



the time of the accident, plaintiff and the rest of the class, consisting of other ASPCA special agents, were paired off to learn a restraint technique known as the "takedown" maneuver. Plaintiff's partner for the simulation was third-party defendant Gankiewicz, another special agent.

At the time of the injury plaintiff was playing the role of a suspect being subdued by Gankiewicz, the "arresting officer." Lopez states in his affidavit that he instructed the class that the person playing the suspect should have his or her hands against a wall to maintain balance throughout the simulation. Plaintiff and Gankiewicz confirmed that the maneuver was to be performed with the "arrestee" using a wall as a brace. Plaintiff also testified that Lopez demonstrated the maneuver. The injury occurred when Gankiewicz executed the maneuver and landed on top of plaintiff before she was able to brace herself against a wall two feet away. Plaintiff attributed the accident to a "miscommunication."

Defendants demonstrated prima facie that Lopez provided appropriate instructions and properly demonstrated the technique (see *David v County of Suffolk*, 1 NY3d 525 [2003]). In opposition, plaintiff failed to raise an issue of triable fact.

The expert affidavit submitted by plaintiff is not sufficient to raise an issue regarding whether the training class

should have been conducted on a floor covered by a mat. The expert failed to elaborate on his experience or provide any information establishing that he is qualified to opine on this issue (see e.g. *Schechter v 3320 Holding LLC*, 64 AD3d 446, 449-450 [1st Dept 2009]). Moreover, defendants did not furnish the premises where the accident occurred.

We have considered plaintiff's remaining contentions and find them unavailing. Accordingly, there is no triable issue of fact as to whether defendants were negligent.

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

ENTERED: JULY 2, 2013

  
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Sweeny, J.P., Saxe, Renwick, Freedman, JJ.

9321            In re H. Kenneth Ranftle, etc.,            File No. 4585/08  
                 Deceased.

                 - - - - -  
                 Ronald J. Ranftle,  
                 Petitioner-Appellant,  
  
                 J. Craig Leiby.  
                 Respondent-Respondent.

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

Weiss, Buell & Bell, New York (Erica Bell of counsel), for respondent.

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Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about September 14, 2011, which dismissed the petition for, inter alia, leave to submit objections to the probate of the will, affirmed.

Before us is the second proceeding challenging the ongoing probate of the last will of decedent H. Kenneth Ranftle. In December 2008, the Surrogate issued a decree granting probate upon the petition of respondent J. Craig Leiby, who is Ranftle's surviving husband and the appointed executor of the will (*Matter of Ranftle*, NYLJ, Feb. 3, 2009 at 27, col 1 [Sur Ct, NY County 2009]).

In June 2009, one of Ranftle's brothers petitioned for vacatur of the probate decree, arguing that recognizing Ranftle's

and Craig's same-sex marriage in Canada would violate New York's public policy. The Surrogate denied the petition, finding the public policy argument to be "patently without merit," and we unanimously affirmed that decision (*Matter of Ranftle*, 81 AD3d 566, 567 [1st Dept 2011]).

In December 2009, another of Ranftle's brothers filed the petition now before us, claiming that the Surrogate's Court lacks jurisdiction over the estate's personal property because Ranftle was domiciled in Florida when he died. In opposition, Leiby contends that, at least six months before his death, Ranftle changed his domicile from Florida to New York.

The Surrogate's Court directed a hearing to determine the question of domicile, after which the Surrogate, in a September 2011 post-hearing decision, found that Leiby had proved by clear and convincing evidence that Ranftle had abandoned his Florida domicile and reestablished domicile in New York. For the reasons set forth below, we affirm.

The following facts were either uncontroverted or were adduced at the April 2011 hearing: Ranftle was born in 1943 in New York City and lived there for most of his life. In 1990, Ranftle and Leiby began living together as domestic partners and remained a committed couple until Ranftle's death. Throughout their relationship, Leiby was domiciled in New York. In 2003,

however, Ranftle, who owned a house in Fort Lauderdale, Florida, changed his domicile to Florida because of certain tax benefits. To qualify as a Florida resident for tax purposes, Ranftle kept diaries to show he spent 183 days, or more than one half a year, in the state for each year from 2003 through 2007.

