff. SIF defended plaintiff in the underlying lawsuit, and paid workers' compensation benefits to Vasquez's estate. Plaintiff chose to retain its own counsel instead of SIF's law firm. SIF contributed $150 per hour toward payment of Greenberg Traurig's rate, with plaintiff paying the difference.

Following this Court's decision in *Vasquez v Cohen Bros. Realty Corp.* (105 AD3d 595 [1st Dept 2013]), holding that issues of fact required trial of Cohen Brothers' "special employer" defense, the *Vasquez* litigation was settled for $2.5 million. Plaintiff paid $1 million; its excess insurer paid the remaining $1.5 million.

Plaintiff commenced this declaratory judgment insurance coverage action against its broker and RLI on or about July 26, 2011. The motion court granted plaintiff's motion for a declaration that RLI was obligated to defend and indemnify it in the *Vasquez* litigation, and we now affirm.

Plaintiff's delay in notifying RLI was due to a reasonable,

good faith belief that Vasquez's work-related fatality was outside the scope of the CGL policy, excusing the late notice (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 [2005]).[1]

In *Tesler v Paramount Ins. Co.* (220 AD2d 334, 334 [1st Dept 1995]), this Court held that the insureds demonstrated a "good-faith and reasonable belief" in their nonliability where the belief had been predicated upon the incorrect advice of their insurance agent. RLI's argument that *Tesler* is no longer good law is unpersuasive. *National Union Fire Ins. Co. of Pittsburgh, Pa. v Great Am. E&S Ins. Co.* (86 AD3d 425 [1st Dept 2011]) explicitly distinguished *Tesler* on the ground that in *Tesler* "the insurance agent specifically advised the insured that there was no indication a claim could be brought against it," whereas in *National Union* "there was no evidence that [the insured] was advised by any insurance agent as to nonliability" (*id.* at 427). Similarly, *Macro Enters., Ltd. v QBE Ins. Corp.* (43 AD3d 728 [1st Dept 2007]) did not involve a situation where an insured's failure to timely notify an insurer was based on the incorrect

[1]By amendment to the Insurance Law, effective January 17, 2009, applicable only to policies issued or delivered on or after that date, to deny coverage on the basis of untimely notice it is now necessary for the insurer to show that it was prejudiced as a result of the late notice (*see* Insurance Law § 3420[a][5]). The parties agree that this case falls under the former law.

advice of an insurance agent. The fact that *National Union* distinguished *Tesler* confirms that it is "good law," albeit inapplicable on the *National Union* facts.

RLI's argument that the voluntary payment doctrine bars recovery of amounts paid to Greenberg Traurig in defense of the underlying claim is without merit. Having chosen to deny coverage and not participate in the defense, RLI "excluded itself from any aspect of the [p]laintiff's defense in the Vasquez estate's action," including the negotiation of attorneys' fees and the selection of attorneys, as so found by the motion court, and cannot now be heard to complain. Plaintiff is entitled to recover attorneys' fees incurred in defense of the underlying action as "damages which are the natural and probable consequence of the breach" by RLI of the contract of insurance (*see e.g Estate of Coppersmith v Blue Cross & Blue Shield of Greater N.Y.*, 177 AD2d 373, 374 [1st Dept 1991] [internal quotation marks omitted]).[2]

We reject defendant's argument that the $150 per hour contributed by SIF acts as a ceiling on fees (*see Sabre, Inc. v*

[2]Indeed, in many jurisdictions an insured who is forced to bring a declaratory judgment action against its insurer is entitled to the legal costs associated with that action as well as the costs associated with the defense of the underlying action.

Insurance Co. of the State of Pa., ___ AD3d ___, 2017 Slip Op 03061 [1st Dept 2017]). Any agreement between SIF and plaintiff as to fees has no bearing on RLI's responsibility to provide a defense, save as it pertains to any eventual allocation of defense costs as between the two carriers (*see generally General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451 [2005]). The record does not contain a copy of the SIF policy, so we are unable to make any determination as to whether the carriers share the costs of defense in equal parts as primary carriers, or whether defendant RLI is solely responsible. It may be noted that under RLI's policy, competing primary insurers are to contribute on an equal basis.

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

KAPNICK, J. (dissenting in part)

While I agree with the majority that defendant RLI Insurance Company (RLI) is obligated to indemnify plaintiff (Cohen Brothers) for its damages in the underlying personal injury action of *Vasquez v Cohen Bros. Realty Corp.* (105 AD3d 595 [1st Dept 2013]), I believe that the voluntary payment doctrine applies here, and therefore I would vacate the declaration that RLI is required to pay the extra attorneys' fees incurred by Cohen Brothers in the defense of that action.

Nonparty New York State Insurance Fund (SIF) defended Cohen Brothers in the *Vasquez* action; however, Cohen Brothers used a different, more expensive law firm than the one SIF offered. Indeed, rather than accepting the law firm recommended by SIF, Cohen Brothers opted for the cash value - $150 per hour - and decided to go with a law firm of its own choosing, which charged $795 per hour, leaving Cohen Brothers to pay the difference.

The voluntary payment doctrine "bars recovery of payments voluntarily made with full knowledge of the facts, in the absence of fraud or mistake of material fact or law" (*DRMAK Realty LLC v Progressive Credit Union*, 133 AD3d 401, 403 [1st Dept 2015] citing *Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525 [2003]). Although Cohen Brothers' decision to hire a lawyer to defend itself in *Vasquez* was not voluntary, its decision to

use a more expensive law firm was. Therefore, the voluntary payment doctrine bars plaintiff from recovering $645 per hour ($795 minus $150) from RLI. Furthermore, Cohen Brothers does not claim that fraud or mistake played *any* part in its decision to select the more expensive law firm (*see id.*). Moreover, if RLI had defended Cohen Brothers in *Vasquez*, it would have been "entitled to control the defense of the action, including the selection of counsel" (*American Home Assur. Co. v Weissman*, 79 AD2d 923, 925 [1st Dept 1981]). If Cohen Brothers had then decided to use a more expensive law firm, it would not have been entitled to have RLI pay the extra cost.

The cases relied upon by the majority in reaching a different result are inapposite. Initially, none of the cases cited discusses or applies the voluntary payment doctrine. Although the majority is correct that a "non-breaching party in a breach of contract case can recover damages that are the natural and probable consequence of the breach" (*Estate of Coppersmith v Blue Cross & Blue Shield of Greater N.Y.*, 177 AD2d 373, 374 [1st Dept 1991]),[1] it is also true that when one party (here, RLI)

[1] This case does not, contrary to the majority's suggestion, stand for the proposition that Cohen Brothers is "entitled to recover attorneys' fees incurred in defense of the underlying action." Rather, *Estate of Coppersmith* involved an insurer's refusal to pay the hospital expenses of an insured and the hospital's subsequent action to obtain payment directly from the

breaches a contract (the policy), the other party (Cohen Brothers) is entitled to be placed in the same – not a better – position than it would have been had no breach occurred (*Brushton-Moira Cent. School Dist. v Thomas Assoc.*, 91 NY2d 256, 261-2 [1998]). To award Cohen Brothers the difference in attorneys' fees would be to put it in a better position than if RLI had defended it in the *Vasquez* action.

Lastly, the allocation of defense costs between SIF and RLI, should either party be entitled to such, is not before us on this appeal and has no bearing on the question of whether the voluntary payment doctrine bars Cohen Brothers' claim for recovery of attorneys' fees over the $150 per hour cash value that it received from SIF.

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

ENTERED: JUNE 13, 2017

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insured. This Court found that the attorneys' fees incurred by the insured in defending his/herself in an action against the hospital were a "natural and probable consequence" of the insurer's breach of the policy (177 AD2d at 374).

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4230 Sian Green, Index 161441/14
Plaintiff-Respondent,

-against-

Fasyal Kabir Mohammad Himon,
et al.,
Defendants,

A+ Couriers,
Defendant-Appellant.

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Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas P. Hurzeler of counsel), for appellant.

Lindabury McCormick Estabrook & Cooper, P.C., New York (Stacey K. Edelbaum of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered on or about October 3, 2016, which denied defendant A+ Couriers' pre-answer motion to dismiss the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted pursuant to CPLR 3211(a)(7). The Clerk is directed to enter judgment accordingly.

Plaintiff was severely injured when, while standing on the sidewalk, a taxicab hopped the curb and struck her. Just prior to the accident, the taxicab driver had an altercation with a bike messenger, defendant Olivo, who allegedly banged his hands and fists against the taxicab. The taxicab driver then allegedly steered his vehicle into the bike messenger, striking plaintiff

in the process. Plaintiff alleges that A+ Couriers, as Olivo's employer, is vicariously liable for Olivo, who incited the altercation.

While the determination of whether a particular act of an employee is within the scope of his employment is heavily dependent on factual considerations, the complaint failed to state a cause of action against A+ Couriers on the theory of respondeat superior (*see generally Riviello v Waldron*, 47 NY2d 297, 303-305 [1979]). Accepting the allegation that Olivo was an employee of A+ Couriers at the time of the accident, his alleged conduct cannot be reasonably viewed as falling within the scope of his employment (*see Sauter v New York Tribune, Inc.*, 305 NY 442 [1953]). Although the precipitating dispute might have arisen while Olivo was acting in the course of his employment in making deliveries, his alleged inciting of an altercation or provoking the taxicab driver's assault cannot reasonably be construed as part of his duties as a bike messenger, or as acting in furtherance of his employer's interests (*see Lazo v Mak's Trading Co.*, 84 NY2d 896, 899 [1994] [Titone, J., concurring]). The complaint is devoid of any allegations that A+ "condoned, instigated or authorized" Olivo's actions (*Milosevic v O'Donnell*, 89 AD3d 628, 629 [1st Dept 2011]).

In light of the foregoing, we need not address A+'s remaining arguments.

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4231 In re Catherine M.,

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

Catherine L.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Allison Mahoney of counsel), attorney for the child.

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about May 17, 2016, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about April 15, 2015, which found that respondent mother had neglected the subject child, unanimously affirmed, and the appeal from the order of disposition otherwise dismissed, without costs, as moot.

The evidence amply supports Family Court's neglect finding on account of the mother's untreated mental illness, which both harmed the child and put her at imminent risk of further harm (Family Ct Act § 1012[f][i][B]; *Matter of Skye C. [Monica S.]*,

127 AD3d 603 [1st Dept 2015]; *Matter of Zariyasta S.*, 158 AD2d 45, 48 [1st Dept 1990]). As a result of her mental illness, the mother, among other things, removed the child from school and kept her socially isolated (*Skye C.*, 127 AD3d at 604). In addition, the mother's unfounded fear of radioactive contamination in her home caused dozens of emergency personnel to enter the home and transport the child to the hospital for an unnecessary medical evaluation, which the child told caseworkers made her nervous (*see Matter of Salvatore M. [Nicole M.]*, 104 AD3d 769, 769 [2d Dept 2013], *lv denied* 21 NY3d 858 [2013]). The mother's delusion also caused her to throw away the child's toys, clothing, furniture items, and all of the family's food, leading both the mother and the child to refrain from eating.

The nine-month period of supervised visitation has now lapsed, which render the mother's arguments regarding the

disposition moot (*Matter of Daleena T. [Wanda W.]*, 145 AD3d 628, 628, 629 [1st Dept 2016]).

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

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4232 In re Kristopher Vagianos, Index 652190/14
Petitioner-Appellant,

-against-

City of New York, et al.,
Respondents-Respondents.

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Benjamin Welikson of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Margaret A. Chan, J.), entered May 15, 2015, which denied the petition to vacate an arbitration award terminating petitioner's employment as a tenured school teacher, and granted respondents' motion to dismiss the petition, unanimously affirmed, without costs.

