

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 17, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Catterson, Richter, Román, JJ.

6060-		Index 603827/07
6061-		600232/09
6062-		600357/10
6063-		
6064-		
6065	Virginia M. Henneberry, Plaintiff-Appellant,	

-against-

Leon Baer Borstein, et al.,
Defendants-Respondents.

Capuder Fazio Giacoia LLP, New York (Douglas M. Capuder of counsel), for appellant.

Leon Baer Borstein, New York, respondent pro se.

James B. Sheinbaum, New York, respondent pro se.

Furman Kornfeld & Brennan LLP, New York (Joshua B. Sandberg of counsel), for Borstein & Sheinbaum, respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 15, 2010, which granted defendants' motions to dismiss the complaint (the 2007 Action) to the extent of dismissing the complaint pursuant to CPLR 3211(a)(8) without prejudice, and granted plaintiff's cross motion for, inter alia,

an extension of time to effect service to the extent of permitting plaintiff to serve within 30 days of a copy of the order with notice of entry "a proper summons and complaint . . . with a new index number," unanimously modified, on the law, to the extent of denying defendants' motion and granting plaintiff an extension of time to effect service pursuant to CPLR 306-b, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered January 20, 2010, which granted defendants' motions to dismiss the complaint (the 2009 Action) pursuant to CPLR 3211(a)(4), unanimously dismissed, without costs, as academic. Order, same court (Charles E. Ramos, J.), entered October 25, 2010, which granted defendants' motion to dismiss the complaint (the 2010 Action) on statute of limitations grounds, unanimously reversed, on the law, without costs, the motion denied, and the complaint deemed to be an amended complaint in the 2007 Action. Appeal from order, same court (Charles E. Ramos, J.), entered March 4, 2011, which discontinued the 2010 Action, unanimously dismissed, without costs, as abandoned.

Plaintiff, proceeding pro se, brought the 2007 Action against defendant attorneys and their firm, asserting claims of legal malpractice and breach of fiduciary duty in their

representation of her in an arbitration against a former employer. That arbitration concluded on December 4, 2004 with a decision adverse to plaintiff. Plaintiff commenced the 2007 Action by filing a summons with notice on November 19, 2007, just under a month before the expiration of the applicable three-year statute of limitations (see CPLR 214[6]).

On March 13, 2008, within 120 days of the filing of the summons with notice, plaintiff arranged for a licensed process server to serve defendants in accordance with CPLR 306-b. She subsequently filed two affidavits of service with the court. On April 1, 2008, 19 days later, defendants submitted a notice of appearance and a demand for a complaint. Plaintiff served a summons and complaint upon defendants on April 28, 2008.

On November 7, 2008, approximately six months later, after having sought and obtained numerous adjournments, defendants moved to dismiss the 2007 Action, on a number of grounds, including lack of personal jurisdiction. Plaintiff, now represented by counsel, cross moved for, inter alia, an extension of time to effect service pursuant to CPLR 306-b.

While the parties' motions were pending, plaintiff filed the 2009 Action, which contained substantially the same substantive claims. She did so to protect her claims in the event that the

2007 Action was terminated on a ground subject to revival under CPLR 205(a). Next, on June 19, 2009, defendants moved to dismiss the 2009 Action, arguing that there was an identical action pending before the court (CPLR 3211[a][4]). On July 23, 2009, the court held a traverse hearing regarding the validity of the March 13, 2008 service.

In the first order appealed from, Justice Tingling dismissed the 2007 Action for lack of personal jurisdiction (based on improper service), without prejudice, and granted plaintiff's cross motion for an extension of time to effect service pursuant to CPLR 306-b, on condition that she purchase a new index number and properly serve a summons and complaint within 30 days after service of the order with notice of entry. In the second order appealed from, issued contemporaneously with the first, Justice Tingling dismissed the 2009 Action based upon the pendency of another identical action (CPLR 3211[a][4]).

Following the court's directive in the first order, on February 11, 2010 plaintiff commenced the 2010 Action. In the third order appealed from, Justice Ramos dismissed that action as untimely. Plaintiff challenges each of these three orders.

The unintended effect of the disposition of the first two orders appealed from was to deprive plaintiff of an opportunity

to pursue her timely filed lawsuit, based entirely upon her failure to effectively complete the ministerial act of properly serving defendants within 120 days of the filing of notice. This was error.

CPLR 306-b provides, as relevant:

"Service of the summons and complaint, summons with notice, . . . shall be made within one hundred twenty days after the filing of the summons and complaint, summons with notice, . . . If service is not made upon a defendant within the time period provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

The statute requires that a defendant challenging service move to dismiss on that ground (*Daniels v King Chicken & Stuff, Inc.*, 35 AD3d 345 [2006]). In deciding such a motion, the express language of CPLR 306-b gives the court two options: dismiss the action without prejudice; or extend the time for service in the existing action. Here, defendants made their motions after the statute of limitations had expired. In these circumstances, the court's options were limited to *either* dismissing the action outright, or extending the time for plaintiff to properly effect service.

The first order appealed from dismissed the action, without prejudice to the filing of a *new* action, *and* granted plaintiff's

cross motion for an extension of time to effect service. This directive was internally inconsistent, and it led plaintiff to file the 2010 action, later dismissed as untimely (*Matter of Rodamis v Cretan's Assn Omonoia*, 22 AD3d 859, 860 [2005] [court cannot grant CPLR 306-b extension where action has been dismissed and statute of limitations has expired]; see *Sottile v Islandia Home for Adults*, 278 AD2d 482, 484 [2000]). The court should have limited its ruling in the first order on appeal to granting plaintiff's cross motion for an extension of time to effect service pursuant to CPLR 306-b (see *Lippett v Education Alliance*, 14 AD3d 430, 431 [2005]).

CPLR 306-b authorizes an extension of time for service in two discrete situations: "upon good cause shown" or "in the interest of justice" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-106 [2001]). The Court of Appeals has confirmed that the "good cause" and "interest of justice" prongs of the section constitute separate grounds for extensions, to be defined by separate criteria (*id.* at 104). The Court stated,

"Our analysis is buttressed by an examination of the legislative history behind the amendment [to CPLR 306-b]. The New York State Bar Associations Commercial and Federal Litigation Section Committee on Civil Practice Law and Rules characterized the interest of justice standard as 'more flexible' than the good cause standard, specifically noting that '[s]ince the term "good cause" does not include conduct

usually characterized as "law office failure," proposed CPLR 306-b provides for *an additional and broader standard, i.e., the "interest of justice,"* to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant'".

(*id.* at 104-105 [emphasis added]). A "good cause" extension requires a showing of reasonable diligence in attempting to effect service upon a defendant. At least one Appellate Division decision has suggested that good cause is likely to be found where "the plaintiff's failure to timely serve process is a result of circumstances beyond [its] control" (*Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 32 [2009] [noting difficulties of service with person in military or difficulties with service abroad through Hague Convention]).

Even if this case does not qualify for an extension under the "good cause" exception (see *Mead v Singleman*, 24 AD3d 1142, 1144 [2005]), we find that it qualifies under the "interest of justice" category. Under this prong of CPLR 306-b, the Court of Appeals has instructed that a court "may consider [plaintiff's] diligence, or lack thereof, along with any other relevant factor . . ., including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*Leader*, 97 NY2d

at 105-106).

Here, plaintiff's attempted March 2008 service, although ultimately deemed defective, was a diligent attempt by a pro se plaintiff to hire a process server to serve defendants at their law firm, within 120 days of the timely filing of a summons with notice. By the time the court ruled on the motions in the 2007 Action, the statute of limitations had expired, precluding the filing of a new action. In addition, defendants were aware of the 2007 Action and appeared to demand a complaint as early as April 2008 - they were not prejudiced by the service errors and were afforded full participation in discovery (see *Spath v Zack*, 36 AD3d 410, 413 [2007]). Finally, construing the pleading in the light most favorable to plaintiff, as is required on consideration of a CPLR 3211 motion to dismiss, we find that it asserts actions and omissions by defendants that support viable claims for recovery (see *Leder v Spiegel*, 31 AD3d 266 [2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]).