From the time Ranftle established Florida domicile in 2003 until he moved back to New York in 2008, Ranftle regularly commuted from Florida to be with Leiby. During that period, Ranftle retained his concert and theater subscriptions and made charitable contributions to New York City institutions. Ranftle's financial advisor and his doctors and other health care professionals were also based in New York City.

In March 2008, Ranftle was diagnosed in New York with stage IV adenocarcinoma of the lung and a metastatic tumor of the brain. He never returned to Florida after his diagnosis, but instead lived until his death with Leiby in their jointly-owned New York City condominium.

On May 14, 2008, New York State Governor David Paterson issued an Executive Directive requiring the State's agencies to recognize same-sex marriages that had been validly contracted in other jurisdictions.<sup>1</sup> Leiby testified that, when Ranftle learned

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<sup>1</sup>In contrast to New York, Florida law prohibited at the time, and still prohibits, the recognition of same-sex marriages

about the Executive Directive on the same day that it was issued, he immediately proposed to Leiby, who immediately accepted.

On June 7, 2008, Ranftle and Leiby married in Montreal, Canada, where they owned an apartment. Canada had extended the legal rights of marriage to same-sex couples in 2005. In accordance with Canadian law, the couple executed a declaration of marriage in which both stated that their "domicile after the marriage" would be their New York City apartment.

After the marriage, Ranftle took further affirmative steps to establish residence in New York. These included applying for Social Security from his New York address when he turned 65 in July 2008, shipping his car from Florida to New York, and changing his address of record for his investment accounts and tax documents from that of the Florida house to that of Ranftle's and Leiby's New York apartment. In addition, Ranftle's accountant testified that he had retained her to prepare his tax returns, and when she informed him that he had to file as a New York resident, he assented, but died before any filing took place.

On August 12, 2008, Ranftle executed the will admitted for probate. Ranftle's attorney, who prepared his final will in

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even if the marriage was valid in the jurisdiction where it was performed (see Fla Stat Ann, tit 43, § 741.212).

August 2008, testified at the hearing about what the Surrogate in her September 2011 order described as a "discordant note in this narrative," namely, that the will recites Florida as Ranftle's domicile. The attorney stated that the recitation was the result of her own error. Ranftle had asked her to make specific changes from his prior will to, among other things, reflect the new legal status of his relationship with Leiby. Instead of drafting the new will from scratch, the attorney testified, she produced it by revising the word processing file for Ranftle's prior will, executed while he was a Florida domiciliary. The error had passed unnoticed because both the attorney and Ranftle focused their attention on the dispositional changes Ranftle wanted.

On November 1, 2008, Ranftle died suddenly from a heart attack. His diaries indicate that in 2008 he spent only 13 days in Florida, all before his cancer diagnosis, and that apart from brief visits to Montreal and California, he spent the rest of the year in New York.

In support of his claim that Ranftle did not change his domicile before his death, petitioner relied on the recitation in the final will, Ranftle's failure to change his driver's license, car registration, and Florida homestead declaration, and his vote in Florida by absentee ballot in the November 2008 presidential election.

In her post-hearing decision, the Surrogate found that Leiby had proved by clear and convincing evidence that in 2008, "probably at or around the time of his terminal diagnosis, but no later than his marriage," Ranftle changed his domicile to New York. The Surrogate credited Leiby's testimony and found that it "[told] a compelling and convincing story that answers and/or overcomes [petitioner's] arguments." Ranftle changed his domicile, the Surrogate found, for two reasons: (1) "to be with those he loved, in the city where he had lived and prospered, in the commodious apartment he and his husband owned together" as he faced his mortality; and (2) because New York, unlike Florida, recognized his marriage to Leiby.

