SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 1, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5683 Global Imports Outlet, Inc., doing business as Global Fine Reproductions,
Plaintiff-Respondent,

-against-

The Signature Group, LLC, et al.,
Defendants,

Cast Iron Company, LLC, et al.,
Defendants-Appellants.

[And Other Actions]

Index 602695/07
111425/08

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Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellants.

Frankfort & Koltun, Deer Park (Scott A. Koltun of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about February 10, 2011, which denied defendants Cast Iron Company, LLC (Cast Iron) and Monaco Management, Inc.'s (Monaco) motion for summary judgment dismissing the complaints as against them, unanimously reversed, on the law, without costs,

and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff Global's president testified that he spoke to the "super of the building, meaning the management people" about a concern that defendant Western Spirit was doing electrical renovation work in an unsafe manner. He also indicated that "one of the people from the building," possibly "the super" actually saw Western Spirit's unsafe work. However, given that neither Cast Iron, the out-of-possession landlord of the building's retail space, nor Monaco, Cast Iron's managing agent, had responsibility for the building superintendents, Global's president's testimony raises no issue as to whether either of these defendants had any notice of a hazardous condition.

Moreover, the theory of res ipsa loquitur is inapplicable against the appealing defendants because neither had exclusive control of the space occupied by Western Spirit, where the fire originated (*see Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]).

Finally, the subrogation action should be dismissed as against both defendants because Global waived its right to

subrogation in the commercial lease it entered into with Cast Iron, as landlord, and the waiver applies to Monaco, as management company, as well (*see Foremost Furniture Showroom, Inc. v 830 W. Co.*, 73 AD3d 491 [2010]).

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

ENTERED: DECEMBER 1, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4325 ABKCO Music & Records, Inc., Index 110349/05
Plaintiff-Appellant,

-against-

Nathaniel Montague, et al.,
Defendants-Respondents.

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Michael B. Kramer & Associates, New York (Peter T. Salzler and Michael B. Kramer of counsel), for appellant.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered August 2, 2010, which, after a nonjury trial, granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, the motion denied, and judgment in the amount of $325,000, with interest from July 27, 2005, granted to plaintiff. The Clerk is directed to enter judgment accordingly.

It is uncontroverted that from 1999 to 2005 plaintiff advanced funds to defendants to aid them in cataloging a collection of African American art and memorabilia. Plaintiff asserts that the funds advanced constituted a loan, while defendants contend that the advances were intended as gifts. In support of its claim, plaintiff presented three witnesses who testified that the advances were made as loans. At the close of

plaintiff's case, defendants moved for a trial order of dismissal. After the court reserved decision on the motion, defendants rested without presenting a case. The court then granted the motion to dismiss, concluding that plaintiff failed to make out a prima facie case because the testimony in support of its claim was given by interested witnesses and therefore could be discounted. We disagree.

As we understand their position on appeal, defendants acknowledge that the advances they received from plaintiff were to be repaid in the event defendants sold the art collection. In this regard, defendants state in their brief, "Since the collection has not yet been sold, no payment is due." Defendants thus recognize that the advances were not gifts. Moreover, at trial, plaintiff introduced a letter from defendants' accountant that referred to plaintiff as having made a loan to defendants. Defendants, on the other hand, offered no evidence of any kind, but rested at the close of plaintiff's case. Given that plaintiff established a prima facie case and defendants failed to present any countervailing evidence, plaintiff is entitled to judgment.

We note that the absence of a specified time for repayment in the parties' oral loan agreement does not defeat plaintiff's

claim. As Supreme Court recognized in denying defendants' pretrial motion for summary judgment, where no time for repayment is specified in a loan agreement, the loan is payable immediately upon demand *(see Bradford, Eldred & Cuba R.R. Co. v New York, Lake Erie & W. R.R. Co.,* 123 NY 316, 326-327 [1890]).

The decision and order of this Court entered May 26, 2011 is hereby recalled and vacated (*see* M-2747, decided simultaneously herewith).

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, Acosta, Abdus-Salaam, JJ.

5160N D&R Global Selections, S.L., Index 603732/07
Plaintiff-Respondent,

-against-

Bodega Olegario Falcón Piñeiro,
Defendant-Appellant.

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Gleason & Koatz, LLP, New York (John P. Gleason of counsel), for appellant.

Zara Law Offices, New York (Robert M. Zara of counsel), for respondent.

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Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered June 2, 2010, which denied defendant's motion to vacate a default judgment, unanimously reversed, on the law, without costs, the judgment vacated, and the motion granted.

This dispute, which raises issues of long-arm jurisdiction, involves two Spanish businesses, neither of which is authorized to do business in New York or has offices, employees, telephone listings, or bank accounts in New York. It is undisputed that plaintiff, a limited liability company, and defendant, a Spanish winery, entered into an oral agreement in or about March 2005 in Spain. Under the agreement, plaintiff agreed to procure American importers for defendant's wine in exchange for commission payments at an agreed rate. The parties dispute the contract's

duration. Plaintiff alleges that commissions were due throughout defendant's entire relationship with any importer plaintiff found for it; defendant contends that commission payments were required for a period of one year.

Pursuant to the agreement, in May 2005, plaintiff introduced defendant to Kobrand Corp., a New York wine and liquor importer and distributor, and, beginning that November, with plaintiff's assistance, defendant's wine was shipped to Kobrand in New York. Defendant paid plaintiff commissions through November 2006; all payments were made in Spain in the Euro currency. Plaintiff also represented defendant at wine events throughout the United States, and it is alleged, and not disputed, that defendant's representatives accompanied plaintiff to Kobrand's promotional event for its Spanish wine portfolio in New York City.

Defendant later entered into its own exclusive distribution agreement with Kobrand, and, in January 2007, defendant discontinued commission payments to plaintiff for the wine it sold to Kobrand. Defendant alleges that the agreement was properly terminated after the one-year period elapsed; plaintiff contends that its entitlement to commissions from sales to Kobrand continued for as long as defendant sold its wine to Kobrand.

Plaintiff commenced this action for breach of contract, quantum meruit, an accounting, and unjust enrichment on November 9, 2007. Upon receipt of court papers from plaintiff in the mail at its Spanish business address, defendant's sales and marketing manager, Angeles Mosteiro, sought advice from defendant's Spanish attorney, who instructed that defendant need not take action on the complaint because personal jurisdiction did not exist and because service of process was insufficient under both Spanish and New York law. Accordingly, defendant neither answered the complaint nor appeared in court, which resulted in a default being taken against it, and, after an assessment of damages, on November 12, 2009, a judgment for $133,570.21 was entered. On February 1, 2010, defendant moved to vacate the default judgment and dismiss the complaint, and Supreme Court denied the motion. Defendant now appeals, and for the reasons that follow, we reverse, and grant defendant's motion to vacate the default. However, we reject defendant's suggestion that the complaint must be dismissed at this time, under CPLR 5015(a)(4), for lack of personal jurisdiction.

CPLR 302(a)(1) authorizes the assertion of long-arm jurisdiction over a non-domiciliary who "transacts any business

within the state or contracts anywhere to supply goods or services in the state." Although CPLR 302(a)(1) is a "single act statute," whereby physical presence is not required and one New York transaction is sufficient for personal jurisdiction, it is only applicable where the defendant's New York activities were purposeful and substantially related to the claim (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], *cert denied* 549 US 1095 [2006] [internal quotation marks and citation omitted]). "Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007] [internal quotation marks and citation omitted]).

However, because it was not defendant, but plaintiff itself, that took action in New York, acting as defendant's agent, it is necessary to consider the general rule that "an agent may not rely upon his or her own New York contacts on behalf of a principal to establish long-arm jurisdiction" (*id.* at 383). While there are limited circumstances in which in-state activity by a plaintiff conducted on a defendant's behalf may present a proper ground for asserting jurisdiction over the defendant, such

as where the defendant actively ships its goods into New York for the plaintiff to sell on its behalf, the defendant must have "played a crucial role in creating the substance of the transaction, amounting to doing business in New York" (*see Courtroom Tel. Network v Focus Media*, 264 AD2d 351, 353 [1999] [internal quotation marks and citation omitted]).