Khedouri v Equinox (73 AD3d 532 [2010]) and *Shelkowitz v Rainess* (57 AD3d 337 [2008]), cited by the defense in support of dismissing the action, are both distinguishable on their facts. In *Khedouri*, the court found that dismissal was warranted because plaintiff made no attempt to serve the defendant, a fitness

corporation, within 120 days of filing the summons and complaint. In addition, this Court found no merit to the plaintiff's underlying claims, given the voluntary assumption of risks inherent in fitness training (73 AD3d at 532-533). Similarly, dismissal was granted in *Shelkowitz*, a personal injury action involving the accumulation of snow and ice at the defendant's building, where plaintiff made no attempt to serve the defendant within 120 days of the filing of the action, and the extension request was made 20 months after filing the complaint (57 AD2d at 337). Here, unlike both *Khedouri* and *Shelkowitz*, plaintiff attempted service within the 120-day period, defendants were aware of the action soon after the filing of the complaint, and, viewing the amended pleading in the light most favorable to plaintiff, we find it sets forth actionable claims (*Spath v Zack*, 36 AD3d 410 [2007], *supra*; *Mead v Singleman*, 24 AD3d 1142 [2005], *supra*; *Lippett v Education Alliance*, 14 AD3d 430 [2005], *supra*).

Granting plaintiff the opportunity to pursue this action is not only consistent with the "interest of justice" exception set forth in CPLR 306-b, but also with our strong interest in deciding cases on the merits where possible (*see e.g. L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1 [2007]). Accordingly, given our conclusion that the 2007 Action qualified

for an extension of time to effect service pursuant to CPLR 306-
b, we reverse the third order appealed from and deem the
complaint in the 2010 Action to be an amended complaint in the
2007 Action.

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

ENTERED: JANUARY 17, 2012

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interest of justice, given the gravity of the crimes to which he admitted. We note that, had defendant been convicted after trial of all counts of the indictment, he could have received an aggregate sentence of as many as 50 years.

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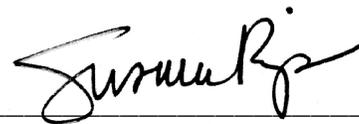
plea allocution, the court noted that if defendant absconded from the program, he would receive a term of postrelease supervision [PRS] in addition to the eight-year prison term. The court did not, however, specify the length of the term of PRS to be imposed in the event defendant absconded. The first time the court ever informed defendant that his sentence would be eight years plus three years' PRS was when it actually imposed sentence, after defendant absconded and was returned on a warrant.

At the outset, we reject the People's assertion that defendant was required to preserve his present challenge to the voluntariness of his plea. Since the plea court "failed to advise defendant of the specific term of PRS . . . a postallocation motion was not required to challenge the sufficiency of the plea" (*People v Boyd*, 12 NY3d 390, 393 [2009]; see also *People v Louree*, 8 NY3d 541, 545-546 [2007]). Unlike the situation in *People v Murray* (15 NY3d 725 [2010]), defendant was not "advised of what the sentence would be, including its PRS term, at the outset of the sentencing proceeding" (*id.* at 727). When the prosecutor inaccurately stated the terms of defendant's plea agreement to the sentencing court, and requested a particular term of PRS, this did not constitute the type of advice to defendant contemplated by *Murray*.

Because PRS is a direct consequence of a conviction (*People v Catu*, 4 NY3d 242, 244 [2005]), a court must advise a defendant who pleads guilty not only of the fact that PRS will be imposed, but also of the length of the PRS term (see *People v Boyd*, 12 NY3d at 393; see also *People v McAlpin*, _ NY3d _, 2011 NY Slip Op 08456 [2011]). Because the plea allocution did not satisfy that requirement, the plea was not knowingly, voluntarily, and intelligently made.

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Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6236 The Corcoran Group Real Estate, Index 116740/08
 Plaintiff-Appellant,

-against-

Grace De Libero,
Defendant-Respondent.

Margolin & Pierce, LLP, New York (Errol F. Margolin of counsel),
for appellant.

Grace De Libero, respondent pro se.

Order, Supreme Court, New York County (Paul G. Feinman, J.),
entered February 25, 2011, which denied plaintiff's motion for
renewal of its petition to confirm an arbitration award,
unanimously reversed, on the law, without costs, the motion
granted, and the petition to confirm the award granted.

Plaintiff's motion for renewal of its petition to confirm an
arbitration award was supported by evidence, not submitted on the
prior application, showing that plaintiff timely re-filed the
petition under the terms of the order dismissing the original
petition on technical grounds. Under the circumstances, we find
that plaintiff has demonstrated a "reasonable justification for
the failure to present [the new] facts on the prior motion" (CPLR
2221[e][3]). Accordingly, plaintiff is entitled to renewal, and,

upon renewal, to confirmation of the award, defendant having failed to raise any substantive grounds for denial of that relief on the merits.

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ENTERED: JANUARY 17, 2012

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Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6399 Hopeton Grant, et al., Index 302949/08
Plaintiffs-Appellants,

-against-

United Pavers Co., Inc., et al.,
Defendants-Respondents.

Amy Posner, New York, for appellants.

Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of
counsel), for respondents.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.),
entered July 23, 2010, which granted defendants' motion for
summary judgment dismissing the complaint, unanimously modified,
on the law, to deny the motion, except as to the claim under the
90/180-day category of the Insurance Law, and otherwise affirmed,
without costs.

In this action for personal injuries, plaintiff Hopeton
Grant (plaintiff) alleges that he sustained a serious injury as a
result of a car accident that occurred on September 15, 2007.
Plaintiff's vehicle was struck in the rear by a dump truck owned
by defendant United Pavers Co., Inc. and operated by defendant
Antonio Ricci, while plaintiff attempted to make a left turn.
Plaintiff was removed from the scene by ambulance and taken to a

nearby hospital, where he was treated, stayed for a few days due to his blood pressure and released.

Plaintiffs commenced this action alleging that plaintiff sustained a serious injury under Insurance Law § 5102(d). Defendants subsequently moved for summary judgment dismissing the complaint based on the degenerative nature of plaintiff's injuries so that he would not be able to establish that the automobile accident caused his injuries. Defendants further argued that any injuries plaintiff sustained were resolved, and thus not "significant."

Defendants made a prima facie showing that plaintiff's injuries were not permanent or significant because the injuries had resolved and plaintiff had full range of motion in his left knee and cervical and lumbar spine (see Insurance Law § 5102[d]; *Porter v Bajana*, 82 AD3d 488 [2011]). On review of plaintiff's MRI films, defendants' radiologist noted that plaintiff suffered from a preexisting degenerative condition and that the motor vehicle accident did not proximately cause his injuries (see *Arroyo v Morris*, 85 AD3d 679 [2011]; *Shu Chi Lam v Wang Dong*, 84 AD3d 515 [2011]). These findings establish that any injury to plaintiff's left knee and cervical and lumbar spine was not causally related to the accident (see *Depena v Sylla*, 63 AD3d 504

[2009], *lv denied* 13 NY3d 706 [2009]). Thus, the burden shifted to plaintiff to raise a triable issue of fact.

In opposition to defendants' motion, plaintiffs submitted the affirmation of his treating physicians, Dr. Cabatu and Dr. Liebowitz, who both concluded that plaintiff's injuries were caused by the accident. Dr. Cabatu based his opinion on the MRI report and his clinical examinations of plaintiff beginning a few days after the accident and continuing through the date of his affirmation. Dr. Liebowitz also based his opinion on the MRI report and his treatment of plaintiff's left knee, including arthroscopic surgery that an associate performed in March 2009, 18 months after the accident.

Although plaintiff's physicians did not expressly address defendants' expert's conclusion that the injuries were degenerative in origin, by relying on the same MRI report as defendants' expert, and attributing plaintiff's injuries to a different, yet equally plausible cause, plaintiffs raised a triable issue of fact (*see Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [2011]; *Linton v Nawaz*, 62 AD3d 434, 440 [2009], *affd* 14 NY3d 821 [2010]). Although "[a] factfinder could of course reject this opinion" (*Perl v Meher*, __ NY3d __, 2011 NY Slip Op 08452 [2011]), we cannot say on this record, as a matter

of law, that plaintiff's injuries had no causal connection to the accident.

Plaintiff's deposition testimony that he missed two months from work and that he had significant impairment of his usual and customary activities was insufficient to establish that plaintiff was prevented from performing his usual and customary activities for at least 90 of the 180 days following the accident (Insurance Law § 5102[d]; see *Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522, 523 [2010]; *Valentin v Pomilla*, 59 AD3d 184, 186-87 [2009]).