Finding the testimony of Ranftle's attorney "highly credible," the Surrogate held that the last will recited a Florida domicile because of a scrivener's error that Ranftle failed to notice when he signed the document. The Surrogate held that Ranftle's vote in Florida by absentee ballot was "an anomaly insufficient to overcome the otherwise compelling evidence that [Ranftle] chose to become, became, and died a domiciliary of New York." She discounted other factors as mere passive acts of omission. Those passive acts included Rantfle's failure to amend a quitclaim deed and other documents showing a Florida domicile, all of which Rantfle had executed before he proposed to and

married Leiby. Accordingly, the Surrogate dismissed the petition.

We see no basis for disturbing the Surrogate's Court's finding that Ranftle changed his domicile to New York in the months before his death. The Surrogate's Court Procedure Act defines domicile as "[a] fixed, permanent and principal home to which a person wherever temporarily located always intends to return" ( SCPA 103[15] ). "The determination of an individual's domicile is ordinarily based on conduct manifesting an intent to establish a permanent home with permanent associations in a given location" (*Matter of Clute v Chu*, 106 AD2d 841, 843 [3d Dept 1984]). A person's domicile is generally a mixed question of fact and law, which the court must determine after reviewing the pertinent evidence (*see Matter of Brunner*, 41 NY2d 917, 918 [1977]). No single factor is dispositive (*Matter of Kartiganer v Koenig*, 194 AD2d 879, 881 [3d Dept 1993]), and the unique facts and circumstances of each case must be considered (*Ruderman v Ruderman*, 193 Misc 85, 87 [Sup Ct, NY County 1948], *affd* 275 AD 834 [1st Dept 1949]). A party alleging a change of domicile has the burden of proving that change by clear and convincing evidence (*Gletzer v Harris*, 51 AD3d 196, 199 [1st Dept 2008], *affd* 12 NY3d 468 [2009]).

We agree with the Surrogate that Leiby met his burden of proof as to the change of domicile. As noted, petitioner's scattered evidence that Ranftle remained a Florida domiciliary is overwhelmed by the large and consistent body of evidence showing that Ranftle moved back into the New York City apartment he shared with his husband with the intent of permanently remaining there, and that his change of domicile was motivated both by his grave illness and New York's recognition of same-sex marriages.

As a final matter, petitioner's contention that SCPA 1403 (1)(c) or (d) required that he be served with a citation is meritless. By their terms, both sections are inapplicable because no other will was filed or offered for probate (see *Matter of Dobbs*, 23 Misc 3d 1105[A] [Sur Ct, Bronx County 2009]; *Matter of Dubelier*, 138 Misc 2d 180, 181 [Sur Ct, NY County 1987]).

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

SWEENEY, J.P. (dissenting)

Respondent failed to show by clear and convincing evidence that the decedent not only physically resided in New York at the time of his death, but also intended to change his domicile to New York (*see Matter of Kartiganer v Koenig*, 194 AD2d 879, 880-881 [3d Dept 1993]; *Matter of Shapiro*, 36 Misc 2d 271, 273 [Sur Ct, Westchester County 1962], *affd* 18 AD2d 837 [2d Dept 1963]). I must therefore dissent.

It is undisputed that decedent changed his domicile from New York to Florida in 2003. From 2003 to 2007, he kept meticulous records to show that he resided in Florida at least the required minimum of 183 days per year in order to maintain proof of his domicile in that state. In an attempt to demonstrate decedent's intent to change his domicile to New York, the majority points to the fact that decedent "regularly commuted" to New York, "retained his concert and theater subscriptions and made charitable contributions to New York City institutions." He also utilized health care professionals in New York City. Decedent used his New York address when he applied for Social Security, had his address changed from Florida to New York for his investment accounts and listed his New York address on his Canadian marriage certificate. He also had one of his vehicles shipped from Florida to New York.