In light of the hearing officer's findings that petitioner, a teacher of special-needs students who had previously been disciplined for verbal abuse of one student and corporal punishment of a student confined to a wheelchair, made denigrating comments about the students' limitations in the presence of other teachers, including referring to them as "waste products," made inappropriate comments to a student with autism, and made threatening comments to another teacher, our sense of

fairness is not shocked by the penalty of termination (*see Matter of Camacho v City of New York*, 106 AD3d 574 [1st Dept 2013]; *see also Matter of Haubenstock v City of New York*, 130 AD3d 435 [1st Dept 2015]; *Matter of Haas v New York City Dept. of Educ.*, 106 AD3d 620 [1st Dept 2013]). Petitioner's insensitivity to and disrespect for his students "compromised his ability to function as a teacher" (*see Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 857, 857 [1st Dept 2011]). Moreover, petitioner showed neither remorse for his conduct nor any appreciation of its seriousness so as to suggest that he would not engage in similar conduct again (*see e.g. Matter of Varriale v City of New York*, 148 AD3d 650 [1st Dept 2017]). Indeed, petitioner failed to take responsibility for the misconduct for which he had previously been disciplined, and was not deterred by that discipline from continuing his pattern of inappropriate behavior.

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

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4233 Teresa Patterson, Index 23916/13
Plaintiff-Appellant,

-against-

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

_____

Law Offices of Mark B. Rubin, Bronx (Frederick Salanitro of counsel), for appellant.

Lawrence Heisler, Brooklyn (Harriet Wong of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered January 4, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law, in this action where plaintiff alleges that she was injured when a white truck crossed near the bus on which she was riding, the bus driver braked, and the alleged stop caused her arm to twist and hit the pole that she was holding on to as she stood on the bus. Defendants submitted evidence showing that the bus was just pulling out of the bus lane when the alleged

stop occurred due to traffic, and there was nothing extraordinary or violent about the stop under the circumstances.

In opposition, plaintiff failed to raise a triable issue of fact. The bus driver's deposition testimony submitted by plaintiff established that the bus was traveling at three to five miles per hour, and the bus driver applied the brakes when a white truck suddenly made a turn in front of the bus. In response, plaintiff failed to provide "objective evidence of the force of the stop sufficient to establish an inference that the stop was extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel and, therefore, attributable to the negligence of defendant" (*Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 830 [1995]; *see Pfleshinger v Metropolitan Transp. Auth.*, 137 AD3d 516 [1st Dept 2016]). Plaintiff's affidavit, which contradicted her section 50-h hearing testimony, created a feigned issue of fact, by

asserting that the bus failed to yield to the white truck (*see* *Mermelstein v East Winds Co.*, 136 AD3d 505 [1st Dept 2016]).

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

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4234 The People of the State of New York, Respondent, Ind. 1870/11

-against-

Lance Owens, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Cassandra M. Mullen, J. at hearing; Eduardo Padró, J. at plea and sentencing), rendered January 25, 2013, convicting defendant of robbery in the second degree, and sentencing him to a term of one to three years, unanimously affirmed.

The court properly denied defendant's suppression motion. The hearing record and our examination of a copy of a photo array support the court's finding that the array was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). The alleged discrepancies in skin tone and facial hair between defendant and the fillers were not noticeable (*see e.g. People v Sanchez*, 95 AD23d 241, 250 [1st Dept 2012], *affd* 21 NY3d 216 [2013]), and the fact that defendant

was depicted wearing a very common article of clothing that was briefly referred to in the identifying witness's description did not call attention to defendant (*see e.g. People v Drayton*, 70 AD3d 595 [1st Dept 2010], *lv denied* 15 NY3d 749 [2010]).

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4235 In re URS Corporation - New York, Index 100147/15
Petitioner-Respondent,

-against-

Expert Electric, Inc.,
Respondent-Appellant.

_____

Kouril Law Office, P.C., Locust Valley (Cynthia Kouril of counsel), for appellant.

Thompson Hine LLP, New York (Richard A. DePalma of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Paul Wooten, J.), entered February 8, 2017, awarding petitioner attorneys' fees, unanimously reversed, on the law, without costs, and the judgment vacated.

The court properly declined to vacate respondent's default, upon which petitioner's motion to cancel the public improvement lien filed by respondent was granted, because respondent failed to demonstrate a reasonable excuse for the default and a meritorious defense (*see Lopez-Reyes v Heriveaux*, 144 AD3d 486 [1st Dept 2016]).

The court erred in awarding petitioner attorneys' fees since, as petitioner concedes, attorneys' fees are not authorized either by statute or court rule, and we find that the contractual

provisions on which petitioner relies do not authorize an award of attorneys' fees in the instant circumstances (*see Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]).

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4236 Alicia Kearney, Index 104322/11
Plaintiff-Appellant,

-against-

Capelli Enterprises, et al.,
Defendants-Respondents,

New Roc Associates, L.P.,
Defendant.

_____

Ogen & Sedaghati, P.C., New York (Eitan A. Ogen of counsel), for appellant.

Harrington, Ocko & Monk, LLP, White Plains (Dawn M. Foster of counsel), for respondents.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered April 28, 2016, which granted the motion of defendants Capelli Enterprises, Inc. (Capelli) and George A. Fuller Company, Inc. (Fuller) for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to the extent of denying the motion as to Fuller, and otherwise affirmed, without costs.

Dismissal of the complaint as against Capelli was proper. The evidence shows that Capelli did not own the premises, was not involved in the construction project, and did not cause or create the dangerous condition that resulted in plaintiff's injuries.

Plaintiff also signed a release expressly releasing Capelli from tort claims and civil wrongs.

However, Fuller failed to show that it did not owe plaintiff a duty of care; that it had no role in creating the dangerous condition that caused the accident or control over the subcontractor; that the defect was trivial; that plaintiff had released the claim against it; and that the Workers' Compensation defense was applicable.

Here, the accident report indicated that the concrete mound on which plaintiff fell was four inches high, 30 inches long, and 18 inches wide, and the lighting in the area was dim. Clearly, a defect of this size in a darkened area was not trivial. Fuller failed to show that it had no control over the construction of the concrete floor in that the unsigned contract and memorandum of understanding with a concrete subcontractor were not probative.

The release signed by plaintiff was not absolutely clear with respect to waiving claims against Fuller *(see Gross v Sweet*, 49 NY2d 102, 107 [1979]). Fuller also failed to demonstrate that

plaintiff's employer was its alter ego warranting piercing the corporate veil to permit the assertion of a Workers' Compensation defense.

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4237 Cara Goldenberg, Index 161164/13
Plaintiff-Appellant,

-against-

425 Park-South Tower Corporation, et al.,
Defendants-Respondents,

Matthew Wagman, et al.,
Defendants.

- - - - -

[And a Third-Party Action]

_____

Akerman LLP, New York (Joshua D. Bernstein and Jamie Shyman of counsel), for appellant.

Boyd Richards Parker & Colonnelli, P.L., New York (Bryan J. Mazzola of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 1, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment as to liability on the second cause of action (breach of a proprietary lease) and dismissing the counterclaim for a declaration that plaintiff is solely responsible for all repairs related to non-original plumbing in the subject apartment, and granted defendants 425 Park-South Tower Corporation and Goodman Management Co., Inc.'s cross motion for summary judgment dismissing the second cause of action, unanimously affirmed, without costs.

Plaintiff's proprietary lease provides that the lessor "shall not be required to repair or replace, or cause to be repaired or replaced, equipment, fixtures, furniture, furnishings or decorations installed by [plaintiff] or any previous proprietary lessee of the leased space." In addition, it provides that plaintiff "shall be solely responsible for the maintenance, repair, and replacement of plumbing, gas and heating fixtures and equipment." The lease is unambiguous on its face and must be enforced according to the plain meaning of its terms (*see Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]). Contrary to plaintiff's contention, there is no ambiguity as to whether "gas, steam, water or other pipes or conduits within the walls, ceilings or floors or heating equipment which is part of the standard building equipment," for which the lease places the responsibility for maintenance, repair, and replacement on the

lessor, includes the fixtures or equipment installed by the previous proprietary lessee.

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

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4238- Ind. 1404/13
4239 The People of the State of New York, 4873/12
Respondent,

-against-

Tyson Hines,
Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Edward McLaughlin, J.), rendered December 19, 2003,

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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: JUNE 13, 2017

CLERK

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

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4240 Board of Managers of the 411 East 53rd Street Condominium,
Plaintiff-Respondent,

-against-

Barton Mark Perlbinder,
Defendant,

Stephen Perlbinder,
Defendant-Appellant.

Index 650603/14

_____

Granger & Associates LLC, New York (Raymond R. Granger of counsel), for appellant.

Meyers Tersigni Feldman & Gray LLP, New York (Anthony L. Tersigni of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 20, 2016, which, to the extent appealed from as limited by the briefs, denied defendant Stephen Perlbinder's motion for summary judgment dismissing the cause of action for aiding and abetting breach of fiduciary duty predicated on defendants' post-injunction communications to the Department of Environmental Protection (DEP), and, upon a search of the record, granted partial summary judgment to plaintiff on that cause of action, unanimously reversed, on the law, without costs, the grant of summary judgment to plaintiff vacated, and that defendant's motion granted. Appeal from said order by

defendant Barton Mark Perlbinder unanimously dismissed, without costs, as abandoned.

The court erred in finding that defendant Stephen Perlbinder (Stephen) aided and abetted defendant Barton Mark Perlbinder's (Barton) breach of a fiduciary duty, since it made no determination that Barton breached a fiduciary duty (*see Yuko Ito v Suzuki*, 57 AD3d 205, 208 [1st Dept 2008]). In any event, defendants' letters to the DEP asking the agency to reconsider its administrative order neither interfered with the court's injunction precluding defendants from interfering with the condominium's access to their garage unit for the purpose of installing a backflow prevention device nor impeded the condominium's compliance with DEP's order.

In addition, there is insufficient evidence to support a conclusion that Stephen had actual knowledge of Barton's alleged breach of fiduciary duty or that he provided substantial assistance to Barton in furtherance of such a breach (*see Yuko Ito*, 57 AD3d at 208).

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4241 Andrea Barone, Index 155032/12
Plaintiff-Appellant,

-against-

Emmis Communications Corporation,
et al.,
Defendants-Respondents.

_____

DeLince Law PLLC, New York (J. Patrick DeLince of counsel), for appellant.

Littler Mendelson P.C., New York (Eric A. Savage of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about June 8, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, and the motion denied.

As ostensibly nondiscriminatory reasons for terminating plaintiff, defendants pointed to plaintiff's alleged management deficiencies; her alleged insubordination, by, among other things, refusing a directive to extend her vacation; and her alleged concealment of her romantic relationship with a subordinate.

In response, plaintiff raised issues of fact as to pretext (*see Arifi v Central Moving & Stor. Co., Inc.*, 147 AD3d 551, 551 [1st Dept 2017]; *Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 200, 202 [1st Dept 2015]). Among other things,

plaintiff points out that her termination on June 30, 2011, represented a drastic shift from the favorable performance review which she received only three weeks earlier. Indeed, plaintiff was on vacation for nearly a week of that three-week time period. Nothing in the record explains why any defects in plaintiff's management style, identified in her otherwise favorable performance review, suddenly warranted her termination. Defendants' assertion that plaintiff was insubordinate and hostile is belied by the record, which shows nothing more than innocuous e-mail exchanges between plaintiff and her superior, defendant Alexandra Cameron, during the several days prior to the termination. Finally, defendants' assertion that plaintiff's concealing of her relationship with her subordinate was a ground for termination is belied by, among other things, emails exchanged only a week earlier, demonstrating that the subordinate would be reporting to another manager, in order to avoid any appearance of impropriety.

Plaintiff has also pointed to evidence of gender bias, in the form of Cameron's holding women, including plaintiff, to a different standard than men in the workplace. Nor were these

mere "stray remarks." To the contrary, Cameron told plaintiff that she lacked "emotional intelligence and empathy toward others," which were perceived as shortcomings in her ability to manage her subordinates, and which were "amplified because [she was] in a high profile seat and female."