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

ENTERED: JANUARY 17, 2012


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Tom, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

6548 90 Washington Rest Associates, LLC, Index 600557/10
 Plaintiff-Appellant,

-against-

JDM Washington Street, LLC,
Defendant-Respondent.

Warshaw Burstein Cohen Schlesinger & Kuh, LLP, New York (Bruce H. Wiener of counsel), and Kenneth F. McCallion, New York, for appellant.

Windels Marx Lane & Mittendorf, LLP, New York (Gregory T. Kerr of counsel), for respondent.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered June 14, 2011, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment to the extent of dismissing all claims for damages relating to the loss and/or interruption of business, and denied plaintiff's cross motion for partial summary judgment on its breach of contract claim, unanimously modified, on the law, defendant's motion denied, and plaintiff's cross motion granted to the extent it sought summary judgment on its breach of contract claim that the scaffolding erected and maintained by defendant between August 2008 and August 2010 violated the terms of the parties' lease, and otherwise affirmed, with costs against defendant.

The motion court improperly granted defendant summary judgment dismissing plaintiff's claims for damages from the interruption or loss of business. Triable issues exist as to whether defendant performed any work on the premises. Furthermore, there are triable issues as to whether, if the landlord did perform work, such work was diligently prosecuted, and that the work necessitated the scaffolding.

Plaintiff was entitled to summary judgment on its claim that between August 2008 and August 2010, defendant violated the lease provision requiring that any scaffolding not obstruct the signage for plaintiff's restaurant. The record shows that during the relevant time period the scaffolding obstructed the view of the subject signage and the testimony of the building owner failed to address the specific lease requirement that scaffolding not block the signage.

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is an arbitration agreement which is nevertheless claimed to be invalid or unenforceable because its conditions have not been complied with" (*Matter of Matarasso [Continental Cas. Co.]*, 56 NY2d 264, 266 [1982]).

It is undisputed that the subject accident occurred while the insured was driving a rental car in Mexico. The insured's automobile insurance policy provided benefits for accidents that occurred within the State of New York, "the United States, its territories or possessions, or Canada." Since the policy did not provide for coverage in the geographic area where the accident occurred, it cannot be said that the parties ever agreed to arbitrate this claim (see *Matter of Allstate Ins. Co. (Richards)*, 178 AD2d 142 [1991], *lv denied* 79 NY2d 756 [1992]; cf. *Matter of Fiveco, Inc. v Haber*, 11 NY3d 140 [2008]).

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identifying witness will realize that the police are displaying a person they suspect of committing the crime, rather than a person selected at random" (*People v Gatling*, 38 AD3d 239, 240 [2007], *lv denied* 9 NY3d 865 [2007]).

The lineup identifications were not unduly suggestive (see *People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Regardless of the recorded age difference between defendant and the fillers, the age disparity, as depicted in the lineup photographs, was not so noticeable as to single defendant out (see *People v Amuso*, 39 AD3d 425 [2007], *lv denied* 9 NY3d 862 [2007]). Moreover, age was not a factor in the description given by the identifying witnesses (see *People v Jackson*, 98 NY2d 555, 559 [2002]). We have considered and rejected defendant's remaining arguments concerning the showup and lineup identifications.

Defendant did not preserve his challenges to the sufficiency of the evidence, and we decline to review them in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We further find that 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 credibility and

identification.

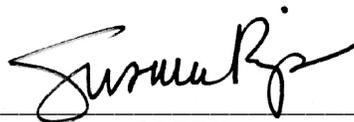
The court properly denied defendant's request for a circumstantial evidence charge. That instruction is only required when the evidence of guilt is entirely circumstantial (*People v Barnes*, 50 NY2d 375, 380 [1980]). Here, the main evidence was the testimony of multiple witnesses that defendant shot the victim.

Defendant's 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.

We perceive no basis to reduce the sentence.

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Tom, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

6560 Eyal Ben-Yosef, et al., Index 602681/07
Plaintiffs-Respondents,

-against-

Yoram Hillel, et al.,
Defendants-Appellants,

QTY Realty Corp.,
Defendant.

Chapman Zaransky, LLP, Mineola (Michael B. Zaransky of counsel),
for appellants.

Bennett D. Krasner, Atlantic Beach (Elizabeth Mark Meyerson of
counsel), for respondents.

Order, Supreme Court, New York County (Martin Shulman, J.),
entered January 28, 2011, which, to the extent appealed from,
denied defendants' motion for summary judgment dismissing the
complaint on the ground of lack of standing, unanimously
affirmed, without costs.

Plaintiffs are investors in a real estate development
relationship with defendants. At some point in their dealings
with defendants, plaintiffs became disenchanted with defendants
and commenced suit to, inter alia, recover funds allegedly due
them from the venture. All defendants except QTY Realty Corp.
(hereinafter defendants) moved for summary judgment on the ground

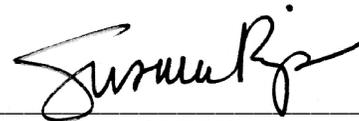
that plaintiffs had no standing to maintain the action. Plaintiffs opposed on the ground that they borrowed the capital investment monies from three nonparty sources. Defendants contend that plaintiffs' deposition testimony establishes that there were no loans and that plaintiffs derived no benefit from the return of the investment monies and from the return on the investments, which were issued to the lenders (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772-773 [1991]). Plaintiffs argue that they directed that the returns on the investment be paid to one of the lenders in repayment of the loans, and that they realized a significant benefit from the repayment of that debt. Defendants' assertion that plaintiffs acted as "agents in fact" for the funding sources, i.e., the "true" investors, is without support in the record. Nevertheless, issues of fact exist whether plaintiffs were the

true investors and whether they derived any benefit from the investment monies that were returned to the lenders.

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

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Tom, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

6561 In re Eduardo E.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about December 13, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of sexual abuse in the second degree, incest in the third degree, and sexual misconduct, and placed him on enhanced supervision probation for a period of 18 months, unanimously affirmed, without costs.

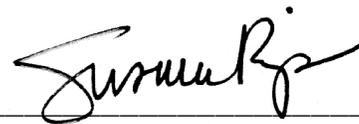
The court properly denied appellant's motion to suppress his statement to the police. The totality of the circumstances establishes that the statement was voluntarily made (*see Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]). There is no evidence that appellant had

any mental impairment that would affect his ability to understand *Miranda* warnings. Appellant turned 16 years of age between the incident and the interrogation; therefore, the special statutory procedures for juvenile interrogations were not required (see Family Court Act § 305.2[2]; *Matter of Christopher QQ*, 40 AD3d 1183 [2007]).

The fact-finding determination 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 court's credibility determinations.

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CLERK

Tom, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

6562 In re Dashawn W., and Others,

Dependent Children Under the
Age of Eighteen Years, etc.,

Antoine N.,
Respondent-Appellant,

Ronnelle B.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

Elisa Barnes, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for Administration for Children's Services, respondent.

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

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about October 4, 2010, which, upon a fact-finding determination that respondent father committed acts constituting severe abuse, found that petitioner Administration for Children's Services (ACS) is excused from making diligent efforts to reunite respondent father with his son, Jayquan N., unanimously affirmed, without costs.

Family Court properly determined, in light of this Court's

prior determination that there was clear and convincing evidence that the child Jayquan N. was "severe[ly] abuse[d]" as that term is defined by Social Services Law § 384-b(8)(a)(i) (see 73 AD3d 574 [2010], *lv dismissed* 16 NY3d 767 [2011]), that such "aggravated circumstances" (Family Ct Act § 1012 [j]) excused ACS from exercising diligent efforts to reunite the father with the child because such efforts would be detrimental to the best interests of the child and are unlikely to be successful in the foreseeable future (Family Court § 1039-b [b] [1]; see *Matter of Marino S.*, 100 NY2d 361 [2003]; *Matter of Stephiana UU.*, 66 AD3d 1160, 1165 [2009]).

We reject the father's attempt to characterize the Family Court's proceedings conducted pursuant to this Court's remand as a wholly distinct and separate hearing. The Family Court's proceeding constituted a continuation of the prior fact-finding hearing in light of this Court's clarification on an issue of law (see 73 AD3d at 575). Moreover, the father's argument that Family Court exceeded its authority by failing to make a reasonable efforts finding simultaneously with a severe abuse finding is also unavailing and, in any event, is precluded under the law of the case doctrine since it was raised and rejected on the prior appeal.