However, the allegations and disputed points in the record preclude the conclusion as a matter of law that New York lacks any possible basis to assert jurisdiction over defendant. Although it was plaintiff alone who initially brought defendant's product into New York, and defendant did not itself initially undertake any purposeful business activities in New York during the period in which the parties' contract was concededly in effect, defendant's subsequent formation of an exclusive relationship with Kobrand, and its direct shipping of wine to Kobrand, may constitute the requisite purposeful business transactions in New York under CPLR 302(a)(1). Of course, for jurisdiction to exist there must be an "articulable nexus" between the cause of action and defendant's New York business transactions (*McGowan v Smith*, 52 NY2d 268, 272 [1981]). But, particularly considering the parties' dispute regarding the terms of their oral contract, such a nexus may be established here. We

need not rule definitively on that point in this context; we need only hold that defendant is not entitled to dismissal of the action for lack of personal jurisdiction.

We therefore turn to whether defendant established the requisite reasonable excuse and potentially meritorious defense to justify vacating its default under CPLR 5015(a)(1).

Of course, failure to answer a complaint will not be excusable where it is "willful" or "part of a pattern of dilatory behavior" (*DaimlerChrysler Ins. Co. v Seck*, 82 AD3d 581, 582 [2011]). Furthermore, parties that fail to take steps to protect their interests, relying instead on their own incorrect assumptions and failing to consult with attorneys, despite being advised and placed on notice to do so, do not establish the existence of a reasonable excuse (*see Passalacqua v Banat*, 103 AD2d 769 [1984], *appeal dismissed 63 NY2d 770 [1984]*; *Tucker v Rogers*, 95 AD2d 960 [1983]). Additionally, "bare allegations of [attorney] incompetence" are insufficient to vacate a default judgment (*Spatz v Bajramoski*, 214 AD2d 436, 436 [1995]).

Here, however, defendant has put forth a reasonable excuse for its default. When defendant received the summons and complaint in the mail, its sales and marketing manager actively sought and relied on advice from its attorney that it later learned was inaccurate. Defendant's reliance on its law firm's advice was neither willful nor contumacious, but was reasonable and in good faith. Like the plaintiff in *Goldman v Cotter* (10

AD3d 289, 291 [2004]), defendant here did not intend to abandon its defense; it was simply acting in accordance with its attorneys' interpretations of New York and Spanish law.

Plaintiff's reliance on *Spatz v Bajramoski* (214 AD2d at 436) is misplaced. Unlike the "bare allegations of incompetence on the part of prior counsel" in that case, the facts in this case are set forth at length by defendant and its prior counsel. It is irrelevant how many times defendant was contacted about its persistent refusal to respond to the complaint, since defendant had been instructed by its attorney that declining to respond was the proper course of action.

The affidavit by defendant's sales and marketing manager, Angeles Mosteiro, to the effect that the oral agreement specified a one-year term for commission payments, which elapsed in December 2006, and that defendant had paid all the commissions owed thereunder, demonstrates a potentially meritorious defense (*see Tat Sang Kwong v Budge-Wood Laundry Serv.*, 97 AD2d 691, 692 [1983]).

Plaintiff failed to demonstrate that vacating the default would unjustly prejudice it, and the motion to vacate the default

judgment was not untimely. Especially in view of New York's preference for resolving disputes on their merits, it is appropriate to vacate the default judgment and permit the matter to be addressed on its merits.

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

ENTERED: DECEMBER 1, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5656 In re Linda Salvati, etc., Index 500088/02

- - - - -

Julie Stoil Fernandez,
Respondent,

-against-

George J. McCormack,
Nonparty Executor-Appellant.

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Ciampi, LLC, New York (Arthur J. Ciampi and Maria L. Ciampi of counsel), for apellant.

Greenberg & Wilner, LLP, New York (Harvey L. Greenberg of counsel), for respondent.

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Order, Supreme Court, New York County (Lottie E. Wilkins, J.), entered June 1, 2010, which held that the nonparty executor is collaterally estopped from objecting to the respondent-guardian's final account insofar as it is based on annual accounts submitted for the years 2003-06, and denied the executor's motion for discovery as to those annual accounts, unanimously reversed, on the law, without costs, and the matter remanded for further proceedings.

In 2003, the respondent was appointed guardian for Linda Salvati, who was then in her 80s and in a coma. Thereafter, as required by Mental Hygiene Law § 81.32, the guardian filed annual accounts for the years 2003 through 2007. The reports for 2003

through 2006 were reviewed by a court-appointed examiner and approved by the court "in the respects set forth in the Examiner's Report."

After Salvati died in November 2008, the guardian prepared a final report and account and commenced a proceeding seeking final approval and settlement pursuant to Mental Hygiene Law §§ 81.33 and 81.34, serving the executor as an interested party. The executor filed preliminary objections, and requested an opportunity to review the guardian's books and records and to obtain discovery concerning disbursements and property transactions. The court denied the executor's requests for relief, except as to the accounts for 2007 and 2008, which had not yet been approved by the court. The court ruled that the executor was collaterally estopped from objecting to the prior accountings and therefore not entitled to any discovery relating to transactions from 2003 through 2006. We conclude that the guardian has failed to make out the defense of collateral estoppel.

To invoke the doctrine of collateral estoppel, the guardian had to establish that the executor, the incapacitated person, or any representative on her behalf received notice and had an opportunity to be heard, or that the guardian ever sought

permission to render an intermediate report upon notice pursuant to Mental Hygiene Law § 81.33. Without this proof, the annual accounts were merely ex parte proceedings, which cannot be binding on the executor in this proceeding (*see Matter of Haher v Hamilton*, 267 NY 474, 478-79 [1935]; *see also Matter of Lazarus*, 54 Misc 2d 593, 598 [Sur Ct, NY County 1967]; 7-99 Warren's Heaton, Surrogate's Court Practice § 99.03 [6] [2011]). No such proof was presented below. In the fiduciary accounting cases relied on by the guardian, the objectants had received notice and a "full and fair opportunity" to object in a prior accounting proceeding and were therefore precluded from relitigating matters previously determined by the court (*Matter of Hunter*, 4 NY3d 260 [2005]; *see also Matter of Van Deusen*, 24 Misc 2d 611 [1960]).

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

ENTERED: DECEMBER 1, 2011

CLERK

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

5968 Gabriel Borja, Index 16064/07
Plaintiff-Respondent,

-against-

Julio E. Delarosa, et al.,
Defendants-Appellants.

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Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Paris & Chaikin, PLLC, New York (Jason L. Paris of counsel), for respondent.

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Order, Supreme Court, Bronx County (Diane A. Lebedeff, J.), entered June 15, 2010, which, in this action for personal injuries sustained in a motor vehicle accident, denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion to the extent of dismissing plaintiff's 90/180-day claim and any claim relating to his shoulder injury, and otherwise affirmed, without costs.

Plaintiff was injured on September 16, 2006 when driving west on 155th Street in Manhattan. His vehicle was struck on the driver's side by a truck owned by defendant Benycol. Although defendants submitted sufficient evidence to rebut plaintiff's

claim of serious injury to his shoulder, plaintiff submitted medical evidence in admissible form raising a triable issue of fact with respect to permanent limitations of motion of his cervical spine. Plaintiff's treating physician, Dr. Javier Chacon, submitted a sworn statement opining that plaintiff sustained injuries to his cervical spine that were objective and specifically quantifiable and were caused by the motor vehicle accident. Dr. Chacon's findings were consistent with those of radiologist Dr. Steven Brownstein's, whose reading of an MRI revealed anterior and posterior protruded disc herniations at C6-7. Dr. Arden Kaisman, an anesthesiologist, based on a finding of spasm and limited range of motion in the cervical spine, concluded that plaintiff suffers from permanent cervical radiculopathy and myofascial pain syndrome. He administered epidural steroid injections.