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4242 The People of the State of New York, Ind. 2025/14
Respondent,

-against-

Tara McDonald,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Tomoeh Murakami Tse of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered March 1, 2016,

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: JUNE 13, 2017

CLERK

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

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4243 In re Roberto O.,

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

Lakeysha H.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

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

_____

Appeal from order of fact-finding and disposition (one paper), Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about July 22, 2016, which, upon respondent mother's failure to appear, found, among other things, that she had permanently neglected the subject child, terminated her parental rights, and freed the child for adoption, unanimously dismissed, without costs, and assigned counsel's motion to withdraw granted.

Assigned counsel has advised this Court that after examination of the record, he has determined that respondent's case presents no viable issues, as no appeal lies from an order entered on default (*see Matter of Lukes Jacob R. [Cynthia R.]*, 148 AD3d 420, 421 [1st Dept 2017]). Counsel seeks an order allowing him to withdraw. The brief accompanying the motion

recites the underlying facts and highlights pertinent portions of the record. Counsel has provided respondent with a copy of the brief and informed her of her right to raise points in a pro se supplemental brief, which she failed to submit. We have reviewed the record and agree with assigned counsel that there are no viable arguments to be raised on appeal (*see Matter of Weems v Administration for Children's Servs.*, 73 AD3d 617 [1st Dept 2010]).

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4244 The People of the State of New York, Respondent, Ind. 5239/13

-against-

Matthew Tineo, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered September 24, 2014, 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: JUNE 13, 2017

CLERK

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4248 The People of the State of New York, Respondent, Ind. 1905/11

-against-

Lazarus Roseboro, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered February 21, 2013, convicting defendant, after a jury trial, of two counts of promoting prostitution in the third degree, and sentencing him to concurrent terms of five years, unanimously affirmed.

The court providently exercised its discretion in declining to strike the testimony of the People's main witness, a teenage girl whose prostitution defendant was charged with promoting. There was no substantial risk of prejudice to defendant from the witness's invocation of her privilege against self-incrimination in response to questions on cross-examination regarding her continued prostitution activities after defendant's arrest and her ability to post escort ads herself. Although defendant sought to explore these matters in order to show that the witness

was a self-employed prostitute, and that defendant did not advance or profit from her prostitution, defendant was still able to present this aspect of his defense (*see People v Chin*, 67 NY2d 22 [1986]; *People v Sims*, 209 AD2d 192 [1st Dept 1994], *lv denied* 84 NY2d 1015 [1994]). Furthermore, defense counsel and the codefendant's counsel were able to comment on the witness's refusal to answer in their summations, and the court instructed the jury that it could draw an adverse inference from her invocation of the privilege. Thus, the court properly fashioned a less drastic alternative to striking her testimony (*see People v Vargas*, 88 NY2d 363, 380 [1996]; *People v Visich*, 57 AD3d 804, 806 [2d Dept 2008], *lv denied* 12 NY3d 763 [2009]).

Defendant's challenge to the court's denial of a missing witness charge is unpreserved because defense counsel never requested the charge, and, despite several opportunities to do so, never joined the codefendant's request (*see People v Buckley*, 75 NY2d 843 [1990]; *People v Toledo*, 101 AD3d 571 [1st Dept 2012], *lv denied* 21 NY3d 947 [2013]), and we decline to review it in the interest of justice. As an alternative holding, we find that the court providently exercised its discretion in denying a missing witness charge for a person with the dual status of being a former codefendant (having been charged in the indictment with promoting prostitution as a third defendant, and having pleaded

guilty before trial to prostitution), as well as being one of the persons whose prostitution defendant was charged with promoting. The record demonstrates that she would not "naturally be expected" to provide testimony favorable to the People (*People v Kitching*, 78 NY2d 532, 536 [1991]). The uncalled witness's guilty plea did not obligate her to testify for the People, and the prosecutor stated that the witness was "uncooperative" from the outset, and had completely denied all involvement in prostitution and in posting related online escort ads (*see e.g. People v Mariano*, 36 AD3d 504, 505 [1st Dept 2007], *lv denied* 8 NY3d 987 [2007]). Moreover, her close relationship to defendant, as a goddaughter who lived with him, reinforces this conclusion (*see id.*).

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Renwick, Richter, Feinman, Webber, JJ.

4249N Risk Control Associates Insurance Group,
Plaintiff-Appellant,

-against-

Maloof, Lebowitz, Connahan & Oleske, P.C., et al.,
Defendants-Respondents.

Index 113735/11

Behman Hambelton, LLP, New York (Kevin H. O'Neill of counsel), for appellant.

Schenck, Price, Smith & King, LLP, New York (John P. Campbell of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered July 19, 2016, which, to the extent appealed from, denied plaintiff's motion for leave to amend the pleadings and serve a second amended complaint, unanimously affirmed, with costs.

"Leave to amend pleadings is freely granted, unless the proposed amendment is palpably insufficient or patently devoid of merit. At this stage of the pleadings, plaintiff need only plead allegations from which damages attributable to defendants' conduct might be reasonably inferred" (*Risk Control Assoc. Ins. Group v Maloof, Lebowitz, Connhan & Oleske, P.C.*, 127 AD3d 500, 500 [1st Dept 2015] [internal quotation marks and citations omitted]). However, "subrogation is premised on the concept 'that the party who causes injury or damage should be required to

bear the loss by reimbursing the insurer for payments made on behalf of the injured party'" (*NYP Holdings, Inc. v McClier Corp.*, 65 AD3d 186, 189 [1st Dept 2009]). By plaintiff's own admission, National Specialty, the insurer that issued the subject insurance policy, was also the party that provided financial resources to pay the settlement at issue in the underlying action, and thus, "plaintiff failed to allege . . . actual damages" (*Risk Control*, 127 AD3d at 500), regardless of whether its subrogation claim is pleaded on an equitable or a contractual basis.

National Specialty's claims are time-barred by the three-year statute of limitations applicable to nonmedical malpractice actions, whether sounding in breach of contract or tort (*see* CPLR 214(6); *Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 542 [2004]; *Berger & Assoc. Attorneys, P.C. v Reich, Reich & Reich, P.C.*, 144 AD3d 543, 544 [1st Dept 2016]; *Voutsas v Hochberg*, 103 AD3d 445, 446 [1st Dept 2013], *lv denied* 22 NY3d 853 [2013]). Plaintiff's argument, that leave to amend to substitute new parties, related to the original parties, should not be precluded as time-barred so long as the earlier pleading gave the adverse party sufficient notice of the transaction out of which the new claim arises (*see Bellini v Gersalle Realty Corp.*, 120 AD2d 345, 347-348 [1st Dept 1986]), is

unavailing in these circumstances, as the proceeding was not commenced by the real party in interest, and the amendment to add the proper party was time-barred.

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

ENTERED: JUNE 13, 2017

CLERK

Friedman, J.P., Renwick, Feinman, Gische, JJ.

2962 Mt. Hawley Insurance Company, as subrogee of as Marlite Construction Corp., Plaintiff-Appellant, Index 161321/14

-against-

Penn-Star Insurance Company, Defendant-Respondent.

Kenny Shelton Liptak Nowak LLP, Buffalo (Timothy E. Delahunt of counsel), for appellant.

Miranda Sambursky Slone Sklarin Verveniotis LLP, Mineola (Steven Verveniotis of counsel), for respondent.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 27, 2015, which granted defendant's motion to dismiss the complaint on the ground that plaintiff was collaterally estopped from bringing this action and denied plaintiff's cross motion to dismiss defendant's affirmative defenses and for summary judgment on its claims, unanimously affirmed, with costs.

Plaintiff brought this action in its capacity as subrogee of its insured, the Marlite Construction Corp. Marlite was the general contractor on a construction project. Marlite hired nonparty W.R. Precision, Inc. to be the steel work subcontractor on the project, and W.R. Precision, in turn, subcontracted its work to nonparty Structure Builders, Inc., d/b/a J&B Ironworks. An employee of Structure was injured in the course of the work

and commenced a prior action against Marlite, among others. Plaintiff, as Marlite's insurer, tendered Marlite's defense of the prior action to defendant, W.R Precision's insurer, based on the claim that Marlite was an additional insured under W.R. Precision's policy. Defendant disclaimed coverage on the basis of, inter alia, an exclusion in the insurance policy for the work of independent contractors. Before the settlement of the prior action, the Appellate Term determined that defendant (W.R. Precision's insurer), was not obligated to indemnify or defend either W.R. Precision or Marlite because of that exclusion in its policy (*Szymanksi v 444 Realty Co., LLC.*, 33 Misc 3d 126[A], 2011 NY Slip Op 51752[U] [App Term, 1st Dept 2011]).

As part of the settlement of the prior action, a judgment was entered in favor of Marlite against W.R. Precision requiring W.R. Precision to indemnify Marlite for its liability in the prior action under the terms of the contract between the two parties. After the entry of this judgment, plaintiff, as Marlite's subrogee, commenced this action, pursuant to Insurance Law § 3420(b), against defendant, as W.R. Precision's carrier, to recover the amount plaintiff had paid to settle the prior action on Marlite's behalf, arguing, inter alia, that defendant had not timely disclaimed coverage in connection with the prior action. Defendant moved to dismiss the action, contending that plaintiff

was collaterally estopped to assert its present claim by Appellate Term's determination of the coverage issue in the prior action. Supreme Court granted defendant's motion, and we now affirm.

As previously noted, in the prior action, which has been finally determined, Appellate Term held that defendant has no duty to defend or indemnify either W.R. Precision, its named insured, or Marlite, which claimed to be an additional insured under W.R. Precision's policy, because of the policy's exclusion of coverage for injuries to persons employed by independent contractors. Plaintiff, as Marlite's subrogee, cannot raise yet again the issue of the effectiveness of defendant's disclaimer of coverage merely because it now wears the hat of a judgment creditor against defendant's named insured rather than the hat of a purported additional insured under the named insured's policy. While Insurance Law § 3420(b) enables a judgment creditor of an insured to "step[] into the shoes of the [insured] tortfeasor" (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 355 [2004]) and to sue the carrier directly to assert any rights the insured might have against it with respect to the judgment, the statute does not confer upon such a judgment creditor new rights against the carrier not held by the insured. "[T]he effect of the statute is to give to the injured claimant [or other judgment creditor of

the insured] a cause of action against an insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement after the judgment had been satisfied. The cause of action is no less but also it is no greater" (*id.* at 354-355 [internal quotation marks omitted]).

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

ENTERED: JUNE 13, 2017

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3040- Index 650795/14
3041-
3042 Kenyon & Kenyon LLP,
Plaintiff-Appellant,

-against-

SightSound Technologies, LLC, etc., et al.,
Defendants-Respondents,

SightSound Technologies Holdings, LLC, etc.,
Defendant.

_____

Schiff Hardin LLP, New York (Louis T. DeLucia of counsel), for appellant.

Robinson & Cole LLP, New York (Joseph L. Clasen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered January 26, 2015, which, insofar as appealed from as limited by the briefs, granted defendants SightSound Technologies, LLC (SST), DMT Licensing, LLC (DMT), and General Electric Company's CPLR 3211 motion to dismiss the conversion and unjust enrichment claims as against General Electric, unanimously reversed, on the law, and the motion denied, with costs. Order, same court and Justice, entered August 25, 2015, which denied plaintiff's motion to compel production of an unredacted copy of the minutes of the April 26, 2012 meeting of the SST board of representatives or, in the alternative, for an in camera review

of an unredacted copy of such minutes, unanimously reversed, on the law, without costs, and the motion granted to the extent of directing that the court conduct an in camera review of the unredacted minutes to determine whether the redacted material is privileged under the common interest doctrine as defined by *Ambac Assur. Corp. v Countrywide Home Loans, Inc.* (27 NY3d 616 [2016]). Order, same court and Justice, entered August 2, 2016, which, inter alia, denied plaintiff's motion for partial summary judgment on its fraudulent conveyance claim, unanimously affirmed, with costs.