None of this is surprising in view of the fact that, on his last trip to New York in 2008, decedent was diagnosed with stage IV adenocarcinoma of the lung and a metastatic tumor of the brain. He was being treated for this condition at Sloan Kettering, one of the premier cancer treatment centers in the world. In fact, the record reveals that his oncologist and radiologist were literally "blocks" from the apartment he owned with respondent.

This evidence of intent to change domicile, however, is largely ambiguous. It would, of course, make sense for decedent to have his checks and mail sent to the address where he would be residing and receiving medical treatment for an extended period of time. However, this change of residence does not conclusively demonstrate an intent to change domicile (see *Kartiganer*, 194 Ad2d at 880-881; *Shapiro*, 36 Misc2d at 273). Moreover, while the decedent's Canadian marriage documents reflect the New York residence, other documents show the decedent's residence as Florida and New York, but specifically reference his "domicile," as opposed to residence, as Florida. Indeed, the decedent continued to vote in Florida, even doing so while living in New York by absentee ballot a week prior to his death. Additionally, he continued to maintain a house in Florida, and never changed either his Florida driver's license or the Florida registration

of his vehicles. Given decedent's meticulousness in preparing and maintaining records to prove and maintain his Florida domicile, his failure to take obvious actions that would demonstrate an unequivocal intention to change that domicile to New York are clearly inconsistent with any fixed intention to abandon Florida as his domicile.

Decedent's longtime attorney, who drafted the will at issue testified that the Florida domicile as set forth in that will was merely a "scrivener's error," since she had used a prior computer-generated will to make various changes desired by decedent. Attorney statements, while not proof of domiciliary intent in and of themselves, can be considered when supported by decedent's actions; contrariwise, they may be disregarded when they conflict with such actions (see 2-32 Warren's Heaton, Surrogate's Court Practice § 32.11[3][d] at 32-72 [7th ed 2006]).

In this case, both decedent's and his attorney's actions clearly conflict with her statement. Decedent's estate planning documents (health care proxy, living will, durable power of attorney, last will and testament) all specifically declared Florida as his "domicile," while simultaneously declaring that he "resided from time to time" in New York. Significantly, all those documents, as well as the quitclaim deed transferring Florida real property to his revocable trust were prepared and

notarized by the same attorney who now inexplicably claims the Florida domicile in his will was a "scrivener's error." Further, the quitclaim deed was prepared and signed in close temporal proximity to the will. Although decedent transferred the Florida property into a revocable trust for the benefit of respondent, decedent was the sole trustee of that trust. Notably, that revocable trust instrument also specifically declared decedent's domicile as Florida.

These actions do not support the claim that decedent intended to change his domicile. Moreover, the trust affidavit, filed with the court by *respondent* postmortem, also listed decedent as a Florida domiciliary.

Nor is there support in the record for the majority's contention that decedent assented to having his taxes filed in New York due to his new status as a New York domiciliary. This claim arises from an accountant's assertion that, based upon decedent's change of domicile, she would not be able to file taxes for him as a Florida domiciliary. It should be noted that the record does not reflect that decedent ever filed taxes as a New York domiciliary after 2003. In fact, the tax returns upon which respondent rely to prove decedent's intention to establish New York as his domicile were filed by respondent *after* decedent's death, in his capacity as executor of decedent's will.

Curiously, this filing conflicts with respondent's postmortem filing of the trust affidavit, which, as noted above, lists Florida as decedent's domicile.

"A domicile once established is presumed to continue unless and until a new domicile is acquired" (*Matter of Shapiro*, 36 Misc 2d at 273). In order to change domicile, there must be an intention to change domicile coupled with actions consistent with such intent (*id.*). In determining whether a change in domicile has occurred, "[n]o single factor is controlling and the unique facts and circumstances of each case must be closely considered" (*Matter of Gadway*, 123 AD2d 83, 85 [3d Dept 1987]). Where the facts are conflicting, the presumption is strongly in favor of the former domicile as against the asserted one (*Matter of Ratkowsky v Browne*, 267 App Div 643, 646 [3d Dept 1944], *lv denied* 268 App Div 835 [3d Dept 1944]). The party seeking to establish a change in domicile must do so by clear and convincing evidence" (*Matter of Kartiganer*, 194 AD2d at 881). To meet this burden, the proponent of the new domicile "must establish the decedent's intention to effect a change of domicile from [his] acts, statements, and conduct" (*Matter of Urdang*, 194 AD2d 615, 615 [2d Dept 1993]).