On the other hand, defendants' experts, Dr. Kudlip Sachdev, a neurologist, and Dr. Michael J. Katz, an orthopedist, found normal range of motion in the cervical spine. Dr. David L. Milbauer, a radiologist, noted disc bulging in the C6-7 area, but attributed it to degenerative changes. Although Dr. Chacon did not directly address Dr. Milbauer's nonconlusory opinion that the cervical spine injuries were degenerative, he specifically

attributed the cause of the injuries to the motor vehicle accident. Thus, his opinion is entitled to equal weight with that of the defense experts (*Linton v Nawaz,* 62 AD3d 434, 439 [2009], *affd* 14 NY3d 821 [2010]; *Yuen v Arka Memory Cab Corp.,* 80 AD3d 481, 482 [2011]).

Plaintiff acknowledged that the pain in his shoulder resulting from the accident had resolved, and thus any claim relating to the shoulder is dismissed. Similarly, the record also demonstrates that dismissal of plaintiff's claim under the 90/180-day category of serious injury is warranted. Plaintiff's bill of particulars and affidavit indicate that he missed only 40 days of work (see *Hospedales v "John Doe,"* 79 AD3d 536, 837 [2010]). Moreover, plaintiff's reduced work schedule was insufficient to raise a triable issue of fact on this claim (*see Perez v Corr*, 84 AD3d 646, 647 [2011]).

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

ENTERED: DECEMBER 1, 2011

CLERK

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

6038-
6039 Alexis Handwerker, Index 112462/07
Plaintiff-Respondent-Appellant,

-against-

The City of New York, et al.,
Defendants-Appellants-Respondents.

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Kaye Scholer LLP, New York (William Hoffman of counsel), for appellant-respondent.

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

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 23, 2010, which, in this action for personal injuries allegedly sustained when plaintiff, while sitting on a park bench, was struck by a branch that fell from a tree, denied defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion to strike the answer for spoliation of evidence, unanimously affirmed, without costs.

Dismissal of the complaint was not warranted since the record presents triable issues of fact as to whether defendants had constructive notice of the alleged condition of the tree. Plaintiff submitted evidence, including affidavits from experts, showing that there were clear, visible signs of the tree's decay

that existed for several years and that defendants performed work on the tree prior to the accident (*see Harris v Village of E. Hills*, 41 NY2d 446 [1977]; *compare Clarke v New York City Hous. Auth.*, 282 AD2d 202 [2001]]).

The court did not improvidently exercise its discretion in considering the affidavits of plaintiff's experts. There is no evidence that plaintiff willfully failed to disclose the experts in a timely manner; nor was there prejudice to defendants (*see Martin v Triborough Bridge & Tunnel Auth.*, 73 AD3d 481 [2010], *lv denied* 15 NY3d 713 [2010]; *Gallo v Linkow*, 255 AD2d 113, 117 [1998]).

Furthermore, the court properly denied plaintiff's cross motion to strike defendants' answer as a sanction for the partial destruction of the subject tree, without prejudice to plaintiff's ability to move for an adverse inference charge at trial. The

record shows that portions of the tree were preserved and that the tree was photographed (*see Rodriguez v 551 Realty LLC*, 35 AD3d 221 [2006]).

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6194 The People of the State of New York, Ind. 2474/06
Respondent,

-against-

Eriverto Martinez,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), and Fitzpatrick, Cella, Harper & Scinto, New York (Dara M. Kurlancheek of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (John Cataldo, J.), rendered November 16, 2006, as amended January 25, 2007, convicting defendant, after a jury trial, of assault in the second degree (two counts), criminal possession of a controlled substance in the seventh degree and harassment in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of five years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its assessment of the injured officer's characterization of his injury (*see*

People v Guidice, 83 NY2d 630, 636 [1994]).

Defendant challenges the sufficiency and weight of the evidence supporting the physical injury element of the assault charges (*see* Penal Law § 10.00[9]). To establish that element, the People were only required to prove that the victim's injuries were more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]). The statutory threshold of "substantial pain" may be satisfied by relatively minor injuries causing "more than slight or trivial pain" (*see People v Chiddick*, 8 NY3d 445, 447 [2007]).

The evidence showed that defendant, who was attempting to avoid being arrested, punched the arresting officer in the shoulder. Defendant had a rock in his fist at the time of the punch. This caused the arresting officer to experience an immediate sharp pain, followed by numbing and a tingling sensation. That evening the officer went to a hospital, where he was prescribed a painkiller and advised to treat the area with ice. The hospital records also show that the officer reported

significant pain. For the next three to five days, the officer suffered extensive swelling and bruising, as well as pain and soreness. Accordingly, the jury's verdict was amply supported by the evidence.

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6199 Joseph Lehey, etc., Index 112623/10
Plaintiff-Respondent,

-against-

Tim Goldburt, et al.,
Defendants-Appellants,

David Perillo, et al.,
Defendants.

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Smith Valliere PLLC, New York (Mark W. Smith of counsel), for appellants.

Jules A. Epstein, Garden City, for respondent.

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Order, Supreme Court, New York County (Charles Edward Ramos, J.), entered June 2, 2011, which, among other things, designated and installed plaintiff as manager of FSJ, LLC; removed Goldburt as manager of FSJ; directed defendants not to transfer any of FSJ's property, assets, inventory or funds, except as required in the ordinary course of business; and declared that the parties' operating agreement remains in full force and effect, except as set forth in the order, unanimously modified, on the law and the facts, to vacate the order except as to those portions that enjoined defendants from transferring any of FSJ's property, assets, inventory or funds, except as required in the ordinary course of business, and declared that the parties' operating

agreement remains in full force and effect, and the matter remanded for a hearing on whether FSJ's assets are at risk of being materially injured or destroyed or whether plaintiff will be irreparably harmed in the absence of a provisional remedy, and to determine the appropriate provisional remedy, if any, and otherwise affirmed, without costs.

The decision to grant or deny provisional relief is ordinarily committed to the sound discretion of the court. However, the function of a provisional remedy is "not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits" (*Residential Bd. of Mgrs. of Columbia Condominium v Alden*, 178 AD2d 121, 122 [1991]). Further, the issuance of a mandatory injunction is appropriate only when such extraordinary relief is essential to maintaining the status quo (*id.*). "[W]here conflicting affidavits raise sharp issues of fact," injunctive relief should not be granted (*id.* at 123).

Here, the parties submitted conflicting affidavits regarding the status of FSJ and its assets. Thus, it is not clear that plaintiff was entitled to any provisional remedy, let alone the extraordinary one granted here. Plaintiff established some likelihood of success on the merits by demonstrating the various

expenditures that were made without his written consent and by raising issues regarding the ownership of the patents, trademarks and FSJ's inventory. However, he did not clearly establish that he would be irreparably harmed in the absence of a preliminary injunction or that FSJ's property was in danger of being injured or destroyed such that the appointment of a temporary receiver was warranted (*see* CPLR 6301; 6401). Indeed, the status of FSJ's assets was disputed, as was the propriety of the various expenditures and transfers of funds. Defendants also raised legitimate concerns about the future of FSJ should Goldburt be removed and plaintiff installed as manager. In particular, they noted Goldburt's intimate knowledge of the company and its technology as well as the fact that Goldburt made many personal contacts with distributors, suppliers and others that were essential to the health of the company. Accordingly, an evidentiary hearing is warranted to the extent indicated.

To the extent Supreme Court based its order on its examination of FSJ's operating agreement, we examine the agreement's language de novo (*see Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140 [2008]). The agreement's section on management expressly provides that the managing members "shall be David Perillo and Tim Goldburt." Although the

section presumed that a manager had a membership interest in FSJ, Goldburt had an indirect membership interest in the company through his interest in defendant RAM Phosphorix, LLC, which had a membership interest, and Goldburt executed the agreement on RAM's behalf. The section on management also states that Perillo and Goldburt shall be managers, "unless removed as permitted hereby, or until they shall no longer own any part of the Membership Interest." For the motion court to read this language to mean that Goldburt was never properly a manager because he did not own a direct membership interest in the company leads to an absurd result and ignores the parties' clear intent to have Goldburt serve as a manager. Thus, we read the agreement to unambiguously permit Goldburt to serve as manager, as this construction effectuates the parties' intent (*see Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629 [2006]).

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6202 Walter Winters, et al., Index 310637/08
Plaintiff-Respondent,

-against-

Ramon L. Cruz, et al.,
Defendants-Appellants.