The motion court erred in granting defendants' CPLR 3211(a)(7) motion to dismiss, which was never converted to a motion for summary judgment pursuant to CPLR 3211(c), on the basis of the averments in their supporting affidavit (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976] ["affidavits received on an unconverted motion to dismiss for failure to state a cause of action are not to be examined for the purpose of determining whether there is evidentiary support for the pleading"]).

Since the court issued the order deciding plaintiff's motion to compel, the Court of Appeals has clarified that the common interest doctrine preserves the privileged status of an attorney-client communication disclosed to a third party only if the

communication was shared "in furtherance of a common legal interest in pending or reasonably anticipated litigation" (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 628 [2016], *supra*). Therefore, we reverse the denial of plaintiff's motion to compel the production of an unredacted copy of the minutes of the indicated SST board meeting, at which an attorney provided legal advice to the SST board in the presence of two persons (Sohn and Giordano) identified in the minutes as representatives of DMT, and direct that the court conduct an in camera review of the unredacted minutes to determine whether the redacted material comprises attorney-client communications made in reasonable anticipation of litigation in which SST and DMT would have a common interest. We note, however, that, because plaintiff did not challenge the status of Sohn and Giordano as representatives of DMT in its motion to compel, that matter, which plaintiff raises for the first time on appeal, need not be considered upon the in camera review.

Plaintiff's motion for summary judgment on its fraudulent conveyance claim was correctly denied, because plaintiff failed to establish prima facie that SST, the debtor, was insolvent; it

relied solely on the book value of assets and tax returns, and offered no evidence of the market ("salable") value of SST's assets (*see* Debtor and Creditor Law § 271[1]; *Morgan Guar. Trust Co. v Hellenic Lines Ltd.*, 621 F Supp 198, 220 [SD NY 1985]).

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

ENTERED: JUNE 13, 2017

CLERK

Friedman, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

4250-
4251 The People of the State of New York,
Respondent,

-against-

Charles Little,
Defendant-Appellant.

Ind. 309/12

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew A. Wasserman of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Stanley R. Kaplan of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Miriam R. Best, J. at initial requests for self-representation; Denis J. Boyle, J. at subsequent requests, jury trial and sentencing), rendered January 17, 2014, convicting defendant of robbery in the first degree, and sentencing him, as a second felony offender, to a term of 12 years, unanimously affirmed.

There was no violation of defendant's right to represent himself. Rather than being unequivocal, each of defendant's requests for self-representation "was made in the context of a claim of dissatisfaction with counsel" (*People v Scivolette*, 40 AD3d 887, 887 [2d Dept 2007]. In any event, defendant abandoned his request to appear pro se (*see People v Gillian*, 8 NY3d 85, 88 [2006]; *People v Graves*, 85 NY2d 1024, 1027 [1995]; *People v Hirschfeld*, 282 AD2d 337, 339 [1st Dept 2001], *lv denied* 96 NY2d

919 [2001], *cert denied* 543 US 1082 [2002]). There was no stage of the proceedings at which a court actually denied, rather than temporarily deferred, a request by defendant for self-representation. Furthermore, after assigning the last in a long series of attorneys, the trial court advised defendant that although he had the right to represent himself, a lengthy colloquy with the court would be required, which the court would conduct at the next adjourned date two weeks later, but that in the meantime defendant should confer with the new attorney to see if defendant might accept her services. The minutes of the ensuing court appearance, as well as the next appearance, clearly establish that defendant was satisfied with the new attorney and no longer wished to represent himself. The record fails to support defendant's present contention that, given the fact that two prior requests for self-representation had been deferred by the court, it would have been futile for defendant to renew his ultimate request on the date on which the court had promised to entertain it.

The court providently exercised its discretion in denying defendant's mistrial motion, made after the prosecutor's summation. Any improprieties in the summation were sufficiently addressed by a curative instruction, which met with defendant's satisfaction, or were trivial and harmless (*see People v*

D'Alessandro, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. During the robbery, two benefit cards belonging to defendant were left in the victim's car, and defendant's explanation for the presence of his cards was highly implausible.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 13, 2017

CLERK

Friedman, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

4252 Ethel George, Index 159336/14
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant,

City of New York,
Defendant.

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Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

Arze & Mollica, LLP, Brooklyn (Raymond J. Mollica of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered January 18, 2017, which denied the motion of defendant New York City Housing Authority (NYCHA) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

NYCHA established its entitlement to judgment as a matter of law by showing that it did not have actual or constructive notice of the alleged icy condition that caused plaintiff's fall. NYCHA submitted plaintiff's deposition testimony that she did not notice ice on the crosswalk until after she fell. NYCHA also submitted its record logs which indicated that there was no precipitation on the day of the accident, and the testimony of its supervisor of grounds that he was not aware of any complaints

about the condition of the sidewalk prior to plaintiff's fall. The supervisor also stated that he had inspected the area the day before plaintiff's fall and did not observe any ice (*see Herrera v E. 103rd St. & Lexington Ave. Realty Corp.*, 95 AD3d 463 [1st Dept 2012]; *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund. Corp.*, 79 AD3d 518, 519-520 [1st Dept 2010]).

In opposition, plaintiff raised a triable issue of fact as to whether NYCHA had notice of the condition, by submitting an expert meteorologist's opinion that, based on meteorological data, the ice condition was present for at least 45 hours prior to plaintiff's accident (*see Santiago v New York City Health & Hosps. Corp.*, 66 AD3d 435 [1st Dept 2009]). NYCHA was not entitled to fill the gaps in its moving papers by submitting an expert affidavit introducing a new theory for summary judgment, for the first time in its reply papers (*see Scansarole v Madison*

Sq. Garden, L.P., 33 AD3d 517, 518 [1st Dept 2006). In any event, NYCHA's alternative theory about the timing of the ice formation is a factually disputed issue.

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

ENTERED: JUNE 13, 2017

CLERK

Friedman, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

4253-
4254 In re Sydney A. B.,

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

Felicia M., et al.,
Respondents-Appellants,

Catholic Guardian Services,
Petitioner-Respondent,

The Commissioner of the
Administration for Social
Services,
Petitioner.

_____

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

Andrew J. Baer, New York, for Tyshawn K., appellant.

Joseph T. Gatti, New York, for respondent.

Karen Freedman, Lawyers for Children, New York (Shirim Nothenberg of counsel), attorney for the child.

_____

Order of fact-finding and disposition (one paper), Family Court, New York County (Jane Pearl, J.), entered on or about June 7, 2016, which, after a hearing, determined that respondent mother had permanently neglected the subject child, terminated the mother's parental rights and transferred custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, and determined that respondent father's

consent was not required for the adoption of the child, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]), including the testimony of the case planner and the agency's progress notes. The record establishes that the agency made diligent efforts to encourage and strengthen the parental relationship by, among other things, formulating a service plan, discussing with the mother the necessity of complying with the plan, making referrals for services, monitoring the mother's progress, and facilitating visitation (*see* § 384-b[7][f]; *see e.g. Matter of Isaac A.F. [Crystal F.]*, 133 AD3d 515 [1st Dept 2015], *lv denied* 27 NY3d 901 [2016]). Despite such efforts, however, the mother failed to visit the child on a consistent basis, was noncompliant with critical services, including drug, alcohol and mental health treatment, and failed to plan for the child's return (*see Matter of Nevaeh Karen B. [Tamara B.]*, 134 AD3d 438, 439 [1st Dept 2015]).

A preponderance of the evidence supports Family Court's determination terminating the mother's parental rights (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]), given the evidence that the mother had not made any progress in overcoming the problems that led to the child's placement (*see Matter of*

Zhane A.F. [Andrea V.F.], 139 AD3d 458, 459 [1st Dept 2016], *lv denied* 27 NY3d 1187 [2016]), or gained any insight or taken responsibility for her actions (*see Matter of Deime Zechariah Luke M. [Sharon Tiffany M.]*, 112 AD3d 535, 536 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]). Under the circumstances, Family Court correctly rejected a suspended judgment, especially since the child, who has special needs, needs stability, which he obtained in the long-term foster home, where he was well-cared for and doing well (*see Matter of Zhane*, 139 AD3d at 459).

Evidence of the father's failure to pay fair and reasonable support for the child according to his means is fatal to his claim that he is entitled to more than notice of the child's adoption (*see* Domestic Relations Law § 111[1][d]; *Matter of Sjuqwan Anthony Zion Perry M. [Charnise Antonia M.]*, 111 AD3d 473, 473 [1st Dept 2013], *lv denied* 22 NY3d 864 [2014]).

Moreover, the father failed to consistently visit the child or maintain regular communication with the child or the child's custodians (*see* Domestic Relations Law § 111[1][d]).

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

ENTERED: JUNE 13, 2017

CLERK

Friedman, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

4255 Arch Insurance Company, Index 157377/13
Plaintiff-Respondent,

-against-

Old Republic Insurance Company,
Defendant-Appellant,

Indian Harbor Insurance Company,
etc., et al.,
Defendants.

_____

Harrington, Ocko & Monk, LLP, White Plains (Paul Howansky of counsel), for appellant.

Gallo Vitucci Klar LLP, New York (Christen Giannaros of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered July 21, 2016, which granted plaintiff's motion for summary judgment declaring that defendant Old Republic Insurance Company is obligated, on an equal basis with plaintiff, to defend and indemnify Bovis Lend Lease LMB, Inc. in the underlying personal injury action, and so declared, unanimously affirmed, with costs.

The policy's conflicting self-insured retention (SIR) clause and private and non-contributory (PNC) endorsement cannot be reconciled as to Bovis, an additional insured. The PNC endorsement, which was added after the effective date of the policy containing the SIR clause and made effective

retroactively, is controlling (*see Kratzenstein v Western Assur. Co. of City of Toronto*, 116 NY 54, 57-58 [1889]). The clause expressly provides that it "modifies" the relevant coverage to provide to an additional insured "primary insurance on a non-contributory basis" if such coverage is required by the contract between the named insured and the additional insured, as is the case here. The subsequently agreed-to PNC endorsement's requirement of "primary insurance on a non-contributory basis" is, on its face, inconsistent with, and therefore overrides, the original policy's $1,000,000 SIR provision. We note that nothing in the contract between Bovis and the named insured supports the conclusion that Bovis consented to a self-insured retention. Indeed, as previously noted, the contract requires that coverage for the additional insured be primary (*see Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391 [2003]).

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

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

ENTERED: JUNE 13, 2017

CLERK

Friedman, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

4256 The People of the State of New York, Ind. 1152/15
Respondent,

-against-

Roger Hill,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J. at plea; Larry Stephen, J. at sentencing), rendered June 30, 2015,

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: JUNE 13, 2017

CLERK

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

Friedman, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

4257 Carlos Medina, Index 158120/12
Plaintiff-Respondent, 590292/13

-against-

Biro Manufacturing Company, et al.,
Defendants-Appellants,

601 Old Country Road Corporation,
doing business as John's Farms,
Defendant.

- - - - - -

[And a Third-Party Action]

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Moran Reeves & Conn PC, Richmond, VA (C. Dewayne Lonas of the bar of the State of Virginia, admitted pro hac vice, of counsel), for Biro Manufacturing Company, appellant.

Milber Makris Plousadis & Seiden, LLP, White Plains (Gregory Saracino of counsel), for Bi-County Scale & Equipment Co. LLC, appellant.

Law Offices of Bruce E. Cohen & Associates, P.C., Melville (Bruce E. Cohen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about October 17, 2016, which, insofar as appealed from, denied defendant Biro Manufacturing Company's motion for summary judgment dismissing the strict products liability claim as against it, and denied defendant Bi-County Scale & Equipment Co., LLC's motion for summary judgment dismissing the negligence claim as against it, unanimously modified, on the law, to grant Biro's motion except to the extent it is predicated on a design defect theory, and to grant Bi-County's motion, and otherwise

affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against Bi-County.