Based on my review of the record as a whole, respondent's proof is equivocal at best. It is therefore woefully short of the "clear and convincing" standard required in order to prove a change of domicile.

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

ENTERED: JULY 2, 2013

  
CLERK

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

10103 In re Daquan B.,

A Person Alleged to be  
a Juvenile Delinquent,  
Appellant.

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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 (Michael J. Pastor of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about April 12, 2012, which adjudicated appellant a juvenile delinquent upon his admission that he committed the act of unlawful possession of a weapon by a person under 16, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

A police officer testified that she was investigating an unruly crowd when she observed appellant walking towards her with his arm under his shirt, clutching an object held at his waist. Based on the rigidity of his body and how tightly he held the object, she believed it to be a weapon. As he passed by, she heard him say that he was "going to get him." When she approached with her shield visible around her neck, appellant moved towards her, whereupon she grabbed his hand and felt the

handle of a knife. During a brief struggle, the knife fell to the ground. Appellant was placed under arrest and the knife, which had a six-inch blade, was recovered.

A witness for appellant told the court that he had observed appellant fighting with another individual. Someone intervened to break up the altercation and escorted appellant to his apartment building, where he remained for about 10 minutes. When appellant emerged, he looked angry and flustered. The witness did not hear the officer identify herself prior to struggling with appellant.

Family Court credited the officer's testimony, which was corroborated by the account given by appellant's own witness, and the court's ability to observe the witnesses affords much weight to its findings (*People v Prochilo*, 41 NY2d 759, 761 [1977]). Given appellant's rigid posture, the location of the bulge, his remarks and the attendant circumstances, the officer had reasonable suspicion to detain and frisk him, and appellant's suppression motion was properly denied (see *People v Benjamin*, 51 NY2d 267, 271 [1980]; *Matter of George G.*, 73 AD3d 624 [1st Dept 2010]).

Imposition of a juvenile delinquency adjudication with a 12-month term of probation was a provident exercise of Family Court's discretion. In subjecting appellant to supervision, the

court appropriately weighed the need for protection of the community and the juvenile's best interests (Family Court Act § 352.2[2][a]). While his completion of a counseling program is commendable and he has no prior encounters with the juvenile justice system, it remains that appellant was involved in a fight, obtained a knife and returned to the scene. Finally, the disposition is supported by a Mental Health Services report noting a history of aggressive and disruptive behavior.

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

ENTERED: JULY 2, 2013

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

10300 Claude Williams, Index 117924/04  
Plaintiff-Respondent,

-against-

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

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Wallace D. Gossett, Brooklyn (Lawrence A. Silver of counsel), for appellants.

Arnold E. DiJoseph, New York, for respondent.

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Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered September 20, 2012, which, insofar as appealed from as limited by the briefs, upon a jury trial on liability, apportioned 40% liability to defendants, reversed, on the law, without costs, the judgment vacated, and the matter remanded for a new trial on liability.

Defendants appeal from a judgment entered upon a jury verdict returned at the retrial of this action. Plaintiff is alleged to have sustained personal injury when he stepped off a curb and came into contact with a bus operated by defendant Transit Authority and driven by defendant Cindy Hooper. Upon reversing the prior judgment, this Court noted that plaintiff's theory of the case, as supported by testimony given by independent witnesses, was that he "was hit immediately after he

stepped off the sidewalk and into the path of the bus . . . without looking" and while well outside the crosswalk (82 AD3d 448, 449 [1st Dept 2011]). We noted, "The jury could not rationally have found fault on the part of the bus driver unless it accepted plaintiff's theory that the bus was traveling 'too close' to the curb as it approached the bus stop" (*id.* at 448). However, because defendant had failed to object to the admission of unsubstantiated testimony supporting this theory, reversal was predicated on the improper provision of a *Noseworthy* instruction (*Noseworthy v City of New York*, 298 NY 76 [1948]) and the jury's irrational finding that plaintiff was free of comparative negligence.