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

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

ENTERED: JANUARY 17, 2012

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CLERK

applicability of the automobile presumption, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. In the circumstances of this case, there was "a reasonably high degree of probability" (*People v Leyva*, 38 NY2d 160, 166 [1975]) that defendant's possession of a large quantity of drugs hidden in a vehicle followed from his presence in the vehicle.

The court properly declined defendant's request for a circumstantial evidence instruction. The case was not based on circumstantial evidence. Instead, it was based on direct evidence of defendant's presence in the car in close proximity to a large quantity of cocaine. From that evidence, the jury could infer possession under the automobile presumption, the theory of constructive possession, or both. The court properly instructed the jury on those theories, and there was no need for the court to give a circumstantial evidence charge as well (see *People v Vasquez*, 56 AD3d 378, 378-379 [2008], *lv denied* 12 NY3d 788 [2009]).

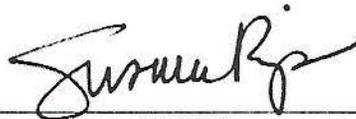
We perceive no basis for reducing the sentence.

This court's prior order (M-3531, 2011 NY Slip Op 60327[U] [January 6, 2011]), which denied defendant's motion to unseal the

minutes of a hearing conducted pursuant to *People v Darden* (34 NY2d 177 [1974]) and for related relief, is dispositive of defendant's remaining claims. In any event, there is no reason to revisit our prior determination.

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

ENTERED: JANUARY 17, 2012

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CLERK

Tom, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

6565-

Index 22741/06

6566 Jason Romero,
Plaintiff-Respondent,

-against-

Morrisania Towers Housing Company
Limited Partnership, et al.,
Defendants-Appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmecci of counsel), for Morrisania Towers Housing Company Limited Partnership, The National Housing Partnership etc., Apartment Investment and Management Company and NHP Management Company, appellants.

Gallo Vitucci & Klar, New York (Kimberly A. Ricciardi of counsel), for First Quality Maintenance, L.P., and Limpiar, Inc., appellants.

Lester Schwab Katz & Dwyer, LLP, New York (Howard R. Cohen of counsel), for McRoberts Protective Agency, appellant.

Berson & Budashewitz, LLP, New York (Jeffrey A. Berson of counsel), for respondent.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered March 23, 2011, which, among other things, denied defendants' motions for summary judgment dismissing the complaint and all related cross claims, unanimously modified, on the law, without costs, to grant defendant McRoberts's motion for summary judgment dismissing the complaint and cross claims against it, grant the motion by defendants First Quality Maintenance and

Limpiar, Inc. (collectively FQM) for summary judgment to the extent of dismissing the complaint against it, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff allegedly slipped and fell on a "brownish liquid" in the stairwell of a building owned and managed by the Morrisania defendants, cleaned by the FQM defendants, and monitored by McRoberts. Defendants failed to make a prima facie showing that they did not have notice of the hazardous condition. Indeed, they did not submit evidence, based on personal knowledge, of their fulfillment of their cleaning and inspection duties at the subject premises on the date in question. Accordingly, the burden did not shift to plaintiff regarding notice (see e.g. *De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566, 566 [2010]).

Nevertheless, McRoberts and the FQM defendants made a prima facie showing that, as service providers pursuant to contracts with Morrisania, they owed no duty of care to plaintiff (see *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140-141 [2002]). In response, plaintiff failed to raise a triable issue of fact as to whether McRoberts or FQM launched a force or instrument of harm by failing to exercise reasonable care in the performance of

their contractual duties; whether they entirely displaced Morrisania's duty to maintain the premises safely; or whether plaintiff detrimentally relied on the continued performance of their contractual duties. Accordingly, the complaint should have been dismissed as against McRoberts and the FQM defendants.

However, FQM is not entitled to summary judgment dismissing the cross claims against it. In its maintenance contract with the Morrisania defendants, FQM agreed to indemnify the "owner" for any loss arising from its cleaning duties. As noted above, FQM failed to offer competent evidence that it properly performed its maintenance duties on the date in question.

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

ENTERED: JANUARY 17, 2012

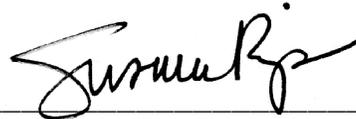
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CLERK

NY3d 342, 348-349 [2007])). There is no basis for disturbing the court's credibility determinations. Defendant's intent to injure the victims, as well as the other elements of the crimes, could be readily inferred from the evidence.

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

ENTERED: JANUARY 17, 2012

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CLERK

Tom, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

6568 Eugene Buckley, Index 401759/09
Plaintiff-Respondent,

-against-

Triborough Bridge and Tunnel Authority,
Defendant-Appellant.

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel),
for appellant.

Sacks and Sacks, New York (Scott N. Singer of counsel), for
respondent.

Order, Supreme Court, New York County (Michael D. Stallman,
J.), entered June 15, 2011, which, to the extent appealed from as
limited by the briefs, denied defendant's motion to dismiss
plaintiff's cause of action based on Labor Law § 241(6),
unanimously affirmed, without costs.

Plaintiff was employed as an iron worker on the Triborough
Bridge. He was injured when, while retrieving an electrical cord
from a basket lift, the loose end of his lanyard became caught
and suddenly released. The lanyard snapped back causing the hook
end to hit his eye. That portion of Industrial Code (12 NYCRR)
section 23-1.8(a), which requires such protective eyewear under
circumstances where an employee is engaged in any "operation
which may endanger the eyes," is specific enough to support a

Labor Law § 241(6) claim (*Galawanji v 40 Sutton Place Condominium*, 262 AD2d 55 [1999], *lv denied* 94 NY2d 756 [1999]). Whether the activity in which plaintiff was engaged presented a foreseeable risk of eye injury, requiring the furnishing of eye protection "suitable for the hazard involved," pursuant to Industrial Code § 23-1.8(a), is a question for the jury (see *Fresco v 157 E. 72nd St. Condominium*, 2 AD3d 326, 328 [2003], *lv dismissed* 3 NY3d 630 [2004]).

We have examined defendant's other contentions, and find them unavailing.

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

ENTERED: JANUARY 17, 2012



CLERK

Tom, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

6571N- Index 666/08

6571NA In re Daniel Z. Rapoport, et al.,
Executors of the Estate of Boris Lurie,
Deceased.

- - - - -

American Friends of New Communities
in Israel Inc., et al.,
Proposed Intervenors-Appellants,

Richard Nadelman, et al.,
Petitioners-Respondents,

Boris Lurie Art Foundation,
Respondent-Respondent,

Elizabeth Goodman,
Respondent.

Wimpfheimer & Wimpfheimer, New York (Michael C. Wimpfheimer of
counsel), for appellants.

Marino & Chambers, P.C., White Plains (Frank P. Marino of
counsel), for Richard Nadelman and Daniel Rapoport, respondents.

DLA Piper US, LLP, New York (Kiran N. Gore of counsel), for Boris
Lurie Art Foundation, respondent.

Eric T. Schneiderman, Attorney General, New York (Ann P. Zybert
of counsel), for Attorney General, respondent.

Order, Surrogate's Court, New York County (Nora Anderson,
S.), entered May 14, 2010, which denied the proposed intervenors'
motion to intervene, unanimously affirmed, without costs. Appeal
from decree, same court and Surrogate, entered on or about May

11, 2010, which reformed Articles Second and Third of the testator's will dated December 28, 2005, unanimously dismissed, without costs.

The Surrogate properly denied the proposed intervenors' request to intervene in the reformation proceeding regarding the testator's will. The proposed intervenors are not named in the will - a fact that they concede - and cannot fulfill the requirement under CPLR 1012 that the judgment may adversely affect their interests (*see Matter of Vaughn*, 267 AD2d 763, 763-64 [1999]; *Matter of Flemm*, 85 Misc 2d 855, 857 [1975]). Indeed, the proposed intervenors base their argument in favor of intervention on the occurrence of a contingent event that might or might not occur at an indeterminate time in the future. The distribution, if any, would rest in the executors' sole discretion. Thus, the proposed intervenors have no standing to intervene (*see Matter of May*, 213 AD2d 838, 839 [1995], *lv dismissed* 85 NY2d 1032 [1995]).