Plaintiff was injured when the blade of a meat-cutting bandsaw he was operating at his place of employment allegedly dislodged and fell on his left hand. Plaintiff testified that the blade faced the right and that he was pushing the meat from right to left through the blade and grabbing it with his left hand from the left (non-cutting) side of the blade.

Defendant Biro, the manufacturer of the saw, failed to establish prima facie that the bandsaw was so designed as to contain adequate safeguards for protecting an operator's left hand from the blade. Biro merely contended that the warnings on the bandsaw, including to keep hands away from the blade, were sufficient. However, "even with adequate warnings, a product may be so dangerous, and its misuse may be so foreseeable, that a factfinder employing the required risk-utility analysis ... could reasonably conclude that the utility of the product did not outweigh the risk inherent in marketing it" (*Yun Tung Chow v Reckitt & Coleman, Inc.*, 17 NY3d 29, 34 [2011]).

The record demonstrates as a matter of law that any inadequacy of the warnings provided was not the proximate cause of plaintiff's accident, since plaintiff acknowledged that he did

not pay attention to the warnings (*see Sosna v American Home Prods.*, 298 AD2d 158 [1st Dept 2002]).

Defendant Bi-County, the servicer of the saw, cannot be held liable to plaintiff for negligent performance of its service contract (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]). There is no evidence of a negligent act or omission on its part or of any connection between any service it provided and plaintiff's accident.

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

ENTERED: JUNE 13, 2017

CLERK

Friedman, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

4260 The People of the State of New York, Ind. 3500/14
Respondent,

-against-

Basem Altam,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered July 28, 2015,

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: JUNE 13, 2017

CLERK

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

Friedman, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

4261 The People of the State of New York, Respondent, Ind. 420/11

-against-

Donald DeSusa,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Kramer Levin Naftalis & Frankel, New York (Evie Spanos of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Robert McIver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J. at mistrial declaration; Seth L. Marvin, J. at jury trial and sentencing), rendered December 16, 2013, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 5 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. It does not avail defendant to rely on statements made at arraignment and hearing testimony that were not adduced at trial (*see People v Dukes*, 284 AD2d 236 [1st Dept 2001], *lv denied* 97 NY2d 681 [2001]).

The court properly exercised its discretion in declaring a mistrial sua sponte before the completion of jury selection, over both parties' objections, because of a scheduling problem that was unavoidable given the information available to the court at the time (*see People v Chandler*, 30 AD3d 161 [1st Dept 2006], *lv denied* 7 NY3d 786 [2006]).

Defendant's challenge to a jury charge to the effect that the People were not obligated to present certain kinds of evidence is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see People v Jiovani*, 258 AD2d 277 [1st Dept 1999], *lv denied* 93 NY2d 900 [1999]).

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

ENTERED: JUNE 13, 2017

CLERK

Friedman, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

4262 The People of the State of New York, Respondent, Ind. 33792/14

-against-

Manuel Martinez, Defendant-Appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Susan Epstein of counsel), for appellant.

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered February 24, 2015, 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: JUNE 13, 2017

CLERK

Friedman, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

4263-
4264 Index 651834/14

Jia Wang,
Plaintiff-Appellant,

-against-

Dan Zhao, also known as
Danyang Zhao,
Defendant-Respondent,

Osiddeas Konstakopolous,
Defendant.

_____

Jia Wang, appellant pro se.

Aaron L. Lebenger, Flushing, for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered May 4, 2016, which granted defendant Dan Zhao's motion to confirm the report of a special referee, made after a hearing, recommending dismissal of the complaint against Zhao based on lack of personal jurisdiction, denied plaintiff's cross motion to reject the report's recommendation, and dismissed the complaint as against Zhao, unanimously affirmed, without costs. Order, same court and Justice, entered August 9, 2016, which, to the extent appealable, denied plaintiff's motion to renew, unanimously affirmed, and the appeal therefrom otherwise dismissed, without costs.

Plaintiff's contention that Zhao testified falsely at the traverse hearing is unsupported by the record. Contrary to

plaintiff's argument, Zhao acknowledged in his testimony that he used one apartment at 130 Water Street as his mailing address on various documents and that he owned another apartment in that building. The Small Claims Court records relied upon by plaintiff do not contradict Zhao's testimony and, in any event, are irrelevant because they postdate plaintiff's attempted service on Zhao by almost two years.

The relevant inquiry at the traverse hearing was whether the address where plaintiff's process server attempted to serve the summons and complaint was Zhao's "dwelling place or usual place of abode" (CPLR 308[2]). Zhao's testimony that he did not reside in either apartment at 130 Water Street was corroborated by the doorman's testimony, and plaintiff has pointed to no contradictory evidence.

The special referee properly denied plaintiff's request for an adjournment or continuance, because plaintiff did not adequately explain her failure to appear personally or to have a witness present, and Zhao had come from China for the hearing.

The motion to renew was not based on new facts that would change the prior determination (*see* CPLR 2221[e][2]; *see also Naomi S. v Steven E.*, 147 AD3d 568 [1st Dept 2017]), and no appeal lies from an order denying reargument (*see Naomi S.*, 147 AD3d 568).

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

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

ENTERED: JUNE 13, 2017

CLERK

Friedman, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

4265 In re Kyriaki Borekas, Index 100463/15
Petitioner-Appellant,

-against-

New York City Department of Housing Preservation and Development, et al.,
Respondents-Respondents.

David A. Kaplan, P.C., New York (David A. Kaplan of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for New York City Department of Housing Preservation and Development, respondent.

Montgomer McCracken Walker & Rhoads, LLP, New York (Jose Saladin of counsel), for Washington Square Southeast Apartments, Inc., respondent.

Order and judgment (one paper), Supreme Court, New York County (Margaret A. Chan, J.), entered February 25, 2016, denying the petition to vacate respondent New York City Department of Housing Preservation and Development's (HPD) determination dated November 18, 2014, which denied petitioner succession rights to the tenant of record's apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Supreme Court properly concluded that HPD's determination was rational and not arbitrary and capricious. Where a succession claim is made after a Mitchell-Lama tenant of record

dies, the applicant must make an affirmative showing of three criteria: [1] that the applicant qualifies as a family member or was otherwise interdependent with the tenant of record, [2] that the unit at issue was the applicant's primary residence during the two years immediately prior to the tenant's death and [3] that the applicant was listed as a co-occupant on the income affidavits filed for the same two year period (*Matter of Murphy v New York State Div of Housing and Community Renewal*, 21 NY3d 649 [2013]). Here there is no dispute that there are no income affidavits listing petitioner as a co-occupant for the applicable period of time, which alone justifies the denial of her application. There are circumstances, however, where the evidence of primary residence during the operative period is so overwhelming that the absence of an income affidavit may be overlooked (*Matter of Murphy* at 653; see: *Grossbard v New York State Div of Housing and Community Renewal*, 137 AD3d 661 [1sr Dept 2016]). This, however, is not one of these circumstances. While the petitioner provided affidavits of neighbors stating that she lived with the tenant of record, the documentary evidence all shows that she had a residence in Astoria. Notwithstanding that financial interdependence is an important factor considered in determinating whether parties were in a family like relationship (*see Ft Washington Holdings v Abbott*,

119 AD3d 492 (1st Dept 2014]), petitioner admitted that the parties led primarily separate financial lives. Even giving credit to petitioner's explanation that she needed to keep her finances separate from the tenant of record because of his alleged substance abuse problems, she failed to adequately explain why she used the Astoria address for her driver's license and voter registration. Moreover, she failed to provide any documentary evidence for her claim that they divided between them responsibility for paying certain shared expenses. The proof was not overwhelming that petitioner occupied the apartment as her primary residence during the applicable period. In addition there is no innocent explanation proffered for the failure to list petitioner as an occupant of the apartment on the income affidavit. Therefore, HPD had an appropriate basis to deny petitioner's application (*Matter of Murphy*, 21 NY3d at 652, *Clark v New York State Div of Housing and Community Renewal*, 147 AD3d 568 [1st Dept 2017], *Sherman v New York State Div of Housing and Community Renewal*, 144 AD3d 533 [1st Dept 2016]).

Petitioner is not entitled to an evidentiary hearing (*see Matter of Horne v Wambua*, 143 AD3d 605, 606 [1st Dept 2016]).

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

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

ENTERED: JUNE 13, 2017

CLERK

Friedman, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

4266 The People of the State of New York Ind. 2161/13
Respondent,

-against-

John Gonzalez,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Amanda Katherine Regan of counsel), for respondent.

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Judgment, Supreme Court, New York County (Daniel McCullough, J.), rendered December 5, 2013, convicting defendant, after a jury trial, of criminal trespass in the second degree, and sentencing him to a term of four months, unanimously affirmed.

The verdict was supported by legally sufficient evidence and not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). There is no basis to disturb the jury's credibility determinations. Although defendant had been working on a construction project at a building, the evidence, including defendant's own statements, supports inferences that he had no

permission to be in the building in the middle of the night when no work was scheduled or authorized, and that he was aware of his lack of any license or privilege to enter (*see e.g. People v Watson*, 221 AD2d 264, 264 [1st Dept 1995], *lv denied* 87 NY2d 926 [1996]).

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

ENTERED: JUNE 13, 2017

CLERK

Friedman, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

4267-
4268N Index 28490/85

Jack L. Alpert, etc., et al.,
Plaintiffs-Appellants,

Eugene Alpert, as Executor of the
Estate of Jack L. Alpert,
Judgment Creditor-Appellant,

-against-

Zane Alpert, et al.,
Defendants.

- - - - -

Debbie Alpert,
Nonparty Respondent.

_____

Melvin S. Hirshowitz, New York, for appellants.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 19, 2016, which, insofar as appealed from, granted nonparty Debbie Alpert's motion to quash a subpoena dated December 28, 2015 "until such time [as] the parties negotiate a confidentiality agreement" and for a protective order requiring plaintiffs and their counsel to obtain permission of the court before serving any further subpoenas to obtain Alpert's banking or other financial records, unanimously reversed, on the law and the facts and in the exercise of discretion, with costs, so much of the motion as sought to require plaintiffs and their counsel to obtain the aforesaid permission of the court denied, and so

much of the motion as sought to quash denied on condition that the judgment creditor use any documents and information obtained from such subpoena solely to enforce the judgment. Order, same court and Justice, entered September 2, 2016, which, upon reargument, granted Alpert's motion for a protective order with regard to a subpoena dated June 24, 2015, unanimously modified, on the law and the facts and in the exercise of discretion, to delete the limitation that the documents and information received in response to said subpoena not be disseminated or shown to anyone other than plaintiffs and their counsel, and otherwise affirmed, without costs.

The judgment creditor's argument that nonparty Debbie Alpert (the judgment debtor's daughter-in-law) lacks standing to move to quash subpoenas directed at her bank is unpreserved, and we decline to review it.

The judgment creditor is correct that with respect to the December subpoena Alpert failed to establish "either that the discovery sought is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious" (*Matter of Kapon v Koch*, 23 NY3d 32, 34 [2014] [internal quotation marks omitted]). However, CPLR 5240 permits the court to "make an order denying, limiting, conditioning, regulating, extending or modifying the use of any

enforcement procedure," including a subpoena. The motion court providently exercised its discretion in limiting the judgment creditor's use of the documents and information obtained from the June subpoena to this litigation, i.e., solely for purposes of enforcing the judgment. We note that the judgment creditor has always been willing to abide by such a limitation. We find that the motion to quash the December subpoena should have been denied on condition that the judgment creditor abide by a similar limitation and that the limitation that the documents and information obtained from the June subpoena not be disseminated or shown to anyone other than plaintiffs and their counsel, as well as the requirements to obtain court permission before serving any further subpoenas and to negotiate a confidentiality agreement with Alpert before being able to re-serve the December subpoena, are overly restrictive in light of New York's public policy "to put no obstacle in the path of those seeking to

enforce a judgment" (*U.S. Bank N.A. v APP Intl. Fin. Co., B.V.*, 100 AD3d 179, 183 [1st Dept 2012] [internal quotation marks omitted]).