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Mead, Hecht, Conklin & Gallagher, LLP, White Plains (Elizabeth M. Hecht of counsel), for appellants.

Morton J. Sealove, New York, for respondent.

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Order, Supreme Court, Bronx County (Lizbeth González, J.), entered May 27, 2011, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint in its entirety, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendants established their entitlement to judgment as a matter of law by showing that the injury to plaintiff's right knee was not serious within the meaning of Insurance Law § 5102(d). Defendants submitted, inter alia, affirmed reports from a radiologist and an orthopedist, showing a healed right knee contusion and a preexisting condition of degenerative arthritis,

which diagnosis was previously documented in the medical records of plaintiff's orthopedic surgeon (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [2011]). Plaintiff had surgery on his left knee weeks before the accident, and received a steroid injection to the right knee at the same time.

In opposition, plaintiff raised a triable issue of fact with his expert's affirmation stating that the trauma of the automobile accident, and not the degeneration, caused his knee injury (*see Torain v Bah*, 78 AD3d 588 [2010]). However, he failed to set forth any contemporaneous or recent limitations sustained as a result of that trauma (*see generally Thompson v Abbassi*, 15 AD3d 95, 97-98 [2005]). The limitations the expert did note relative to plaintiff's knee were not compared with the standards for normal ranges of motion, and thus, his report was deficient (*see Soho v Konate*, 85 AD3d 522, 523 [2011]). Moreover, during a post-surgery examination, the expert found improved range of motion, and no evidence is submitted of current quantitative or qualitative restriction.

The record further demonstrates that there are no triable issues with respect to plaintiff's 90/180-day claim. The orthopedist's statement that plaintiff was "totally disabled" was too general to raise an issue of fact (*see Morris v Ilya Cab*

Corp., 61 AD3d 434 [2009]). Furthermore, plaintiff's statement that he missed approximately four months of work was not supported by any documentation or affidavit from his employer (*see Dembele v Cambisaca*, 59 AD3d 352 [2009]).

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6203 The People of the State of New York, Ind. 3138/09
Respondent,

-against-

Elise Cohen,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (Charles H. Solomon, J.), rendered on or about September 8, 2009,

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: DECEMBER 1, 2011

CLERK

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

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6205 The People of the State of New York, Ind. 3401/07
Respondent,

-against-

Brian McFadden,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered July 6, 2009, convicting defendant, after a jury trial, of robbery in the first degree, attempted robbery in the second degree, and criminal possession of stolen property in the third and fourth degrees, and sentencing him, as a persistent violent felony offender, to an aggregate term of 43½ years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the first-degree robbery conviction to 20 years to life and directing that all sentences run concurrently, resulting in a new an aggregate term of 20 years to life, and otherwise affirmed.

The verdict was not repugnant, and the court properly denied defendant's application to resubmit the case to the jury. This

case involves an attempted carjacking, followed a few minutes later by a completed carjacking. Four days later, the police apprehended defendant and his codefendant while they were in the stolen car.

The only property taken in the completed carjacking was the car. The jury convicted defendant of first-degree robbery, but acquitted him of second-degree robbery under a provision (Penal Law § 160.10[3]) that required a finding that the property stolen was a motor vehicle as defined in Vehicle and Traffic Law § 125. The jury also convicted defendant of two counts of criminal possession of stolen property, one of which similarly required a finding that the property was a motor vehicle (*see* Penal Law § 165.45[5]). Even if the verdicts appear illogical under the facts of the case, they were not legally repugnant.

The acquittal on the second-degree robbery charge was not conclusive as to any necessary element of any of the convictions (*see People v Tucker*, 55 NY2d 1, 7 [1981]). "If there is a possible theory under which a split verdict could be legally permissible, it cannot be repugnant, regardless of whether that theory has evidentiary support in a particular case" (*People v Muhammad*, __ NY3d __, 2011 NY Slip Op 07302 [Oct 20, 2011]). Regardless of whether a verdict is illogical under the evidence

presented, "factual repugnancy -- which can be attributed to mistake, confusion, compromise or mercy -- does not provide a reviewing court with the power to overturn a verdict" (*id.* at *9-10).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. With regard to the attempted robbery, the totality of defendant's conduct supports the inference of accessorial liability (*see e.g. Matter of Wade* F., 49 NY2d 730 [1980]; *Matter of Marc H.*, 284 AD2d 211 [2001]; *Matter of Devin R*, 254 AD2d 221 [1998]).

The court properly denied defendant's motion to suppress identification testimony. The lineup was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). The photographs of the lineup, although of poor quality, were adequate to show that the lineup did not in any way single out defendant. In particular, the hearing evidence supports the court's finding that the disparity between the recorded ages of defendant and the fillers was not reflected in their physical appearances (*see People v Amuso*, 39 AD3d 425, 425-

426 [2007], *lv denied* 9 NY3d 862 [2007]). There is no evidence that the witnesses influenced each others' identifications. We have considered and rejected defendant's remaining arguments regarding the lineup.

Defendant's constitutional challenge to his sentencing as a persistent violent felony offender is without merit (*see Almendarez-Torres v United States*, 523 US 224 [1998]; *People v Bell*, 15 NY3d 935, 936 [2010]).

We find the sentence excessive to the extent indicated.

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6206 Zygmunt Szumowski, et al., Index 109074/07
Plaintiffs-Respondents,

-against-

PV Holding Corp.,
Defendant-Appellant.

_____

Rubin, Fiorella & Friedman, LLP, New York (Michael C. O'Malley of counsel), for appellant.

Grey & Grey, LLP, Farmingdale (Sherman B. Kerner of counsel), for respondents.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered March 23, 2011, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint, and granted plaintiffs' cross motion for summary judgment as to liability, unanimously reversed, on the law, without costs, defendant's motion granted and plaintiffs' cross motion denied. The Clerk is directed to enter judgment in defendant's favor dismissing the complaint.

Plaintiffs seek to impose vicarious liability on defendant PV Holding Corp. for injuries plaintiff Zygmunt Szumowski allegedly sustained during the course of his employment at Avis when an employee of Budget Rent A Car Systems negligently operated a motor vehicle. Title to that vehicle was held by

defendant. However, no liability may be imputed to defendant, because plaintiffs' "exclusive remedy" is workers' compensation (Workers' Compensation Law § 29[6]; *see Kenny v Bacolo*, 61 NY2d 642, 645 [1983]; *Naso v Lafata*, 4 NY2d 585, 590 [1958]). Given that plaintiffs did not assert any allegation that defendant had committed an act constituting affirmative negligence, the motion court should have dismissed the complaint (*see Chiriboga v Ebrahimoff*, 281 AD2d 353, 354 [2001]). We find plaintiffs' arguments to the contrary unavailing.

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6207 In re Nelson R.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Nancy Bannon, J.), entered on or about August 9, 2010, which adjudicated appellant a juvenile delinquent, upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a controlled substance in the seventh degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly denied defendant's suppression motion.

There is no basis for disturbing the court's credibility determinations. The officer's testimony established a lawful seizure under the plain view doctrine, and we do not find that testimony to be implausible or unworthy of belief.

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6208 The People of the State of New York, Ind. 2529/03
Respondent,

-against-

Anthony Arriaga,
Defendant-Appellant.

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Murray Richman, Bronx (Brian Alexander Jacobs of counsel), for appellant.

Anthony Arriaga, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Christopher J. Blira-Koessler of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Thomas Farber, J.), rendered January 19, 2006, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility, including its evaluation of alleged inconsistencies in testimony.

Defendant's challenges to the People's summation are unpreserved (*see People v Romero*, 7 NY3d 911 [2006]), and we

decline to review them in the interest of justice. As an

alternative holding, we find no basis for reversal (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). To the extent the summation contained any improprieties, the court took curative actions that were sufficient to prevent any prejudice (*see id.*).

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they generally involve matters outside the record concerning counsel's preparation and strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). To the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). We have considered and rejected defendant's remaining pro se claims.

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6209-
6210 The Commissioner of the State Index 401064/08
Insurance Fund,
Plaintiff-Appellant,

-against-

Glenna Weissman,
Defendant-Respondent,

Associates Realty Builders
Construction Corp.,
Judgment Debtor.