The proposed intervenors' appeal from the reformation decree is improper because they were properly denied leave to intervene, and the appeal therefore must be dismissed.

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

ENTERED: JANUARY 17, 2012

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34 AD3d 706, 708 [2006]). The Court did not address the merits of the motion.

The court properly denied Gramercy's request for attorneys' fees. Even assuming that Gramercy presented competent evidence to show that the lease provision on which it relies was included in the proprietary lease signed by plaintiff, that provision is inapplicable here because plaintiff was not alleged to be in default of the lease (see *Dupuis v 424 E. 77th Owners Corp.*, 32 AD3d 720, 722 [2006]).

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

ENTERED: JANUARY 17, 2012



CLERK

Saxe, J.P., Friedman, Abdus-Salaam, Román, JJ.

4010 George Campbell Painting, et al., Index 116389/08
Plaintiffs-Respondents-Appellants,

-against-

National Union Fire Insurance
Company of Pittsburgh, PA,
Defendant-Appellant-Respondent.

Sedgwick, Detert, Moran & Arnold LLP, New York (Jeffrey M. Winn
of counsel), for appellant-respondent.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Lisa J.
Black of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Walter B. Tolub, J.),
entered May 21, 2009, modified, on the law, to deny plaintiffs
summary judgment on the issues of defendant's pro rata share of
the settlement of the underlying personal injury action and the
dollar amount of such pro rata share, and otherwise affirmed,
without costs.

Opinion by Friedman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
David Friedman
Sheila Abdus-Salaam
Nelson S. Román, JJ.

4010
Index 116389/08

x

George Campbell Painting, et al.,
Plaintiffs-Respondents-Appellants,

-against-

National Union Fire Insurance
Company of Pittsburgh, PA,
Defendant-Appellant-Respondent.

x

Cross-appeals from the order of the Supreme Court,
New York County (Walter B. Tolub, J.),
entered May 21, 2009, which granted
plaintiffs' motion for summary judgment and
denied defendant's cross motion for summary
judgment.

Sedgwick, Detert, Moran & Arnold LLP, New
York (Jeffrey M. Winn and Lawrence Klein of
counsel), for appellant-respondent.

Traub Lieberman Straus & Shrewsberry LLP,
Hawthorne (Lisa J. Black, Meryl R. Lieberman
and Robert S. Nobel of counsel), for
respondents-appellants.

FRIEDMAN, J.

Insurance Law § 3420(d) (redesignated as § 3420[d][2] by L 2008, ch 388, § 5) requires a liability insurer to give the insured or the injured person written notice of disclaimer of a personal injury claim “as soon as is reasonably possible.”¹ In *DiGuglielmo v Travelers Prop. Cas.* (6 AD3d 344 [2004], lv denied 3 NY3d 608 [2004]), we held that, notwithstanding this statutory language, “[a]n insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer” (6 AD3d at 346) (hereinafter, the *DiGuglielmo* rule). Today, we decline to follow, and expressly overrule, the *DiGuglielmo* rule, because we

¹Section 3420(d), as in effect when the subject policy was issued, provided in full:

“If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice *as soon as is reasonably possible* of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant” (emphasis added).

The 2008 amendment, in addition to redesignating the provision as § 3420(d)(2), revised the statutory language slightly (the words “delivered or issued for delivery” were changed to “issued or delivered”). The 2008 amendment applies only to policies issued on or after its effective date (see L 2008, ch 388, § 8), and does not appear to bear on the issues raised on this appeal.

find it to be inconsistent with the text of § 3420(d) and with the decisions of the Court of Appeals interpreting that statute. In so doing, we are mindful of the important role precedent plays in common-law adjudication and of the reliance insurers may have placed on the *DiGuglielmo* rule in conducting their business (although the rule has never been adopted by the Second Department). Nonetheless, as more fully explained below, our determination of this appeal is dictated by fidelity to the plain language chosen by the Legislature, the teachings of our state's highest court, and the policy considerations embodied in the law.

Accordingly, we now hold, in agreement with the Second Department's decision in *City of New York v Northern Ins. Co. of N.Y.* (284 AD2d 291 [2001], *lv dismissed* 97 NY2d 638 [2001]), that § 3420(d) precludes an insurer from delaying issuance of a disclaimer on a ground that the insurer knows to be valid -- here, late notice of the claim -- while investigating other possible grounds for disclaiming.² In this case, therefore, where the record establishes that the insurer had sufficient

²In *Northern*, the Second Department held that an insurer was not entitled, under § 3420(d), to delay issuing a late-notice disclaimer until it finished "investigat[ing] whether the City was an additional insured" because "such an investigation was unrelated to the reason for the disclaimer and [the defense of lack of additional insured status] could have been asserted at any time" (284 AD2d at 292).

information to disclaim coverage on the ground of late notice no later than January 19, 2006, a disclaimer issued on that ground nearly four months later, on May 17, 2006, was ineffective as a matter of law. Once the insurer (defendant National Union Fire Insurance Company of Pittsburgh, Pa. [NUFIC]) possessed all the information it needed to determine that plaintiffs, which sought coverage as additional insureds, had failed to give NUFIC timely notice of the claim as required by the policy, NUFIC had no right to delay disclaiming on the late-notice ground while it continued to investigate whether plaintiffs were, in fact, additional insureds (as NUFIC ultimately determined they were).

This insurance dispute arises from an occurrence during renovation work on the Henry Hudson Bridge, a structure owned by plaintiff Triborough Bridge and Tunnel Authority (TBTA). Plaintiff George Campbell Painting (Campbell) was the general contractor for the project in question, and nonparty Safespan Platform Systems, Inc. (Safespan) was a subcontractor on the project. On August 11, 2003, nonparty James Conklin, a Safespan employee, was injured when he lost his footing and fell down a makeshift hillside ramp that provided access to a shanty office at the work site.

Under its subcontract with Campbell, Safespan was required to obtain liability insurance covering both Campbell and TBTA as

additional insureds. At the time of Conklin's accident, Safespan had primary liability coverage, with a per-occurrence limit of \$1 million, under a policy issued by Gulf Insurance Company (Gulf). Safespan also had excess liability coverage under an umbrella policy issued by defendant NUFIC, with a per-occurrence limit of \$10 million excess of the \$1 million limit of the underlying Gulf policy. The "Additional Insured" endorsement to the Gulf policy provided that the policy would cover "any person or organization for whom you [Safespan] are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." The NUFIC umbrella policy provided that it would provide excess coverage to "[a]ny person or organization . . . included as an additional insured" in the underlying Gulf policy.

In December 2003, Conklin commenced a lawsuit against Campbell and TBTA in Supreme Court, Bronx County (the *Conklin* action), in which he sought recovery for his injuries under the common law and Labor Law §§ 200, 240(1) and 241(6). In January 2004, Campbell and TBTA tendered their defense in the *Conklin* action to Gulf, Safespan's primary insurer, pursuant to the "Additional Insured" endorsement to the Gulf policy. Gulf accepted the tender and appointed a law firm to defend both

Campbell and TBTA (collectively, Campbell/TBTA) in the *Conklin* action. NUFIC, Safespan's excess insurer, was not notified of the *Conklin* action when the defense was tendered to Gulf.

During the course of the *Conklin* action, Campbell/TBTA's counsel periodically sent status reports on the litigation to Gulf. In a status report dated August 23, 2004, counsel discussed potential damages in the case in light of the bill of particulars that Conklin had served. As pertinent to this appeal, the August 2004 status report stated:

"The plaintiff is alleging that due [to] the incident he sustained three herniated discs at L3-L4 with nerve impingement at L4-L5 and L5-S1, a bulging disc at L1-L2 as well as an internal derangement of the shoulder. The herniation at the L3-L4 space required a spinal fusion, indicating a severe injury.

"Although the plaintiff continued to work for almost a month following the incident, he claims he was confined to bed due to his injuries from September 2003 through February 2004. The plaintiff apparently is still primarily confined to home.

"Based on the plaintiff's claim that he was earning approximately \$3,200 a week, his lost earnings total is currently \$130,000. The future lost wage claim is \$9,000,000, which seems quite inflated. It assumes that this relatively young 38 year old plaintiff will never return to any work."