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

ENTERED: JUNE 13, 2017

CLERK

Acosta, P.J., Tom, Kapnick, Kahn, Gesmer, JJ.

3427-
3428 The People of the State of New York,
Respondent,

-against-

Mark Boyd,
Defendant-Appellant.

Ind. 2069/11

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Marianne Karas, Thornwood, for appellant.

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered December 18, 2013, affirmed.

Opinion by Tom, J. All concur except Acosta, P.J. and Gesmer, J. who dissent in an Opinion by Acosta, P.J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Peter Tom
Barbara R. Kapnick
Marcy L. Kahn
Ellen Gesmer, JJ.

3427-3428
Ind. 2069/11

_____x

The People of the State of New York,
Respondent,

-against-

Mark Boyd,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Efrain Alvarado, J.), rendered December 18, 2013, as amended February 26, 2014, convicting him, after a jury trial, of criminal possession of a weapon in the third degree, and imposing sentence.

Marianne Karas, Thornwood, for appellant.

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge and Gina Mignola of counsel), for respondent.

TOM, J.

The primary issue raised by defendant on appeal is whether the trial court abused its discretion in granting the People's application to dismiss the count of unlawful possession of an air pistol or BB gun (Administrative Code of City of New York § 10-131[b]) in an indictment that also included charges of criminal possession of a weapon relating to a 9 millimeter Taurus pistol. Because the BB gun count and the weapon possession counts relating to the Taurus pistol were noninclusory, submission of the BB gun count was not mandatory, and the court reasonably determined that it would "simply provide a distraction or an opportunity [for the jury] to [compromise or] split the difference" (*People v Leon*, 7 NY3d 109, 114 [2006]), a scenario to which defendant was not entitled. Defendant's other arguments are either unpreserved or meritless.

Shortly after 1 a.m. on June 8, 2011, while searching for a robbery suspect, Detectives Angelo Tessitore and Ellis DeLoren were driving south on Marion Avenue in the Bronx and spotted defendant holding a gun in each of his hands. Detective DeLoren testified that he had an unobstructed, well lit view of defendant as the unmarked police vehicle approached defendant. As the detectives drew closer, they observed defendant make a throwing motion under a white van parked on the street, and start to walk

away. Defendant was standing alone approximately 25 to 30 feet away from a group of people. DeLoren then heard "two clinks hitting the ground."

Defendant was arrested, and the two guns - a black BB gun, or air pistol, and a 9 millimeter Taurus semiautomatic pistol with a brown handle - were retrieved from under the van.

Defendant was charged with criminal possession of a weapon in the second degree, two counts of criminal possession of a weapon in the third degree, criminal possession of a weapon in the fourth degree, and possession of ammunition in connection with his possession of a loaded Taurus pistol. He also was charged with unlawful possession of an air pistol or rifle based on his possession of the BB gun.

The defense theory at trial was that defendant possessed the BB gun but not the Taurus pistol. To that end, defendant hired a retired detective, John Bruno, who interviewed a witness - Steve Ramsanany - who claimed that he had possessed the Taurus pistol and that he threw it under a car when the police approached. Ramsanany put this statement in writing. However, when the detectives confronted him about his statement he told them that it was a "fake" and a "lie" and that it was defendant's idea. Defendant told him that he would not have to testify and would not get into trouble. When asked why he gave the statement,

Ramsanany said he was afraid of defendant, and later sought from DeLoren his assurance that defendant would not learn that he had recanted his statement.

One of defendant's friends, Adan Gil, testified that on the date in question defendant had shown him a BB gun. Gil also claimed that he saw a man he knew as "Harlem" carrying a gun in his waistband that had a brown handle, and that he saw "Harlem" throw the gun under a white vehicle when police arrived.

At the end of the People's case, the court asked whether the People intended to "par[e] down the indictment." The prosecutor stated that he had not made a decision, and asked if defense counsel was going to request submission of the "pellet gun" charge, referring to the charge of unlawful possession of an air pistol, which related to the BB gun. Defense counsel said that he "would like to think about it. You make the decision first." The prosecutor replied, "I think if defense asks for it [sic] he will get it ... [I]f you know you want it, let me know." Defense counsel said he would do so.

After all of the evidence was presented, defense counsel moved to dismiss the first four counts, relating to the Taurus pistol. He also argued that the "only applicable count" was the air pistol count relating to the BB gun, and asked the court to submit that count to the jury. The People asked the court to

deny defendant's motion to dismiss, and stated, "I am not asking you to submit the air pistol, I know you're not hearing argument on that at this point." The court asked whether the People "wish to dismiss it, although defense stated [sic] they're requesting it." The People responded, "[I]t's on the indictment. I guess it's going to be there." The court denied defendant's motion to dismiss the other counts, but did not address the air pistol count further.

The People later moved to dismiss the air pistol count, and defense counsel objected, stating only that "the jury should be allowed to consider that." The court stated that the People "have the option ... to make that application. And it is not a lesser included, so I don't see there is a legal reason for the [c]ourt to include it ... and were you to object I would deny it, but it is not." Accordingly, the court granted the People's motion and dismissed the count of unlawful possession of air pistol or rifle.

The jury thus considered one count of criminal possession of a weapon in the second degree and two counts of criminal possession of a weapon in the third degree, all in connection with defendant's possession of the Taurus pistol. Defendant was ultimately convicted of criminal possession of a weapon in the third degree, and sentenced, as a second felony offender, to a

term of two to four years.

Whether to dismiss a count in an indictment is a matter to be decided by the court in its discretion (*People v Extale*, 18 NY3d 690, 692 [2012]). As is the case here, when the offenses are noninclusory, the submission of a less serious count, even if there is evidence to support it, is not mandatory; rather, it is a matter for the trial court's discretion whether to dismiss the count (*People v Leon*, 7 NY3d 109 at 113, *supra*; *see* CPL 300.40[3][a] ["With respect to non-inclusory concurrent counts, the court may in its discretion submit one or more or all thereof"]). "In exercising its discretion, the court ha[s] to weigh competing possibilities: Would the submission of the [less serious] count help the jury arrive at a fair verdict, or would it simply provide a distraction or an opportunity to split the difference?" (*People v Leon*, 7 NY3d at 114).

Further, "[d]efendant, in asking for the submission of the less serious charge, was obviously hoping that he could avoid conviction on the more serious one" (*People v Leon*, 7 NY3d at 113-114). Defendant hoped that a jury otherwise prepared to convict him for criminal possession of a weapon in the second or third degree might – "perhaps in an exercise of mercy, or a compromise" - convict him on the unlawful possession of an air pistol instead. However, as the Court of Appeals explained in

Leon, "defendant was not entitled to a chance at jury nullification" (7 NY3d at 114, citing *People v Goetz*, 73 NY2d 751 [1988][nullification "is not a legally sanctioned function of the jury and should not be encouraged by the court"], *cert denied* 489 US 1053 [1989]).

The court providently dismissed the air pistol charge so that the jury could not compromise by resorting to jury nullification and merely find defendant guilty of that less serious charge. Instead, the jury was given an opportunity to resolve any credibility issues related to the possession of the Taurus pistol. Had the jurors believed defendant's theory of the case that he did not possess the Taurus pistol and disbelieved the People's witnesses, they could have easily acquitted defendant of all charges related to the Taurus pistol. Since the count of criminal possession of an air pistol was totally unrelated to the weapon charges, it could only confuse the jurors or permit jury nullification during jury deliberations.

Stated another way, defendant was not prejudiced by the dismissal of the air pistol count. Once the People presented their case concerning the possessory counts of the Taurus pistol, defendant's theory of the case that he did not possess the firearm was considered by the jury. Clearly, if the jurors determined that defendant only possessed the BB gun, they could

return a complete acquittal. Nor is it correct to state, as does the dissent, that dismissal of the air pistol count "removed defendant's only defense from consideration." The fallacy of this argument is that the charge of criminal possession of an air pistol, a misdemeanor, is a distinct and completely separate crime and, thus, cannot serve as a defense to the charge of possession of the 9 millimeter pistol. It would appear that the only reason to give both counts to the jury is to allow the jury to exercise mercy, or a compromise, to find defendant guilty only of criminal possession of the air pistol. Once again, no defendant is entitled to jury nullification. Further, defendant's defense that he did not possess the Taurus pistol was considered, and rejected, by the jury. The jury's finding defendant guilty of possession of the Taurus pistol count was based on the evidence presented by the People, including the credibility of their witnesses, and not for the reason that the air pistol count was dismissed.

In any event, whether or not defendant possessed a BB gun had no bearing on the jury's consideration of the counts relating to the Taurus pistol. Rather than be distracted by the issue of the BB gun, the jury was able to focus its deliberative energies on whether the People had proven beyond a reasonable doubt the elements of the counts relating to the Taurus pistol.

Contrary to the dissent's contention that submission of the air pistol count would have "helped the jury arrive at a fair verdict," the jury was free to credit the defense without regard to whether defendant was charged with the air pistol count. To the extent the dissent notes that the defense was supported by defendant's and Gil's testimony, as well as by Ramsanany's declaration, the dismissal of the air pistol count did not, in any manner, preclude the jury from crediting the defense and acquitting defendant of the charges related to the Taurus pistol.

Nor was it unfair for the jury to hear about Ramsanany's declaration and DeLoren's rebuttal of it. In particular, Ramsanany claimed that he had possessed the Taurus pistol and that he threw it under a car when the police approached. DeLoren rebutted that claim by stating that Ramsanany had admitted to him that his statement was a lie. The dissent mischaracterizes this testimony as "essentially tell[ing] the jury to forget about that testimony and focus only on the 9 millimeter Taurus pistol." The jury was not told or urged to "forget about that testimony," as the dissent says. Rather, the jury was entitled to credit Ramsanany's declaration or not in deciding whether Ramsanany possessed the Taurus pistol. The jury obviously rejected Ramsanany's statement and credited the testimony of Detective DeLoren. The jury's request for a readback of Bruno's testimony

about his conversations with Ramsanany does not indicate any confusion on its part, particularly since the court had already instructed the jury that all submitted counts were related only to the Taurus pistol.

Similarly, while Gil's testimony mentioned defendant showing Gil a BB gun, Gil also stated that he had seen another individual with a gun that matched the description of the Taurus pistol. Thus, his testimony was fairly received and did not unfairly confuse the jury.

There is no basis on which to conclude, as defendant does, that the jury convicted defendant of criminal possession of a weapon in the third degree, and not the top count, because it had to convict him of "something or nothing at all," and could not convict him on the air pistol count. While the conviction on the lowest charge submitted to the jury could have been a show of mercy, "[t]o speculate why the jury voted as it did, is at best, an exercise in futility" (*People v Davis*, 92 AD2d 177 [1st Dept 1983], *affd* 61 NY2d 202 [1984]). Moreover, defendant failed to preserve this particular argument for review.

Defendant further argues that the jury's verdict was against the weight of the evidence because, inter alia, DeLoren was the only witness who saw defendant holding the guns, and his testimony was purportedly undermined by other testimonial

evidence. The verdict was not against the weight of the evidence (see *People v. Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility findings. DeLoren's account of the recovery of the weapon from defendant was found credible by the jury, and his testimony was not undermined by that of Detective Tessitore, whose testimony was similar to DeLoren's. Moreover, there is also support in the record for the jury's determination to credit DeLoren's testimony over Ramsanany's statements, particularly since Ramsanany did not testify in court, recanted his statement, and admitted to DeLoren that he was afraid of and/or influenced by defendant.

Defendant also argues that certain evidentiary rulings denied him a meaningful opportunity to present a defense. Some of these issues are unpreserved, and all are unavailing.