Our prior observation followed this Court's decision in *Splain v New York City Tr. Auth.* (180 AD2d 454 [1st Dept 1992], *lv denied* 80 NY2d 759 [1992]), the facts of which do not differ in material respects. There, the plaintiff, standing at the curb, suddenly stepped off, "almost instantly colliding with the side of a Transit Authority bus traveling at a speed of from 10 to 15 miles per hour" (*id.* at 154). We concluded that no actionable negligence was demonstrated (citing *Rucker v Fifth Ave. Coach Lines*, 15 NY2d 516 [1964], *remittitur amended* 15 NY 2d 852, *cert denied* 382 US 815 [1965]).

At the retrial of the instant matter, plaintiff again

posited that Hooper was operating her vehicle too close to the curb. In support of this contention, he was permitted to offer, over defendants' objection, the videotaped testimony of William Careccia, a retired Transit Authority superintendent and supervisor, who investigated the accident. Though not qualified as an expert, Careccia offered conclusions and opinions based on both his common sense and Transit Authority operating criteria, which he conceded "are much higher than anyone else's, so I would look at the accident by our standards a lot different from anyone else."

The admission of testimony that holds a defendant to a higher standard of care than required by common law is clearly erroneous (*see Crosland v New York City Tr. Auth.*, 68 NY2d 165, 168-169 [1986]; *Montes v New York City Tr. Auth.*, 46 AD3d 121, 123-124 [1st Dept 2007]; *Karoon v New York City Tr. Auth.*, 286 AD2d 648, 649 [1st Dept 2001]). Moreover, the admitted testimony cannot be considered harmless error because it concerns the ultimate issue to be decided and corroborates unsupported theories of liability proffered by plaintiff's expert, thereby lending them an unwarranted air of authority. It is well settled that "the duty owed by one member of society to another is a legal issue for the courts" (*Eiseman v State of New York*, 70 NY2d 175, 187 [1987]). Only after the extent of a duty has been

established as a matter of law may a jury resolve -- as a question of fact -- whether a particular defendant has breached that duty with respect to a particular plaintiff (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). As this Court has noted numerous times, "Where the offered proof intrudes upon the exclusive prerogative of the court to render a ruling on a legal issue, the attempt by a plaintiff to arrogate to himself a judicial function under the guise of expert testimony will be rejected" (*Singh v Kolcaj Realty Corp.*, 283 AD2d 350, 351 [1st Dept 2001]; see also *Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 60 [1st Dept 2006]).

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

DeGRASSE, J. (dissenting)

The case involves an accident in which plaintiff, a pedestrian, was struck by a New York City Transit Authority bus. On a prior appeal, we reversed a judgment in favor of plaintiff and ordered a new trial on grounds that included our determination that the jury's finding of no comparative negligence was "irrational" (82 AD3d 448, 453 [1st Dept]).

A critical issue at the instant trial was whether the bus operator was driving too close to the curb line. According to defendants, the accident happened when the bus was two feet, seven inches away from the curb. Citing *Crosland v New York City Transit Authority* (68 NY2d 165 [1986]), *Montes v New York City Transit Authority* (46 AD3d 121 [1st Dept 2007]) and *Karoon v New York City Transit Authority* (286 AD2d 648 [1st Dept 2001]), the majority bases its reversal of the judgment entered solely on the premise that the trial court improperly allowed a New York City Transit Authority (NYCTA) investigator to testify as to his conclusions and opinions which were based on NYCTA's operating criteria which exceeded the common-law negligence standard of care. *Crosland* involved the application of a specific rule, "rule 85," which imposed a duty higher than that actually owed in the exercise of ordinary care (*Crosland*, 65 NY2d at 168-169). *Montes* involved testimony of how the driver's operation of the