_____

Jan Ira Gellis, New York, for appellant.

John G. Bliss, White Plains, for respondent.

Glenna Weissman, respondent pro se.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered June 25, 2010, which granted defendant's motion pursuant to CPLR 3211(a)(1) to dismiss the complaint based on the documentary evidence, unanimously reversed, on the law, without costs, and the motion denied. Order, same court and Justice, entered June 24, 2010, which denied plaintiff's motion for summary judgment on its fraudulent conveyance claim under Debtor-Creditor Law § 273 and for dismissal of defendant's counterclaim, unanimously reversed, on the law, without costs, the order vacated, and the matter remanded for further proceedings.

Supreme Court held that while the complaint stated causes of action for violations of Debtor-Creditor Law §§ 273, 274 and 276-a, the complaint should be dismissed, pursuant to CPLR 3211(a)(1) as barred by the documentary evidence. Supreme Court stated that because plaintiff Commissioner did not show that defendant was a defendant in an action to recover money damages in which SIF was a plaintiff, or that a judgment was docketed against her, within the meaning of Debtor Creditor Law § 273-a, the entire complaint should be dismissed.

It is not clear, from the motion court's decision, how the failure of the Commissioner to satisfy one element of one cause of action serves to bar the entire complaint, with its admittedly properly pleaded causes of action under Debtor-Creditor Law §§ 273, 274 and 276-a. In any event, the Commissioner states on this appeal that it pleaded no cause of action under § 273-a, and asks that this court reinstate the complaint and to "search the record" to grant it summary judgment on its first cause of action pursuant to § 273 and to dismiss defendant's counterclaim.

To be sure, this court does have broad authority, on a motion for summary judgment, to "search the record" and grant the motion (*see e.g. Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106 (1984). However, here, Supreme Court, upon granting

defendant's CPLR 3211 motion, did not reach the merits of either party's summary judgment motion. Under these circumstances, a sua sponte search of the record would be an improvident exercise of our discretion. The motion court should consider the summary judgment motions in the first instance (*see Conant v Alto 53, LLC*, 21 Misc 3d 1147[A]), including the Commissioner's assertion that defendant's counterclaim must be brought in the Court of Claims (*Commissioners of State Ins. Fund v Netti Wholesale Beverage Co.*, 245 AD2d 48 [1997]).

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

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6211-
6212 3 East 54th Street New York, LLC, etc., Index 600176/09
Plaintiff-Appellant-Respondent,

-against-

Patriarch Partners, LLC,
Defendant-Respondent-Appellant,

Patriarch Partners Agency Services, LLC, et al.,
Defendants-Respondents.

_____

Itkowitz & Harwood, New York (Donald A. Harwood of counsel), for appellant-respondent.

Brune & Richard LLP, New York (Charles Michael of counsel), for respondent-appellant; and Patriarch Partners Agency Services, LLC, Lynn Tilton, Ark Investment Partners, II, LP, Ark CLO 2001-1, Limited, Zohar I CDO 2003-1, Limited, Zohar II 2005-1, Limited, respondents.

Fox Rothschild LLP, New York (Daniel A. Schnapp of counsel), for Petry Media Corp, Petry Television, Inc., Blair Television, Inc., Richard Intrator, Arnold Sheiffer, Timothy McAuliff, Val Napolitano and Leo MacCourtney, respondents.

Akin Gump Strauss Hauer & Feld LLP, New York (Christopher L. Boyd of counsel), for Sandler Mezzanine T.E. Partners, L.P., Sandler Mezzanine Foreign Partners, L.P. and Moira Mitchell, respondents.

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered January 11, 2010, which, to the extent appealed from, granted defendant Patriarch Partners, LLC's motion for summary judgment dismissing the complaint as against it, and denied plaintiff's cross motion for leave to amend to add causes of

action against Patriarch Partners, LLC, unanimously affirmed, without costs. Order, same court and Justice, entered January 12, 2011, which granted defendants Lynn Tilton, Patriarch Partners Agency Services, LLC, Ark CLO 2001-1, Limited, Ark Investment Partners, II, LP, Zohar I CDO 2003-1, Limited, and Zohar II 2005-1, Limited's motion to dismiss the complaint as against them; defendants Sandler Mezzanine Partners, L.P., Sandler Mezzanine T.E. Partners, L.P., Sandler Mezzanine Foreign Partners, L.P. and Moira Mitchell's motion to dismiss the complaint as against them; and defendants Richard Intrator, Arnold Sheiffer, Timothy McAuliff, Val Napolitano, Leo MacCourtney, Petry Media Corp., Petry Television, Inc. and Blair Television, Inc.'s motion to dismiss the second through sixteenth causes of actions as against them; granted plaintiff's motion for leave to renew and, upon renewal, denied Patriarch Partners, LLC's motion for summary judgment as to the second cause of action based on a theory of alter ego liability; and declined to deem the caption amended to include Petry Holding, Inc. as a defendant, unanimously modified, on the law, to deny plaintiff's motion for leave to renew, and to grant plaintiff's request to deem the caption amended to include Petry Holding, and otherwise affirmed, with costs against plaintiff.

Plaintiff owns a building in which it leased space to defendants Petry Television, Inc., and Blair Television, Inc. (the Petry Tenants). The first cause of action in the complaint alleges breach of contract against the Petry Tenants based on unpaid rent. An additional 15 causes of action are asserted variously against the Petry Tenants and several other defendants, both corporate and individual. The gravamen of the complaint is that the other defendants, who are primarily the secured creditors of the Petry Tenants pursuant to a loan agreement initially entered into two years before the lease was signed, participated in a fraudulent scheme to loot the assets of the Petry Tenants, thereby rendering them judgment-proof shells unable to pay contract creditors such as plaintiff.

The complaint does not allege that the initial loan was fraudulent or that the subsequent purchase of the loan by certain of the other defendants was fraudulent. Plaintiff does not dispute that the Petry Tenants pledged substantially all of their assets as collateral for additional loans in 2003 or that the other defendants have put substantially more money into the Petry Tenants than they have received in return. Plaintiff merely asserts, without explanation, that a 2003 public sale of the assets of the Petry Tenants' holding company, Petry Media, and

subsequent loan refinancings and amendments to the agreement were fraudulent and in violation of the Debtor and Creditor Law, inter alia, and challenges the validity of the loan payments resulting from these refinancings and amendments.

Plaintiff does not explain how the disputed transactions, which occurred almost four years after the lease was entered into and five years before the alleged breach, amounted to a scheme to cheat it out of the rent it was owed. Plaintiff does not explain what made the public sale or the loan repayments to secured creditors fraudulent. Plaintiff does not allege exactly which defendant engaged in what activity and when, in furtherance of the alleged fraud. Plaintiff simply states that everyone who was involved in any way with the 2003 transaction participated in fraudulent activity.

Contrary to plaintiff's contention, these bare legal conclusions, especially as they concern claims of fraud, are not entitled to be accepted as true on a motion to dismiss on the pleadings (*see Starr Found. v American Intl. Group, Inc.*, 76 AD3d 25, 42 [2010]; *Kliebert v McKoan*, 228 AD2d 232, 232 [1996], *lv denied* 89 NY2d 802 [1996]). A fortiori, they are insufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiff's motion for leave to renew Patriarch Partners, LLC's motion for summary judgment as to the second cause of action based on a theory of alter ego liability must be denied

for failure to present evidence of fraud (*see Wallace v Wood*, 752 A2d 1175, 1184 [Del Ch 1999]).

We have considered plaintiff's remaining arguments and find them without merit.

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6213 The People of the State of New York, Ind. 3545/07
Respondent,

-against-

David Torres,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered May 13, 2010, convicting defendant, after a jury trial, of manslaughter in the first degree and assault in the second degree, and sentencing him to an aggregate term of 13 years, unanimously affirmed.

To the extent defendant is challenging the legal sufficiency of the evidence, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

Defendant claimed he was justified in stabbing the deceased, and that he accidentally stabbed the surviving victim. These defenses presented issues of credibility, and there is no basis

for disturbing the jury's determinations. The physical evidence and the forensic expert testimony, viewed as a whole, tended to show that defendant's use of deadly force was unjustified.