Ramsanany initially told defense investigator Bruno that he had thrown the Taurus pistol under the van. He later recanted and told DeLoren that defendant had asked him to sign a false statement. At the time of defendant's trial, Ramsanany was in federal custody on charges of possession of an AK-47. The court denied defendant's request to admit evidence of those pending charges.

Defendant argues that evidence of Ramsanany's recantation and of his fear of defendant should not have been admitted.

However, the issue was waived by defense counsel's consent to the admission of that evidence in the event that he introduced Ramsanany's initial inculpatory statement. Regardless, it was properly admitted, since it would be misleading to admit only hearsay evidence of the initial inculpatory statement. Moreover, defense counsel was able to cross-examine DeLoren and elicit facts to undermine his claims regarding Ramsanany's recantation.

As for Ramsanany's arrest for possession of an AK-47, the court correctly excluded that evidence because Ramsanany had not been convicted of any crime, and "the mere fact of an arrest is not a permitted area for impeachment" (*People v Randolph*, 122 AD3d 522, 522 [1st Dept 2014], *lv denied* 25 NY3d 953 [2015]).

There is no merit to defendant's contention that the court did not allow DeLoren to be fully questioned regarding his authority to arrest Ramsanany for his purported possession of the Taurus pistol if he did not recant his prior admission. Defense counsel was able to ask a number of questions on the topic and there is no indication that the court unfairly limited his inquiry.

Defendant also takes issue with the court's *Sandoval* ruling. At the *Sandoval* hearing, the People sought to admit evidence of two prior "narcotics-related" felony convictions, without going into the underlying facts of the drug sales. They also wanted to

ask whether defendant was on parole at the time of the conduct at issue.

The court ruled that the People could inquire about one felony conviction and its underlying facts. The court stated, incorrectly, that that was the compromise the People had proposed. The court also ruled that the People could inquire whether defendant was on parole because credibility was "essential" in the case.

The court's *Sandoval* ruling balanced the appropriate factors and was a provident exercise of discretion (*see People v Walker*, 83 NY2d 455, 458-459 [1994]). The court permitted limited inquiry into matters that were relevant to credibility. Although the court's ruling allowing inquiry into the underlying facts of one prior drug conviction was more than the People had requested, it excluded another drug conviction altogether.

Defendant's claims that the prosecutor engaged in certain instances of trial misconduct are unpreserved and unavailing. First, defendant argues that the prosecutor knowingly elicited perjury from DeLoren, when DeLoren stated that he saw defendant with two guns rather than one. However, there is no record evidence to support this claim. As for defendant's complaint that DeLoren interviewed Ramsanany despite a conflict of interest, the jury properly credited DeLoren's testimony in light

of the circumstances of Ramsanany's initial statement. Nor does it avail defendant to note that the prosecution failed to test the gun for fingerprints or DNA.

Defendant's argument that the prosecutor denigrated the defense by insinuating that defense investigator Bruno was "in cahoots" with defense counsel or defendant is unpreserved. The prosecutor asked Bruno whether he was being paid by defense counsel or defendant. Defense counsel objected to that question, and the court sustained the objection. Defendant did not seek any further relief.

In any event, defendant was not harmed, because Bruno only stated that he would be paid at the end of the case when he "submit[ted] a voucher to the judge." The prosecutor also acknowledged, "There is nothing wrong with that, you're working. This is your job, correct?"

Defendant also failed to preserve his claim that, during their summation, the People impermissibly shifted the burden of proof to the defense by arguing that defendant had failed to produce Ramsanany, that there were numerous questions to which the prosecutor did not "know the answer," and on which the "[s]ilence is deafening." In fact, defense counsel did not object to any of these comments.

Further, when the prosecutor commented that Ramsanany had

said that defendant had told him he would not have to testify, and in fact, he did not testify, defense counsel objected. The court overruled the objection, but it instructed the jury that it would later deliver "a full charge [that] the defendant does not have to prove anything." The prosecutor's comment, either standing alone or combined with the other comments defendant cites, did not amount to conduct so pervasive and egregious that it deprived defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). Moreover, the court reminded the jury that the defense did not have to prove anything, alleviating any prejudice to the defense.

Defendant contends that he was deprived of his due process right to the effective assistance of counsel by his trial counsel's failure to request admission of his out-of-court post-arrest statement admitting possession of the BB gun and denying possession of the Taurus pistol in order to rebut the People's argument that the defense was a recent fabrication.

Initially, we find that this ineffective assistance claim is unreviewable on direct appeal because counsel may have had strategic reasons for his conduct that are not apparent from the trial record (*see People v Love*, 57 NY2d 998 [1982]). For example, admission of the statement might have opened the door to

admission of more of defendant's testimony at the *Settles* hearing, which includes references to his criminal record. Defendant had also named someone named "Billy" or "Bills" as having the Taurus gun, and thus his prior statement would have served only to contradict Ramsanany's statement that he possessed the gun and Gil's testimony that someone named "Harlem" had the gun, and would not have rebutted the contention that they had recently fabricated their statements.

As an alternative holding, we reject defendant's ineffective assistance claim on the merits (*see People v Benevento*, 91 NY2d 708, 713–714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Even if defense counsel asked to introduce evidence of defendant's statement as a prior consistent statement to rebut a charge of recent fabrication, it had little chance of success. While a witness's own prior consistent statement may be admitted, we note that defendant did not testify and thus could not be cross-examined (*see People v McDaniel*, 81 NY2d 10, 18 [1993] [prior consistent statements may be admitted because "it would be unjust to permit a party to suggest that a witness ... is fabricating a story without allowing the opponent to demonstrate that the witness had spoken similarly even before the alleged incentive to falsify arose"]). Accordingly, defense counsel would have had to successfully argue that he could elicit

evidence of that statement through Detective DeLoren's testimony. It should be noted that DeLoren had failed to make a complete written report as to what defendant told him. In sum, this error, standing alone, based on the trial record, does not warrant a finding of ineffective assistance.

Accordingly, the judgment of the Supreme Court, Bronx County (Efrain Alvarado, J.), rendered December 18, 2013, as amended February 26, 2014, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, should be affirmed.

All concur except Acosta, P.J. and Gesmer, J. who dissent in an Opinion by Acosta, P.J.

ACOSTA, P.J. (dissenting)

In my opinion, the trial court abused its discretion in refusing to submit the air pistol charge to the jury (*see* Administrative Code of City of New York § 10-131[b]). On June 8, 2011, at around 1:15 a.m., two detectives were searching for a robbery suspect. As they approached a group of people near 195th Street in the Bronx, Detective Tessitore slowed the car down to five miles per hour, to see whether the suspect was among the group.

As the car slowed, Detective DeLoren saw defendant standing on the east side of the street, to DeLoren's left (on the driver's side of their car), four to five feet away, facing the street, with a gun in each hand. Defendant was looking down at the guns. Defendant was standing separate from the group, roughly 25 to 30 feet away from anyone else.

The area was well lit by street lights, and DeLoren had an unobstructed view of the guns. DeLoren and Tessitore testified that as DeLoren looked to his left, out of Tessitore's side of the car, he told Tessitore, "Stop, stop ... gun, gun, guy has a gun, back up, back up."

DeLoren looked over his shoulder, and defendant looked at him as Tessitore backed up the car. Defendant turned, made a throwing motion under a white van parked on the street, and

started to walk away. DeLoren did not see the guns go under the van, but he heard "two clinks hitting the ground." Tessitore was watching the road, so he did not see defendant holding any guns as he drove.

The detectives got out of the car and went to different sides of the van. Defendant was on the sidewalk by the van, 10 to 12 feet from where he had thrown the guns. There were people near a building 20 to 30 feet away from where defendant had thrown the guns and 15 feet from where detectives had stopped him. DeLoren arrested defendant and then retrieved the two guns from under the van.

DeLoren described one gun as a black BB gun, or air pistol, and the other as a 9 millimeter Taurus semiautomatic pistol with a brown handle. The 9 millimeter pistol was loaded and found to be operable. The air pistol also was also found to be operable. The guns were not tested for DNA or fingerprints, but DeLoren explained that the police gather that evidence only when the suspect's identity is unknown.

The court held a *Settles* hearing, at which retired NYPD Homicide Task Force Detective John Bruno, DeLoren, and defendant testified, in order to determine the trustworthiness and reliability of Ramsanany's statement, a declaration against penal interest (*see People v DiPippo*, 27 NY3d 127 [2016]; *People v*

Settles, 46 NY2d 154 [1978]). After the hearing, the court granted defendant's request to introduce Ramsanany's declaration, and, with defendant's consent, also allowed the People to introduce evidence of Ramsanany's recantation.

Defendant presented evidence at trial that he possessed only the air pistol, and that someone else had possessed the pistol before police retrieved both weapons from under a van. Bruno, who had been working as a private investigator since 1985, was hired by the defense in connection with the instant matter. Defendant asked Bruno to talk to a man named "Steve," whose last name Bruno later learned was Ramsanany. On August 7, 2012, Bruno met Ramsanany at defendant's apartment, with the understanding that Ramsanany was going to admit that he possessed the gun at issue. Bruno did not, before interviewing Ramsanany, know what kind of gun was involved. Before interviewing Ramsanany, he told defendant to leave. He also warned Ramsanany that any admission that he possessed the gun could get him arrested.

Ramsanany then told Bruno that he had been playing dice with people in front of 2650 Marion Avenue, near 197th Street, when a dispute arose between Ramsanany and another player, who slapped Ramsanany. Ramsanany then left and returned with a 9 millimeter Taurus semiautomatic gun, but when an unmarked police car approached, he threw it under a car parked in front of 2650

Marion Avenue. Ramsanany saw defendant throw a BB gun under the car. As police approached, Ramsanany left. He was not promised anything for making the statement, which Bruno put in writing and Ramsanany signed.

Adan Gil, one of defendant's friends, also testified on defendant's behalf. At 1:00 a.m. on June 8, 2011, defendant was sitting on a stoop near 2654 Marion. Some people were playing dice nearby, and an argument started between a man Gil knew as "Harlem" and another man. The other man slapped Harlem, who then left, and returned. When Harlem returned, he had a brown gun handle sticking out of his waistband. As Gil heard the police arrive, he saw Harlem throw the gun under a white vehicle. Gil left when he saw the police arrive. He had not paid attention to what defendant was doing at the time. Earlier that day, defendant had shown him a BB gun.

In rebuttal, Detective DeLoren testified that on March 3, 2013, he, Tessitore, and another detective visited Ramsanany's house, after he had been unwilling to speak to them by phone. They found Ramsanany a block away from his house. When DeLoren confronted Ramsanany about his written statement, Ramsanany "put his head down and sighed heavily." He admitted that it was a "fake" and a "lie" and that it was defendant's idea. Defendant had told Ramsanany that if he agreed to say that he had the 9

millimeter Taurus, the case would be dismissed, Ramsanany would not have to testify, and he would not get in trouble. When DeLoren asked why Ramsanany gave the statement, Ramsanany said he was afraid of defendant. DeLoren did not believe that he had the authority to arrest Ramsanany at that point. A few weeks later, Ramsanany called DeLoren and sought assurance that defendant would not learn that Ramsanany had recanted his statement to DeLoren. DeLoren had not taken notes of that conversation, including when it occurred.

At the end of the case, defendant moved to dismiss the charges relating to the 9 millimeter Taurus pistol, and argued that only the air pistol count should be charged. The People moved to dismiss the air pistol count, and defense counsel objected, stating, "[T]he jury should be allowed to consider that." The court stated that the People "have the option . . . to make that application. And it is not a lesser included, so I don't see there is a legal reason for the [c]ourt to include it . . . and were you to object I would deny [the People's motion], but it is not." Accordingly, it granted the People's motion and dismissed the count of unlawful possession of air pistol or rifle.

The court submitted three counts for the jury's determination, criminal possession of a weapon in the second

degree (Penal Law (PL) 265.03[3]), criminal possession of a weapon in the third degree (PL 265.02[1]), and criminal possession of a weapon in the third degree (PL 265.02[5][ii]). The court also instructed the jury that all the charges referred to the 9 millimeter Taurus and not the air pistol.