Notwithstanding that, as of August 2004, Campbell/TBTA knew from Conklin's bill of particulars that he was alleging "a severe injury" and was asserting a multi-million-dollar lost wages claim -- which, if successful, would far exceed Safespan's primary

insurance -- NUFIC, the excess insurer, was not given notice of the claim until November 2005, more than a year later. By letter to NUFIC dated November 16, 2005, Campbell/TBTA's counsel advised NUFIC of the pendency of the *Conklin* action and brought to NUFIC's attention that "[Conklin's] attorney has recently represented that [his] damages may substantially exceed the \$1,000,000 limit of liability of the [Gulf] policy."³ Noting that NUFIC was Safespan's excess carrier, the November 16 letter requested that "[NUFIC], as the excess insurer of [TBTA] and [Campbell] with regard to the captioned action, participate with [Gulf] in the handling and resolution of the *Conklin* Action." A copy of the *Conklin* complaint was enclosed with the letter.

According to NUFIC, it received the November 16 letter from Campbell/TBTA's counsel on November 23, 2005. A NUFIC claims adjuster responded by letter dated December 23, 2005. While the December 23 letter acknowledged the existence of "potential excess coverage for Safespan" in connection with the *Conklin* action, NUFIC purported to reserve all of its rights under the policy. In that regard, NUFIC raised, inter alia, the possibility that Campbell/TBTA's notice to NUFIC may have been

³By November 2005, Gulf's name had changed due to a corporate acquisition. For purposes of this appeal, the name change may be ignored.

untimely under the terms of Safespan's policy. As noted in the December 23 letter, one of the "Conditions" of the NUFIC policy provided: "If a claim is made or suit is brought against the Insured that is *reasonably likely to involve this policy* you must notify us in writing as soon as practicable" (emphasis added).

The December 23 letter stated:

"[T]he policy conditions require timely notice. We note that your tender request is our first notice of this loss. It further appears [that] this matter has been in suit for approximately 2 years. However, first notice to NUFIC was not [received] until November 23, 2005. This notice may have breached the foregoing policy conditions."

The December 23 letter requested that Campbell/TBTA provide NUFIC with the Gulf policy, "all contracts between the defendants [in the *Conklin* action] and our insured," "all of counsel's evaluations of liability and/or damages," and "your explanation as to why notice to us was delayed."

By letter to Campbell/TBTA's counsel dated January 17, 2006, the NUFIC claims adjuster noted that NUFIC had not yet received any response to its December 23 letter. Counsel to Campbell/TBTA responded to NUFIC by letter dated January 19, 2006, enclosing (1) Safespan's certificate of insurance under the Gulf policy (the policy itself, the letter stated, would be "forwarded under a separate cover"), (2) the contract between TBTA and Campbell, (3) the subcontract between Campbell and Safespan, and (4) "[a]

copy of our previous status reports to [Gulf] which reflect our evaluations of liability and damages.”

Among the documents transmitted to NUFIC with the January 19, 2006 letter from Campbell/TBTA's counsel was the aforementioned August 2004 status report. However, rather than promptly disclaim on the ground of late notice, NUFIC sent counsel for Campbell/TBTA letters dated March 20 and April 5, 2006, repeating its requests for the Gulf policy. NUFIC finally received a copy of the policy on or about May 1, 2006.

Based on the Gulf policy, NUFIC's claims adjuster concluded that Campbell and TBTA were, in fact, additional insureds under the NUFIC umbrella policy, which “followed form” to the Gulf policy. Nonetheless, by letter dated May 17, 2006, NUFIC rejected the claim on the ground of late notice. NUFIC's May 17 letter stated in pertinent part:

“In his bill of particulars, Conklin alleges a future lost wage claim of \$9 million, which substantially exceeds the limits of the Gulf Policy. Conklin further alleges severe and serious spinal injuries that required, among other things, spinal fusion surgery. This is information that was available to you no later than August 2004. However, we received *first* notice of the suit when we received the tender letter on November 23, 2005, almost *two years* after the complaint was filed on January 9, 2004. Moreover, the tender letter enclosed only the complaint, and we did not receive the August 2004 report on plaintiff's first bill of particulars until January 2006, more than sixteen months after you received the first bill of particulars indicating that coverage under the NUFIC Policy may be

implicated.

"By letter dated December 23, 2005, we responded to your tender, noting potential coverage under the NUFIC Policy and reserving rights on the basis of, among other things, late notice. We requested a copy of the Gulf Policy and an explanation as to the delay in notifying us of the lawsuit. Following our third request for the Gulf Policy, we finally received a copy on or about May 1, 2006. To date, you have not provided us with any explanation for the delay in providing notice to NUFIC.

"An insured's duty to notify its excess insurer arises when the insured has reason to believe that an occurrence is likely to involve excess coverage. Based on our review of the information provided to us, we conclude that NUFIC did not receive timely notice of the lawsuit; therefore, there is no coverage under the NUFIC Policy."

About two years after NUFIC's May 2006 disclaimer, Conklin, Campbell/TBTA and three of Campbell/TBTA's insurers entered into a settlement agreement, dated July 21, 2008, resolving the *Conklin* action for total consideration of \$5,500,000. The settlement was funded as follows: Gulf contributed its full \$1 million policy limit; Campbell's primary insurer, American Home Insurance Company (American Home), contributed its full \$1 million limit; and Campbell's excess insurer, Westchester Fire Insurance Company (Westchester), contributed \$3.5 million. The settlement agreement provided that payment of \$1 million of Westchester's share would not become due until July 1, 2009, and that Campbell/TBTA reserved the right to bring a declaratory

judgment against NUFIC challenging the latter's refusal to provide coverage.⁴

Campbell/TBTA commenced this action against NUFIC in December 2008. The complaint seeks, *inter alia*, (1) a declaration that NUFIC's late-notice disclaimer was untimely under Insurance Law § 3420(d) and (2) recovery from NUFIC of \$999,950, NUFIC's alleged pro rata share of the \$3,500,000 excess layer of the settlement of the *Conklin* action. After joinder of issue, Campbell/TBTA moved for summary judgment. NUFIC opposed Campbell/TBTA's motion and cross-moved for summary judgment in its own favor, arguing, *inter alia*, that Campbell/TBTA had given it late notice of the *Conklin* action and that its disclaimer on that ground had been timely under Insurance Law § 3420(d). Supreme Court granted summary judgment to Campbell/TBTA, holding NUFIC liable "to pay \$999,950.00 as its pro rata share of the excess layer settlement" in the *Conklin* action. NUFIC has appealed, and Campbell/TBTA has cross-appealed on one issue on which it deems itself aggrieved. We modify to deny Campbell/TBTA

⁴Although the settlement agreement gave Westchester the right to pay the final \$1 million installment of the settlement before it became due on July 1, 2009, there is no indication in the record that the final payment was made before the order appealed from was entered on May 21, 2009. Whether the payment was made after entry of the order appealed from is, by definition, a matter outside the record.

summary judgment as to the amount of the settlement NUFIC is obligated to pay, but otherwise affirm.

In determining whether NUFIC's disclaimer was timely under Insurance Law § 3420(d), we begin with the statutory language, which, on its face, requires the insurer to disclaim "as soon as is reasonably possible." This plain language cannot be reconciled with allowing the insurer to delay disclaiming on a ground fully known to it until it has completed its investigation (however diligently conducted) into different, independent grounds for rejecting the claim. If the insurer knows of one ground for disclaiming liability, the issuance of a disclaimer on that ground without further delay is not placed beyond the scope of the "reasonably possible" by the insurer's ongoing investigation of the possibility that the insured may have breached other policy provisions, that the claim may fall within a policy exclusion, or (as here) that the person making the claim is not covered at all. Stated otherwise, the statute mandates that the disclaimer be issued, not "as soon as is reasonable," but "as soon as is reasonably *possible*" (emphasis added).

Here, NUFIC's May 17, 2006 disclaimer letter itself demonstrates that NUFIC had all the information it needed to disclaim on late-notice grounds as of January 19, 2006. As set forth in the excerpt from the May 2006 disclaimer quoted earlier

in this opinion, the information on which NUFIC relied in disclaiming -- that, as of August 2004, Campbell/TBTA knew from Conklin's first bill of particulars that "coverage under the NUFIC [umbrella] Policy may be implicated" because there was a significant likelihood that the value of the claim would exceed the amount of primary coverage -- was received by NUFIC on or about January 19, 2006, when it received a copy of the August 2004 status report describing the contents of Conklin's first bill of particulars. By NUFIC's own account, the contents of the August 2004 status report -- which, to reiterate, NUFIC received in January 2006 -- were sufficient to put Campbell/TBTA on notice that the *Conklin* action was "reasonably likely to implicate the excess coverage" (*Century Indem. Co. v Brooklyn Union Gas Co.*, 58 AD3d 573, 574 [2009] [internal quotation marks omitted]).