Defendant was not deprived of a fair trial by the challenged portions of the prosecutor's summation (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). Defendant contends that the prosecutor's line of argument concerning certain physical evidence was speculative and unsupported by the record. However, this line of argument drew permissible inferences from the record and was responsive to the defense summation, which drew a competing inference. Furthermore, the court gave a curative instruction that was sufficient to prevent any prejudice.

Defendant also claims that the prosecutor misstated the law of justification. However, the court gave a prompt curative instruction, and it thoroughly explained justification in its main charge. The jury is presumed to have followed the court's instructions (*see People v Davis*, 58 NY2d 1102, 1104 [1983]).

Defendant's remaining challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6214 Milagros Rosario, et al., Index 7618/06
Plaintiffs-Appellants,

-against-

Bronx Park South III Associates, L.P.,
Defendant-Respondent.

_____

Kenneth J. Gorman, New York, for appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered April 6, 2010, which granted defendant's motion for summary judgment dismissing plaintiffs' complaint, unanimously affirmed, without costs.

Defendant's evidence established prima facie that it had no constructive notice of the alleged wet condition that caused plaintiff to slip and fall. In opposition, plaintiffs failed to raise a triable issue of fact. The assertion of the injured plaintiff's husband that he had observed water accumulate in the lobby of defendant's building when it rained, including on the date of plaintiff's accident, raised no more than a general awareness that the floor became wet during inclement weather, which is insufficient to establish constructive notice of the

specific condition causing her injury (*see Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005]). Plaintiffs failed to produce competent evidence to raise an issue of fact as to whether they had informed defendant of the hazardous condition in the subject building or whether defendant had received notice from any other source (*see Rodriguez v 520 Audubon Assoc.*, 71 AD3d 417 [2010]). Plaintiffs never pleaded that inadequate lighting was a cause of the fall and, in any event, failed to raise an issue of fact with respect to that theory.

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Catterson, Abdus-Salaam, Román, JJ.

6215 In re Gerald H. Pitman, etc., Index 260240/09
Petitioner,

-against-

Richard F. Daines, M.D., Commissioner of the New York State Department of Health, et al.,
Respondents.

_____

Goldfarb Abrandt Salzman & Kutzin LLP, New York (Ira Salzman of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Sudarsana Srinivasan of counsel), for Richard F. Daines, M.D. and David Hansell, respondents.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for Robert Doar, respondent.

_____

Determination of respondent New York State Department of Health, dated January 7, 2009, which, after a fair hearing, affirmed respondent New York City Human Resource Administration's determination denying petitioner-executor's application to have the deceased's net available monthly income reduced for Medicaid eligibility purposes by amounts the deceased paid for private nurses while residing in a nursing home, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, Bronx County [Barry Salman, J.], entered September 2, 2010),

dismissed, without costs.

Respondents' determination that private 24-hour nursing care may have provided the deceased with "optimal care" but was not "essential" care that was "medically necessary" for purposes of Medicaid reimbursement, is based on substantial evidence. The agency's determination is entitled to deference because it involves the agency's interpretation of its own regulations and the legislation under which it functions (*Curry v Wing*, 277 AD2d 41 [2000]).

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

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6216 The People of the State of New York, Ind. 571/02
Respondent,

-against-

Abdul Rauf,
Defendant-Appellant.

_____

Jorge Guttlein & Associates, New York (Jorge Guttlein of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Jodi A. Danzig of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Phylis Skloot Bamberger, J.), rendered January 15, 2004, convicting defendant, upon his plea of guilty, of grand larceny in the second degree and criminal diversion of prescription medications and prescriptions in the third degree, and sentencing him to an aggregate term of 1½ to 4½ years, with restitution in the amount of $200,281.29, unanimously affirmed.

Defendant's argument that the trial court abused its discretion in sua sponte rescinding its oral decision granting defendant's motion to withdraw his guilty plea is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject defendant's contention on the merits. A nisi prius court "has the inherent power, *sua sponte*

or on motion of a party, to reconsider or vacate its prior decision before issuing an order thereon" (*Hulett v Niagara Mohawk Power Corp.*, 1 AD3d 999, 1003 [2003]; *see also American Re-Ins. Co. v SGB Universal Bldrs. Supply*, 160 AD2d 586 [1990]). Moreover, the court explained that, upon review of the transcripts, it found that issues relating to the plea withdrawal motion required a more developed record prior to determination. Our review of that record indicates that defendant's plea was entered knowingly, voluntarily, and intelligently (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]).

The record indicates that defendant's counsel provided meaningful representation (*see People v Benevento*, 91 NY2d 708, 712-714 [1998]). In particular, the favorable nature of the plea bargain demonstrates that defendant received effective assistance (*see People v Ford*, 86 NY2d 397, 404 [1995]).

Defendant's argument that his trial counsel misadvised him as to the deportation consequences of a conviction (*see Padilla v Kentucky*, __ US __, 130 S Ct 1473 [2010]) is unavailing. Defendant never argued that he would not have pleaded guilty if he had been properly advised. Accordingly, defendant has failed

to make the showing of prejudice required to prevail on his claim of ineffective assistance of counsel (*see Padilla*, __ US at __, 130 S Ct at 1483; *People v McDonald*, 1 NY3d 109, 115 [2003]).

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6217N James W. Holme, Index 600232/08
Plaintiff-Respondent, 605084/00

-against-

Global Minerals and Metals Corp., et al.,
Defendants-Appellants.

_____

Kaye Scholer LLP, New York (H. Peter Haveles, Jr. of counsel), for Global Minerals and Metals Corp., GMMC Enterprise Corp., GMMC, Inc., GMMC, LLC, and R. David Campbell, appellants.

McMillan Constabile Maker & Perone LLP, Larchmont (William Maker, Jr. of counsel), for Bipin H. Shah, appellant.

Seidman & Seidman, P.C., New York (Irving P. Seidman of counsel), and Graubard Miller, New York (Steven Mallis of counsel), for respondent.

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Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered March 4, 2011, which, insofar as appealed from, granted an adverse inference charge against defendants due to spoliation of electronic records; ordered the corporate defendants' production of an unredacted master index and the personal tax returns of defendants R. David Campbell and B.H. Shah within 20 days of service of the order with notice of entry; ordered Campbell and Shah, within 20 days of service of the order with notice of entry, in the event they could not produce their tax returns, to execute all forms needed to permit plaintiff to

apply to the Internal Revenue Service to obtain copies thereof for 1996 through 2010; and stated that the court would grant an oral motion to strike defendants' pleadings in their entirety if defendants failed to comply with any portion of this order, unanimously affirmed, with costs.

The court providently exercised its discretion by granting an adverse inference charge against defendants due to their spoliation of their electronic accounting and trading records. Defendants had an obligation to preserve such records because they should have foreseen that the underlying litigation might give rise to the instant enforcement action; the records were destroyed with a culpable state of mind; and they are relevant to plaintiff's claims of fraudulent conveyances (*see Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 482 [2010]; *Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11, 17 [2000]), which this Court previously held were sufficiently pled to withstand dismissal (65 AD3d 417 [2009]).

Further, the court providently exercised its discretion by imposing sanctions for defendants' alleged failure to comply with orders to provide Global's complete general ledgers and unredacted master index.

The IAS court also providently exercised its discretion by

ordering defendants Campbell and Shah to produce their individual tax returns. Although disclosure of tax returns is generally disfavored, special circumstances exist in that plaintiff seeks to support his alter ego and de facto merger claims by showing that Global's assets were improperly transferred while Global was going out of business (*see Berger v Fete Cab Corp.*, 57 AD2d 784 [1977]; *Chaudhry v Abadir*, 261 AD2d 497 [1999]).

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

ENTERED: DECEMBER 1, 2011

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6218N Castor Petroleum, Ltd., Index 600243/08
Plaintiff-Appellant,

-against-

Petroterminal de Panama, S.A.,
Defendant-Respondent.

_____

McGuireWoods LLP, New York (Richard L. Jarashow of counsel), for appellant.