In its first jury note, the jury requested a readback of Bruno's testimony regarding his conversation with Ramsanany. Twenty five minutes later, the jury asked that it be allowed to examine the "two active firearms." Approximately two hours later, it requested "another reading from you [the court] on what the three counts entail - and how they are different." The court recharged the jury on the three counts. It also denied defendant's request that the jury be charged that all three charges referred to the 9 millimeter Taurus pistol.

In my opinion, the court abused its discretion in granting the People's application to dismiss the count of unlawful possession of an air pistol. As a result of the dismissal, the court only submitted the more serious offenses of criminal possession of a weapon in the second and third degrees, relating to possession of the 9 millimeter Taurus pistol, and concomitantly removed defendant's only defense from consideration, namely, that he only possessed the air pistol.

I disagree with the majority's position that submission of

the air pistol count "could only confuse" the jury. Indeed, in allowing testimony about Ramsanany's declaration that he, and not defendant, possessed the 9 millimeter Taurus pistol, the court necessarily found that it did not confuse the issues or mislead the jury (*see People v DiPippo*, 27 NY3d at 135-136 ["a court must determine whether the [declaration against penal interest] is relevant and, if so, whether 'its probative value is outweighed by the prospect of trial delay, undue prejudice to the opposing party, *confusing the issues or misleading the jury*'"] [emphasis added]).

In any event, under the circumstances, submission of the air pistol charge would not have distracted the jury or merely allowed it to reach a verdict based on mercy or compromise; rather, submission of the charge would have helped the jury arrive at a fair verdict if it had credited the defense, a defense supported by defendant's and Gil's testimony and Ramsanany's declaration, as well as the lack of DNA or fingerprint evidence indicating which pistols were in defendant's possession. Instead, because the court dismissed the air pistol count, the jury had no basis on which to convict defendant of possession of only the air pistol, and not the 9 millimeter Taurus pistol, even if it credited the defense, leaving the jury to convict defendant of a more serious offense

or acquit him altogether. This was particularly troubling, given that Ramsanany did not testify at trial. Any claims by the prosecution that Ramsanany was coerced by defendant into assuming criminal responsibility for the air pistol could only have been explored through Detective DeLoren. It seems to me patently unfair to provide Ramsanany's declaration and DeLoren's rebuttal to the jury and then essentially tell the jury to forget about that testimony and focus only on the 9 millimeter Taurus pistol.

It should also be noted that this was not a complicated case, such as one with a 30- or more count indictment; it was actually pretty straightforward, that is, did defendant possess both pistols or just the air pistol? However, by allowing defendant to present a defense based on the air pistol, and then taking that defense away just before the jury charge, the jury was understandably confused. In fact, notwithstanding the court's charge that all the counts referred to the 9 millimeter Taurus pistol, the jurors nonetheless asked for a "read-back of [Bruno's] testimony about his conversations with the witness [Ramsanany]." They followed shortly after that with a request to examine both pistols. And when the jurors requested a recharge on the submitted counts, the court denied the defense's request to charge the jury that the counts only referred to the 9 millimeter Taurus.

Accordingly, in my opinion, defendant is entitled to a reversal followed by a new trial (*People v Extale*, 18 NY3d 690, 696 [2012]).

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

ENTERED: JUNE 13, 2017

CLERK

SUPREME COURT, APPELLATE DIVISION
FIRST JUDICIAL DEPARTMENT

Rolando T. Acosta, Presiding Justice,
Rosalyn H. Richter
Angela M. Mazzarelli
Karla Moskowitz
Sallie Manzanet-Daniels, Justices.

In the Matter of Michael J. Aviles
(admitted as Michael John Aviles),
an attorney and counselor-at-law:

Attorney Grievance Committee for the First Judicial Department,
Petitioner,

Michael J. Aviles,
Respondent.

M-6375

Disciplinary proceedings instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent, Michael J. Aviles, was admitted to the Bar of the State of New York at a Term of the Appellate Division of the Supreme Court for the Second Judicial Department on March 3, 1999.

Jorge Dopico, Chief Attorney,
Attorney Grievance Committee, New York
(Yvette A. Rosario, of counsel), for petitioner.

Emery Celli Brinckerhoff & Abady LLP.
(Hal R. Lieberman, of counsel), for respondent.

IN THE MATTER OF MICHAEL J. AVILES, AN ATTORNEY

PER CURIAM

Respondent Michael J. Aviles was admitted to the practice of law in the State of New York by the Second Judicial Department on March 3, 1999, under the name Michael John Aviles. At all times relevant to this proceeding, respondent maintained an office for the practice of law within the First Judicial Department.

By unpublished order of April 27, 2016, this Court granted the petition of the Attorney Grievance Committee (the Committee) for an order giving collateral estoppel effect to an order and opinion of the United States Bankruptcy Court for the Southern District of Texas dated June 18, 2014. The Texas order arose out of respondent's improper conduct in the bankruptcy proceeding *In re Brown* (511 BR 843 [Bankr. SD Tex 2014]), in that respondent failed to disclose material information to the court and trustee and engaged in the unauthorized practice of law in Texas. Based on the Texas court's decision, this Court found that respondent had violated New York Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.3(a)(1) (knowingly making a false statement of fact or law to a tribunal), rule 5.5(a) (unauthorized practice of law), rule 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and rule 8.4(d) (conduct prejudicial to the administration of justice) and directed a sanction hearing be

held. Respondent did not oppose the Committee's petition for collateral estoppel.

The facts underlying the petition are as follows: in November 2013, respondent agreed to represent a friend who had been ordered to appear as nonparty witness for a Bankruptcy Rule 2004 Examination (that is, a deposition) in a chapter 7 bankruptcy proceeding in the Southern District of Texas (the District Court). The District Court ordered the witness to appear after it transpired that she had received text messages from the late debtor's driver, who purportedly stated that he knew where the debtor's assets were located. Respondent was not admitted in the Southern District of Texas, nor did he apply to be admitted pro hac vice.

On December 5, 2013, the witness, represented by respondent, appeared for her deposition via videoconference in Miami, Florida, where she lived. She testified that her iPhone 4s had suffered a data loss approximately three days earlier which resulted in erasure of all her text messages, but promised the trustee that she would attempt to recover the lost data. On December 10, 2013, the witness purportedly lost her iPhone 4s and, on December 13, 2013, the trustee filed an emergency motion to compel her to turn over the iPhone. Although the witness paid for respondent's plane ticket to Miami, respondent received no other remuneration for representing the witness.

On December 18, 2013, the bankruptcy court conducted a hearing on the trustee's emergency motion at which respondent appeared telephonically on behalf of the witness, who had informed him days earlier that she had lost her iPhone 4s. Respondent did *not* inform the court or the trustee that the witness had apparently lost her iPhone, but argued that requiring her to turn over her phone violated her Fourth Amendment rights. The court ordered the witness to produce her iPhone to the trustee on December 26, 2013.

On December 26, 2013, respondent gave the trustee's local counsel an iPhone 5s (as opposed to an iPhone 4s) that the witness had bought on December 10, 2013; this iPhone was not the one the court had directed to be produced. On December 27, 2013, upon motion of the trustee, the bankruptcy court issued an order directing respondent and the witness to show cause why they should not be sanctioned for contempt and spoliation of evidence.

Following a sanction hearing, the bankruptcy court found that respondent had engaged in the unauthorized practice of law and that he had made a materially false statement to the court by making arguments against the production of the witness's iPhone 4s and then agreeing to produce such when he knew it was lost, and that his conduct rose "to the level of a fraud on the Court" (*In re Brown*, 511 BR at 852). The court directed respondent to pay $54,421.03 in sanctions, representing the fees and expenses

the trustee had incurred and that were directly attributable to his attempts to recover the lost iPhone 4S. Respondent timely paid this amount. The court also directed the trustee to forward a copy of the sanction decision to the Committee.

Before the Committee Hearing Panel (the Panel), respondent averred that when he produced the witness's iPhone 5s to the trustee's IT expert, he immediately disclosed that it was not the iPhone 4s that the trustee sought. He further averred that no one raised his non-admitted status until the sanction hearing before the bankruptcy court. Additionally, respondent noted, he fully cooperated with and apologized to the bankruptcy court and, to ameliorate his conduct, took 7.5 hours of CLE courses related to ethics and made a $2,500 donation to a pro bono organization in Houston. He also noted that he had promptly paid the $54,000 in sanctions, in addition to approximately $200,000 in legal fees to local counsel that represented him and the witness before the bankruptcy court. Respondent did acknowledge his misconduct, apologize, and express remorse. At the Texas sanction hearing, however, the trustee's local counsel and IT expert testified that respondent had not, in fact, immediately disclosed that the witness's iPhone 4s had been lost, and the bankruptcy court found that respondent's testimony on this issue was not credible (*In re Brown*, 511 BR at 853).

The Panel found that respondent's unauthorized practice of

law before the Texas bankruptcy court was aggravated by the fact that he had been practicing law for 15 years at the time that he engaged in this misconduct. As to his misrepresentation to the court, the Panel was deeply troubled by respondent's initial failure to disclose to the bankruptcy court that the witness had lost her iPhone4s. Indeed, the Panel noted, respondent presented a vigorous Fourth Amendment argument against the production of the iPhone 4s during a subsequent motion to compel hearing. The Panel found this conduct "dishonest and deceitful." In addition, the Panel found that respondent's material misrepresentations to the court served to delay the bankruptcy process and wasted the resources of the trustee and the bankruptcy court.

Nonetheless, the Panel found mitigation, namely: (1) respondent had no prior disciplinary history; (2) he made good faith efforts to make restitution or rectify the consequences of his misconduct; (3) he incurred and paid monetary sanctions; (4) he expressed remorse; (5) he cooperated with the Committee; and (6) he presented evidence of good character. Thus, the Panel recommended that respondent be publicly censured.

Now, by motion in accordance with former Rules of the Appellate Division, First Department (22 NYCRR) §§ 603.4(d) and 605.15(e)(2), the Committee seeks an order confirming the Panel's findings of fact and conclusions of law and publicly censuring respondent.

As this Court has already found respondent guilty of professional misconduct according to the doctrine of collateral estoppel, the only issue to be decided is the sanction to be imposed. Sanctions imposed by this Court for the misconduct at issue have ranged from private reprimand to suspensions of varying length (*see e.g. Matter of Radman*, 135 AD3d 31 [1st Dept 2015] [three-month suspension for misrepresentations to court regarding the existence of signed expert affirmations in wrongful death/ medical malpractice action]; *Matter of Hart*, 118 AD3d 13 [1st Dept 2014][censure for unauthorized practice of law in foreign jurisdiction and misrepresentations to corporate defendant; prompt disclosure of misrepresentation to adversary, no prior disciplinary history, remorse, and cooperation with Committee; *Matter of Caro*, 97 AD3d 148 [1st Dept 2012] [six-month suspension for making false statements to a court regarding service of process in a civil action and a claim for attorneys' fees in a bankruptcy proceeding, and failing to promptly disclose to court spoilation of time records]; *Matter of Issler*, 283 AD2d 59 [1st Dept 2001] [public censure for failing to disclose material information to court in an action; previously unblemished 40-year legal career, significant public service, evidence of good character, misconduct not motivated by greed or venality, payment of $375,000 settlement, remorse]).

Public censure is appropriate here, as respondent's failure

to promptly disclose the loss of the correct iPhone and his unauthorized practice of law before the Texas bankruptcy court were isolated instances of misconduct, and are mitigated by his previously unblemished disciplinary history, his prompt payment of significant monetary sanctions, and his admission of wrongdoing and remorse. We find that private discipline is not appropriate because respondent's misconduct involved both misrepresentation to a court and the unauthorized practice of law.

Accordingly, the Committee's motion is granted, and respondent is publicly censured.

All concur.

Order filed.

(June 13, 2017)