Nonetheless, NUFIC did not receive notice of the claim from Campbell/TBTA until November 2005, more than a year after the August 2004 status report. To be clear, not a single document or piece of information that NUFIC's May 17 letter referenced in setting forth its basis for disclaiming on late-notice grounds came into NUFIC's possession *after* January 2006.

Notably, the possible basis for denial of coverage that NUFIC was investigating while withholding its late-notice disclaimer until May 17 -- the possibility that Campbell and TBTA

were not additional insureds under Safespan's NUFIC policy and therefore not covered at all -- would not even have been subject to § 3420(d) had it proven meritorious (see *Zappone v Home Ins. Co.*, 55 NY2d 131, 138 [1982] ["the Legislature in using the words 'denial of coverage' did not intend to require notice when there never was any insurance in effect"]). *Zappone* supports Campbell/TBTA's position in this appeal, since that case establishes that a timely disclaimer on the ground of late notice would not have prejudiced NUFIC's ability to reject the claim subsequently on the additional ground that Campbell and TBTA were not insured, had NUFIC ultimately discovered that the facts justified such a position.⁵

NUFIC contends that the timeliness of its disclaimer is established by the *DiGuglielmo* rule discussed in the first paragraph of this opinion, i.e., the holding that "[a]n insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer" (6 AD3d at 346). As previously stated, we decline to follow the *DiGuglielmo* rule because we find it to

⁵Of course, NUFIC ultimately confirmed that Campbell and TBTA were, in fact, covered by the subject policy as additional insureds. Had it been otherwise, there would be no occasion to discuss the timeliness of NUFIC's disclaimer based on late notice.

be inconsistent with the text of the governing statute -- which, to reiterate, requires that a disclaimer be issued "as soon as is reasonably possible" -- and with the Court of Appeals' jurisprudence on that statute.⁶

To follow the *DiGuglielmo* rule would be in effect to permit an insurer to delay deciding whether to disclaim on grounds known to it while pursuing an investigation of other potential grounds for disclaiming liability or denying coverage. More than 40 years ago, however, the Court of Appeals specifically rejected an insurer's argument that the statute (then codified as Insurance Law § 167[8]) should be read to "requir[e] speed [in giving notice] once the decision to disclaim has been made . . . [but to] permit[] delay in making the decision" (*Allstate Ins. Co. v*

⁶We observe that the *DiGuglielmo* rule was unnecessary to the result in that decision, which held the insurer's disclaimer valid. As noted in *DiGuglielmo*, the insurer in that case "agreed with the insureds to postpone its investigation upon the express condition that plaintiffs waive any claim or defense with respect to the timeliness of any subsequent disclaimer," which waiver was found to be "valid and binding" (6 AD3d at 346). Moreover, the only precedent cited in the decision as support for the *DiGuglielmo* rule concerned the investigation of a *single* ground for disclaimer and, hence, did not raise any question of the propriety of an insurer's waiting to disclaim on a known ground while continuing to investigate *other* possible grounds on which to disclaim (see *2540 Assoc. v Assicurazioni Generali*, 271 AD2d 282, 284 [2000]). Hence, the statement in *2540 Assoc.* that "reasonable investigation is preferable to piecemeal disclaimers" (271 AD2d at 284), does not support NUFIC's position in this case.

Gross, 27 NY2d 263, 268 [1970]). Thus, “[t]he literal language of th[e] statutory provision requires prompt notice of disclaimer after decision to do so, and by logical and practical exclusion, there is imported the obligation to reach the decision to disclaim liability or deny coverage promptly too, that is, within a reasonable time” (Payne and Wilson, New York Insurance Law § 31:15, at 927 [31 West’s NY Prac Series 2010-2011], citing *Gross*). The proposition that an insurer is entitled to hold a known ground for disclaiming in reserve while investigating other grounds for rejecting the claim cannot be squared with *Gross*.

Further, the Court of Appeals has made it abundantly clear that the determination of whether the disclaimer was issued “as soon as [was] reasonably possible” (§ 3420[d]) is made with reference to the time when the insurer first acquired knowledge of the ground upon which it disclaimed. “The timeliness of an insurer’s disclaimer is measured *from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage*” (*Matter of New York Cent. Mut. Fire Ins. Co. v Aguirre*, 7 NY3d 772, 774 [2006] [emphasis added; internal quotation marks omitted], quoting *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 68-69 [2003]; see also *Matter of Allcity Ins. Co. [Jimenez]*, 78 NY2d 1054, 1056 [1991] [same]). “When the basis for denying coverage was or should have been readily

apparent before the onset of the delay [of disclaimer], the insurer's explanation is insufficient as a matter of law" (*Aguirre*, 7 NY3d at 774 [internal quotation marks omitted], quoting *Jetco*, 1 NY3d at 69). Stated otherwise, "A failure by the insurer to give such notice as soon as is reasonably possible *after it first learns of the accident or of grounds* for disclaimer of liability or denial of coverage, precludes effective disclaimer or denial" (*Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1029 [1979] [emphasis added]).

In view of the foregoing, adhering to the *DiGuglielmo* rule would be tantamount to deliberately setting aside the rule promulgated by the Court of Appeals (and flowing naturally from the language of the statute) that "*once the insurer has sufficient knowledge of facts entitling it to disclaim, . . . it must notify the policyholder in writing as soon as is reasonably possible*" (*Jetco*, 1 NY3d at 66 [emphasis added]). We decline to replace the Court of Appeals' rule with a rule that measures the timeliness of a notice of disclaimer from the point in time when the insurer has completed its investigation of *any and all* possible grounds for rejecting the claim, regardless of when the insurer had sufficient knowledge to disclaim on the particular grounds relied upon.

Not surprisingly, the policy behind § 3420(d) is best served

by applying the rule articulated by the Court of Appeals rather than the *DiGuglielmo* rule. Concerning the legislative intent that motivated the enactment of the law, the Court of Appeals has said:

“While the Legislature specified no particular period of time, its words ‘as soon as is reasonably possible’ leave no doubt that it intended to expedite the disclaimer process, thus enabling a policyholder to pursue other avenues expeditiously. As the Legislature’s 1975 Budget Report on the bill that ultimately became section 3420(d) noted, the purpose ‘is to assist a consumer or claimant in obtaining an expeditious resolution to liability claims by requiring insurance companies to give prompt notification when a claim is being denied’ (30-Day Budget Report on Bills, Bill Jacket, L 1975, ch 775)” (*Jetco*, 1 NY3d at 68).

The Court of Appeals then rejected the argument of the insurer in *Jetco* that it was entitled to delay disclaiming on late-notice grounds because it had been investigating other possible sources of insurance for the policyholder. The Court explained that the insurer’s inquiries, even if of some potential benefit to the insured, “may detrimentally delay the policyholder’s own search for alternative coverage. When the insurer promptly disclaims coverage, the policyholder -- perhaps with the aid of its own broker or insurance agent -- is best motivated by its own interest to explore alternative avenues of protection” (*id.* at 69). The Court of Appeals’ reasoning in *Jetco* applies even more strongly here, where the investigation that delayed the

disclaimer was NUFIC's exploration of other possible grounds for rejecting the claim -- an inquiry manifestly undertaken by NUFIC for its own benefit, not that of the parties seeking coverage.

Moreover, just as we would not permit the insured to delay giving the insurer notice of claim while investigating other possible sources of coverage, we should not permit the insurer to delay issuing a disclaimer on a known ground while investigating other possible grounds for avoiding liability. Any uncertainty as to the existence of coverage is irrelevant to the insurer's ability to issue a timely disclaimer based on the insured's breach of a condition precedent to coverage, such as late notice of claim, that is known to the insurer. As previously discussed, such a disclaimer will not prejudice the insurer's ability later to take the position that no coverage exists, should that prove to be the case.