Reitler Kailas & Rosenblatt LLC, NY (Jocelyn L. Jacobson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 22, 2011, which granted defendant's motion to preclude plaintiff's revised Statement of Claim, calculating its lost gross margin, unanimously reversed, on the law, with costs, the motion denied, the order of preclusion vacated, and the matter remanded for consideration of alternative sanctions.

The court's preclusion order was an improvident exercise of discretion (*see* CPLR 3126; *Gradaille v City of New York*, 52 AD3d 279 [2008]). There was no basis for finding that any noncompliance with the preliminary conference order was willful, contumacious, or in bad faith, as would justify precluding plaintiff from presenting evidence in support of its damages claim (*see Sidelev v Tsal-Tsalko*, 52 AD3d 398 [2008]).

Plaintiff was not required to move to amend its interrogatory responses pursuant to CPLR 3101(h), where, although the original response was correct and complete when made, defendant's numerous requests for more detailed calculation of the damages rendered the response incomplete. The statute does not provide for motion practice, except where a party obtains information on the eve of trial, which did not apply here, since no date had been set for trial (*see Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc.*, 73 AD3d 629, 630 [2010]), no depositions had been taken, and the note of issue had not been filed.

Plaintiff was also not required to move to amend its complaint, since its revised damages analysis alleged neither a new cause of action, nor any new factual basis for recovery. Instead, the analysis merely included plaintiff's calculation of its lost profits, and the complaint contained sufficient allegations regarding plaintiff's lost profits resulting from the business interruption. Additionally, since the ad damnum clause did not contain a specific amount, but rather sought damages "in excess of $15 million" (*cf. Reid v Weir-Metro Ambulance Serv.*, 191 AD2d 309, 310 [1993]), no amendment was required.

Plaintiff was nonetheless entitled to amend its complaint (CPLR 3025[b]), since the proposed amendment is not palpably

insufficient or clearly devoid of merit (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499-500 [2010]), and defendant cannot legitimately claim surprise or prejudice. The proposed amendment was premised upon the same facts, transactions or occurrences alleged in the complaint (*see Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15 [2008]).

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

ENTERED: DECEMBER 1, 2011

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, Freedman, JJ.

4598 Verizon New York, Inc., et al., Index 602146/08
Plaintiffs-Respondents,

-against-

Optical Communications Group, Inc.,
Defendant-Appellant.

_____

Klein Law Group, PLLC, Albany (Andrew M. Klein of counsel), for appellant.

Kirkland & Ellis LLP, New York (David S. Flugman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 1, 2009, affirmed, with costs.

Opinion by Mazzarelli, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
David Friedman
Rolando T. Acosta
Helen E. Freedman, JJ.

4598
Index 602146/08

_____x

Verizon New York, Inc., et al.,
Plaintiffs-Respondents,

-against-

Optical Communications Group, Inc.,
Defendant-Appellant.
_____x

Defendant appeals from an order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 1, 2009, which granted plaintiffs' motion to dismiss defendant's fourth, fifth, and tenth counterclaims.

Klein Law Group, PLLC, Albany (Andrew M. Klein and Allen C. Zoracki of counsel), and Hofheimer Gartlir & Gross, LLP, New York (Robert J. Kenney and Zachary B. Grendi of counsel), for appellant.

Kirkland & Ellis LLP, New York (David S. Flugman and Joseph Serino, Jr. of counsel), for respondents.

MAZZARELLI, J.P.

Plaintiff Verizon New York Inc. (Verizon) owns a network of subterranean conduit systems that extends throughout New York City. Because its ownership of the network would enable Verizon to exercise monopoly control over the provision of telecommunication services, the New York Public Service Law places strict controls over Verizon's use of the conduit system. The Public Service Commission has promulgated rules requiring that common carriers, such as Verizon, permit other companies to use space in the conduits. The regulations also restrict the amounts common carriers can charge for leasing space to others.

Defendant Optical Communications Group, Inc. (OCG) is a telecommunications service provider that competes directly with Verizon. In or about July 1998, OCG and Verizon entered into a "Conduit Occupancy Agreement" (the agreement) giving OCG the right to lease space in Verizon's conduit network in which to run its own infrastructure. The agreement required OCG to pay Verizon, within 30 days of billing, monthly conduit occupancy rental fees that were to be determined by a schedule filed with the Public Service Commission. The agreement also governed the manner by which OCG was to request conduit space and the contingency that the space was not readily available. Pursuant to these sections of the agreement, OCG would request that

Verizon search its records to determine whether there was free space in a particular area. If not, Verizon would provide OCG with an estimate of the cost to OCG to have the necessary space made available. Verizon's corporate affiliate, plaintiff Empire City Subway Company (Limited) (ECS), was responsible for this so-called "Make-Ready" work.

OCG contends that, well after the agreement went into effect, Verizon misrepresented to it the availability of certain conduit space that it had sought to lease for various projects. OCG alleges that Verizon purposely concealed that the space was available so that it would have no choice but to engage and pay ECS to perform Make-Ready work. OCG further maintains that Verizon overcharged it for its lease of certain conduits, in violation of the agreement and the regulations, and, when OCG refused to pay the overcharged amounts, blocked its access to the network. This, OCG alleges, led to lost business, since, without this access, it could not provide telecommunications services to its own customers. For example, OCG asserts that Verizon frustrated its ability to complete a project known as the Long Island Fiber Deployment. The project was designed for a specific OCG customer, and required end-to-end connectivity from eastern Suffolk County to western Nassau County. OCG contends that Verizon overcharged it for the lease and for the Make-Ready work,

and locked it out of the conduits for three years after it refused to pay the inflated charges, to its and its customer's detriment.

Based on OCG's refusal to pay amounts it believed were improperly assessed against it, Verizon and ECS commenced this action. They allege that OCG breached the agreement when it failed to make timely lease payments to Verizon and when it failed to pay for Make-Ready work performed by ECS. OCG interposed 10 counterclaims. The first counterclaim is for breach of the agreement and is based on the general allegations that Verizon failed to abide by its contractual obligation to make conduit space available to OCG and to charge the agreed-upon rates. The fourth, fifth and tenth counterclaims are the subjects of this appeal. The fourth and fifth counterclaims are, respectively, for fraud and fraudulent inducement. The former is based on Verizon's alleged practice of misrepresenting the availability of conduit space. The latter is related to the Long Island Fiber Deployment described above. It alleges that OCG embarked on that project in reliance on Verizon's false representations that, as provided in the agreement, it would charge the agreed amounts.

The tenth counterclaim was interposed against both Verizon and ECS for violation of the Donnelly Act (General Business Law § 340 *et seq*.). In this counterclaim, OCG alleges that Verizon and ECS conspired to unlawfully interfere with the deployment and availability of communication conduit and fiber optic cable facilities and services, by developing and implementing processes and actions to hinder the construction, reservation, accessibility and availability of conduit and fiber optics. OCG alleges that the geographic market for communications conduit has been, and remains, adversely affected by the actions and arrangements of Verizon and ECS.

Verizon and ECS moved pursuant to CPLR 3211(a)(7) to dismiss the fourth, fifth and tenth counterclaims.[1] While acknowledging that OCG had stated a cause of action for breach of contract, they argued that the fraud and fraudulent inducement counterclaims against Verizon were duplicative of the counterclaim for breach of contract, and thus improper. As for the Donnelly Act claim, they contended that ECS was a direct and

[1] The counterclaims at issue had been amended in an amended answer. Verizon and ECS moved to dismiss the original counterclaims but that motion was denied as moot after OCG was granted leave to amend. OCG argues in its principal brief that the instant motion should have been denied because the denial of the original motion did not expressly state that it was without prejudice to renewal upon receipt of the amended pleading. The argument fails since the denial was clearly not on the merits.

wholly owned subsidiary of Verizon, and that thus they were considered a single actor that was unable to restrain trade with itself. In reply to OCG's opposition papers, Verizon and ECS submitted an affidavit by a person who is both assistant secretary of Verizon and secretary of ECS, who attested to their corporate status.