In the final analysis, NUFIC has no answer to the argument that the *DiGuglielmo* rule is inconsistent with the statute and relevant Court of Appeals precedent. Nor can NUFIC convincingly demonstrate any reason to allow an insurance company that knows it has grounds to reject a claim to delay giving the insured notice that the claim will be denied. It seems to us that simple fairness, no less than the governing statute, requires us to hold that a person who is covered by an insurance policy, and is about

to be denied the benefit of that coverage, is entitled to be informed of the denial "as soon as is reasonably possible." In sum, the *DiGuglielmo* rule should no longer be followed because it is contrary to the plain language of § 3420(d), inconsistent with the Court of Appeals precedent applying that statute, and antithetical to the policies that statute was intended to advance.⁷

Having established that NUFIC's disclaimer on the ground of late notice is ineffective as against Campbell and TBTA under Insurance Law § 3420(d), we must address the question of the amount of NUFIC's pro rata share of the settlement. Again, the total amount of the settlement was \$5.5 million, of which \$2 million was funded by paying out the limits of the primary policies issued by Gulf to Safespan and by American Home to Campbell. Accordingly, Campbell/TBTA argues that the excess portion of the settlement is \$3.5 million, to be divided between NUFIC (Safespan's excess carrier) and Westchester (Campbell's excess carrier). Since the limits of the NUFIC and Westchester policies are, respectively, \$10 million and \$25 million,

⁷We note that Insurance Law § 3420(d) applies to excess insurers (see *Zappone*, 55 NY2d at 135 [referring to the predecessor statute, Insurance Law § 167(8)]).

Campbell/TBTA contends that NUFIC's pro rata share is \$999,950.⁸

NUFIC contends that the excess share of the settlement is actually less than \$3.5 million because, in NUFIC's view, coverage is available from TBTA's primary carrier, which has not yet made any payment in connection with the *Conklin* action. Specifically, NUFIC states that, during discussions aimed at resolving this matter in June 2008 (before the commencement of this action), Campbell/TBTA's defense counsel in the *Conklin* action, in response to NUFIC's request, produced a document referring to an insurance policy issued to TBTA by nonparty First Mutual Transportation Assurance Company (First Mutual). In his e-mail transmitting the document to NUFIC, Campbell/TBTA's counsel described the document as "the TBTA primary policy." Based on this representation, NUFIC argues that First Mutual must contribute to the settlement up to its policy limits before coverage under NUFIC's umbrella policy is triggered.

Notwithstanding what their counsel told NUFIC in June 2008, Campbell and TBTA now argue that the document counsel transmitted to NUFIC at that time is not an insurance policy at all, but a

⁸Campbell/TBTA derives the figure of \$999,950 by multiplying \$3.5 million (the amount of the settlement remaining to be funded after the exhaustion of the Gulf and American Home primary policies) by 28.57%, NUFIC's approximate percentage of the combined excess coverage afforded under the NUFIC and Westchester policies.

reinsurance policy covering First Mutual with respect to its coverage of TBTA. In support of this position, Campbell and TBTA submitted to Supreme Court the affidavit of the Director of Risk and Insurance Management of the Metropolitan Transportation Authority (MTA) (with which TBTA is affiliated), who asserted that the document in question "is *not* a true and correct copy of a policy issued by [First Mutual] to TBTA. Nor does that policy provide coverage to TBTA."

Supreme Court resolved the dispute over the alleged First Mutual policy by giving effect to the "Other Insurance" provision therein, which, in summary, states that the coverage afforded thereby is excess to any "other insurance protecting the named insured . . . [that] exists," not including other insurance actually purchased by the named insured. Since there is no evidence that TBTA itself purchased other insurance covering its liability in the *Conklin* action, Supreme Court concluded that the First Mutual policy was excess to all other available coverage, meaning that First Mutual was not obligated to contribute to the settlement so long as the NUFIC and Westchester policies had not been exhausted.

On its appeal, NUFIC argues that Supreme Court's treatment of the First Mutual policy contravenes the rules of priority of coverage established in this Court's precedents (see *e.g.* *Tishman*

Constr. Corp. of N.Y. v Great Am. Ins. Co., 53 AD3d 416 [2008]; *Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140 [2008]). Campbell and TBTA, while not objecting to the court's conclusion that First Mutual need not contribute to the settlement, have cross-appealed on the ground that the court should not have considered the alleged First Mutual policy at all.

In our view, the record is not sufficiently developed for us to render definitive rulings on the nature of the First Mutual policy (if that is what it is) and First Mutual's obligation, if any, to contribute to the settlement. On its face, the document in question does appear to be a reinsurance policy, although it sets forth the terms of an underlying insurance policy issued by First Mutual to the MTA and its affiliates, including TBTA. Notably, the meaning of the portion of the document addressing policy limits ("Addendum No. 1") is not transparent; in any event, it is not clear whether the limit provisions are those of the underlying insurance policy or those of the reinsurance contract. Moreover, the document itself is not complete; the word "SCHEDULE" is printed at the top of the first page, and the reinsurer does not seem to be identified. Nor do the affidavits in the record cast much light on the nature of the alleged First Mutual coverage. In particular, the aforementioned affidavit of

the MTA's Director of Risk and Insurance Management is terse to the point of being cryptic. In sum, further proceedings are required to develop an evidentiary record sufficient to establish precisely what kind of coverage, if any, is available to TBTA from First Mutual, and how any such coverage affects the amount NUFIC is obligated to contribute to the settlement under applicable case law. Accordingly, we modify to deny Campbell and TBTA summary judgment as to the amount of NUFIC's pro rata share of the settlement.

Finally, NUFIC argues that Campbell and TBTA (the insureds) are no longer the real parties in interest in this matter because the agreement settling the *Conklin* action required Westchester to pay the final \$1 million of the settlement consideration on or before July 1, 2009. In this regard, NUFIC interprets a statement in Campbell/TBTA's brief to the effect that Westchester "contributed \$3.5 million" to the settlement as an admission that the full amount of the settlement has been paid. If the settlement has been fully paid by insurers -- leaving the insureds with no actual interest in the case and making Westchester, the other excess insurer, the real party in interest -- the argument that NUFIC's disclaimer was invalid under Insurance Law § 3420(d) would be unavailing, since "the protections of . . . § 3420(d) [are] inapplicable to one

insurer's claim for reimbursement from another insurer" (*American Guar. & Liab. Ins. Co. v State Natl. Ins. Co.*, 67 AD3d 488, 488 [2009], citing *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 91-92 [2005]).

An appeal is decided based on the record on which the order appealed from was rendered. There is no indication in the record on this appeal that Westchester paid the final \$1 million of the settlement of the *Conklin* action at any time before Supreme Court entered its order granting summary judgment to Campbell/TBTA on May 21, 2009 (more than a month before the due date of the final payment under the settlement agreement). Moreover, although NUFIC was at all relevant times aware of the terms of the settlement agreement, in the motion practice leading to the order appealed from, NUFIC never raised the argument that Campbell and TBTA would cease to be real parties in interest upon Westchester's payment of the final portion of the settlement on July 1, 2009, as required by the settlement agreement. Thus, no basis exists for us to consider, in reviewing the order appealed from, whether Campbell and TBTA ceased to be real parties in interest at some point after Supreme Court granted them summary judgment. It suffices to say that there is no indication that they were not real parties in interest when the order under

review was rendered.⁹

Accordingly, the order of the Supreme Court, New York County (Walter A. Tolub, J.), entered May 21, 2009, which granted plaintiffs' motion for summary judgment and denied defendant's cross motion for summary judgment, should be modified, on the law, to deny plaintiffs summary judgment on the issues of defendant's pro rata share of the settlement of the underlying personal injury action and the dollar amount of such pro rata share, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JANUARY 17, 2012



CLERK

⁹We note that, during the pendency of this appeal, NUFIC moved in Supreme Court to renew and vacate the order appealed from, based on its belief that Westchester has made the final settlement payment, thereby depriving Campbell and TBTA of their status as real parties in interest in this dispute. By order entered March 24, 2011, Supreme Court denied that motion. NUFIC has filed a notice of appeal from that order. While we are, in conjunction with the decision of this appeal, denying NUFIC's motion to consolidate this appeal with its unperfected appeal from the March 2011 order (see M-2366, decided simultaneously herewith), nothing said herein should be construed to prejudge the merits of the appeal from the March 2011 order, which is not under review at this time.