The motion court granted the motion in its entirety. It found that the fourth and fifth counterclaims were duplicative of the breach of contract claim. It further found that, because of their corporate relationship, Verizon and ECS could not have engaged in anti-competitive behavior. We affirm.

A fraud claim may coexist with a breach of contract cause of action only where the alleged fraud constitutes the breach of a duty separate and apart from the duty to abide by the terms of the contract (*see North Shore Bottling Co. v Schmidt & Sons*, 22 NY2d 171, 179 [1968]). OCG argues that Verizon owed it an independent duty, imposed by the Public Service Commission, not to discriminate in providing access to its conduit network, and not to charge rates above those permitted by the regulations. In making this argument, OCG relies heavily on the Court of Appeals' decision in *Sommer v Federal Signal Corp.* (79 NY2d 540 [1992]).

In *Sommer*, the owner of a commercial building (the plaintiff) contracted with a fire alarm company (the defendant)

for the latter to relay fire alarms sounded in the building to the New York City Fire Department. Due to a misunderstanding between a building engineer and a dispatcher employed by the defendant, the system, which had been deactivated one day at the building owner's request, remained deactivated despite the engineer's request that it be reactivated. A fire occurred that evening, and the defendant failed to relay to the fire department the alarms that it was aware were going off in the building. The plaintiff commenced an action against the defendant for damages arising from the breach of their contract as well as from negligence. The Court of Appeals analyzed whether the plaintiff could have a claim for both breach of contract and negligence arising out of the same nucleus of fact. In doing so, the Court acknowledged the existence of a "borderland" between tort and contract claims, and the difficulty in certain scenarios of separating one from the other (79 NY2d at 550). The Court reviewed prior cases in which it had distinguished the two types of claims and identified certain "guideposts" for the endeavor (*id.* at 551). In restating those guideposts, the Court first noted that merely alleging that a party breached a contract because it failed to act with due care will not transform a strict breach of contract claim into a negligence claim (*id.*). However, the Court continued:

> "A legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals, common carriers and bailees, for example, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties. In these instances, it is policy, not the parties' contract, that gives rise to a duty of due care" (*id.* at 551-552 [internal quotation marks and citations omitted]).

Further, the Court observed that "the nature of the injury, the manner in which the injury occurred and the resulting harm" are all relevant factors in considering whether claims for breach of contract and tort may exist side by side (*id.*).

Based on these factors, the Court in *Sommer* allowed both claims to go forward. The defendant's duty to act with reasonable care, the Court held, was not only governed by its contract with the building, but also by New York City's comprehensive scheme of fire safety regulations, which required the building to have a central station fire service. In addition, the Court noted that the defendant was franchised and regulated by the City. Thus, the Court concluded that the defendant's duties were

> "affected with a significant public service; failure to perform the service carefully and competently can have catastrophic consequences. The nature of [the defendant's] services and its relationship with its customer therefore gives rise to a duty of reasonable care that is independent

> of [the defendant's] contractual obligations" (*id.* at 553).

In interpreting *Sommer*, this Court has described the nature of the harm, particularly whether it is "catastrophic," as "one of the most significant elements in determining whether the nature of the type of services rendered gives rise to a duty of reasonable care independent of the contract itself" (*Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc. Architects*, 192 AD2d 151, 154 [1993] [negligence claim stated, in addition to breach of construction contract, where shoddy construction work caused a large chunk of concrete to fall into courtyard regularly used by college students]; *see also Duane Reade v SL Green Operating Partnership, LP*, 30 AD3d 189 [2006] [negligence claim stated where landlord's reduction of heat in commercial building caused burst pipe and $500,000 worth of flood damage]).

Indeed, the Court of Appeals has declined to extend *Sommer* to cases involving only economic harm. In *New York Univ. v Continental Ins. Co.* (87 NY2d 308 [1995]), the issue was whether plaintiff, in seeking coverage under an insurance contract, could receive punitive damages. Distinguishing *Sommer*, the Court held that such damages were only available if the conduct in question rose to the level of a tort independent of the contract itself.

It found that the defendant's denial of the plaintiff's claim did not qualify as a tort, even in light of the regulatory scheme established by the Insurance Law:

> "To be sure, the provisions of the Insurance Law reflect State policy that insurers must deal fairly with their insureds and the public at large. But governing the conduct of insurers and protecting the fiscal interests of insureds is simply not in the same league as the protection of the personal safety of citizens. As compared to the fire-safety regulations cited in *Sommer*, the provisions of the Insurance Law are properly viewed as measures regulating the insurer's performance of its contractual obligations, as an adjunct to the contract, not as a legislative imposition of a separate duty of reasonable care (see, Insurance Law § 2601 [c]; § 109 [b])" (87 NY2d at 317).

Notably, the Court confirmed that, in *Sommer*, it meant to emphasize the nature of the harm in identifying when an independent duty exists, and "not [to] suggest that statutory provisions necessarily or generally impose tort duties independent of contractual obligations" (*id.*).

The harm alleged here does not rise to the level required to transform it from contractual to tortious in nature. We recognize that Verizon's conduct, as alleged, violated the Public Service Law. We also acknowledge that the alleged harm had an effect on the public, albeit an indirect one, since the public relies on the ability of carriers like OCG to access Verizon's

network to promote competition in the field. Nevertheless, *Sommer* and *New York Univ.* make clear that the public's interest in compliance with a statutory and regulatory scheme is not sufficient to create tort liability. Rather, tort liability arises out of "catastrophic consequences that . . . flow from [a party]'s failure to perform its contractual obligations with due care" (*New York Univ.*, 87 NY2d at 317). It does not result from an injury that, like the harm here, is "solely financial" and "not typical of [harm] arising from tort" (*Logan v Empire Blue Cross & Blue Shield*, 275 AD2d 187, 193 [2000], *lv dismissed* 96 NY2d 823 [2001]). To echo the Court of Appeals, the regulation of telecommunications carriers is "not in the same league as the protection of the personal safety of citizens" (87 NY2d at 317). Accordingly, the motion court correctly dismissed the counterclaims for fraud and fraudulent inducement.

Regarding its tenth counterclaim, alleging violation of the Donnelly Act, OCG argues that Verizon and ECS should not be considered a single actor because they have not adequately established their corporate relationship for purposes of the motion. OCG does not point to any particular infirmity in the affidavit by the secretary for both entities that describes the relationship. Rather, it complains that the affidavit was first submitted in reply. OCG further argues that, in any event, a per

se single-actor antitrust immunity rule should not apply to the Donnelly Act as it does to the federal Sherman Antitrust Act. Finally, OCG argues that Verizon and ECS do not deserve immunity because, unlike Verizon, ECS is not regulated as a common carrier, and so the two corporations do not have a "unity of interest."

We find that Verizon and ECS sufficiently established their status as parent and subsidiary. The reply affidavit by the Verizon and ECS secretary was properly accepted in light of OCG's own recognition in its counterclaims that the two companies are affiliated. Moreover, OCG has not offered any reason why the affidavit is not dispositive of the issue. Further, we reject OCG's argument that Verizon and ECS are not immune from claims that they have violated the Donnelly Act. This argument is based on OCG's theory that, because of differences in the structure of the Sherman Act and the Donnelly Act, it is wrong to view them as analogous. Thus, OCG contends, there is no reason to follow the federal courts, which apply an intra-enterprise immunity rule to the Sherman Act. However, OCG offers no controlling authority to support its theory that the Donnelly Act does not contain this immunity. To the contrary, ample precedent confirms that the immunity does exist (*see e.g. North Atl. Utils. v Keyspan Corp.*, 307 AD2d 342, 343 [2003], *lv denied* 1 NY3d 503 [2003]; *Barnem*

Circular Distribs. v Distribution Sys. of Am., 281 AD2d 576, 577 [2001]). Presumably, those courts that have considered the issue were aware of the differences between the two acts. Finally, OCG fails to offer any support for its argument that, because Verizon is regulated but ECS is not, they do not enjoy the unity of interest that shields them from antitrust liability.

Accordingly, the order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 1, 2009, which granted plaintiffs' motion to dismiss defendant's fourth, fifth, and tenth counterclaims should be affirmed, with costs.

All concur.

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

ENTERED: DECEMBER 1, 2011

CLERK