vehicle in that case "measured up to the Transit Authority's internal rules and standards" (*Montes*, 46 AD3d at 123). Similarly, *Karoon* involved testimony that was based on actual standards (*Karoon*, 286 AD2d at 649). This case is readily distinguishable because, as defendants concede in their brief, the investigator testified that he was not aware of any Transit Authority rule that dealt with a recommended "safety cushion" between buses and curb lines - a matter on which he and plaintiff's expert opined.<sup>1</sup> Therefore, the majority's premise is flawed as the jury heard no testimony about a standard of care that was higher than that imposed by common law. The argument that defendants actually make is that the investigator's "views were incompetent." This cannot be equated with an argument that the investigator's testimony called for an impermissibly more stringent standard of care.

I am not persuaded by the sole argument set forth in defendants' brief - that plaintiff failed to prove negligence on the part of defendant driver or that such negligence proximately

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<sup>1</sup>Although not binding for purposes of this appeal, we determined on the last appeal that a finding of liability on the safe-cushion theory then advanced by plaintiff's expert was supported by legally sufficient evidence (82 AD3d at 455). In contrast to the majority's conclusion today, we did not find on the last appeal that the safe cushion theory involved a duty higher than that imposed by common law.

caused plaintiff's injuries. In order for a court to set aside a verdict and direct a judgment as a matter of law there must be "no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). I would affirm the judgment entered below because defendants have not made the required showing.

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

ENTERED: JULY 2, 2013

  
CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

10325 Elizabeth Berardi, Index 651207/10  
Plaintiff-Respondent-Appellant,

-against-

Eugene Berardi, et al.,  
Defendants-Appellants-Respondents.

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Nolan & Heller, LLP, Albany (Justin A. Heller of counsel), for appellants-respondents.

Pollock & Maguire, LLP, White Plains (Peter S. Dawson of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered September 24, 2012, which denied defendants' motion to dismiss the complaint as to the causes of action for breach of fiduciary duty, accounting and a permanent injunction, and granted the motion, with leave to plaintiff to replead the causes of action for violation of Business Corporation Law § 720 and dissolution pursuant to Business Corporation Law § 1104-a, unanimously modified, on the law, to dismiss the causes of action for breach of fiduciary duty, accounting, and injunction, to dismiss outright the cause of action for violation of Business Corporation Law § 720, and to vacate the grant of leave replead, and otherwise affirmed, without costs.

Because the underlying allegations of wrongdoing were inadequately pleaded, the fiduciary breach and injunction causes

of action were not sustainable. Although plaintiff alleges, among other things, that defendant tried to prevent her from having any meaningful participation in the companies' operation, her allegations are vague and conclusory, made without any specific instances of the alleged misconduct (see *Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]; *Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]). The lack of particularity with respect to plaintiff's allegations of breach of fiduciary duty (CPLR 3016[b]) is not excused by the individual defendant's alleged refusal to provide information or by the lack of discovery, as information regarding the alleged denial of participation in corporate management was not solely in the individual defendant's possession (cf. *Pludeman v Northern Leasing Sys., Inc*, 10 NY3d 486, 491-492 [2008]; *Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]). Moreover, plaintiff failed to assert specific dates that she had requested information, or to specify the information she had requested (see *Moran v Regency Sav. Bank, F.S.B.*, 20 AD3d 305 [1st Dept 2005]).

As to the 1993 and 1995 shareholder agreements and stock transfer restriction, those agreements had long been in place, reflected valid aspects of corporate governance (see *Allen v Biltmore Tissue Corp.*, 2 NY2d 534 [1957]), and were binding on

plaintiff as a successor to the original shareholders (see *Stasyszyn v Sutton E. Assoc.*, 161 AD2d 269, 272 [1st Dept 1990]). Further, it is undisputed that the agreements were not enforced in a manner discriminating against plaintiff.

Similarly, the IAS court should have dismissed the cause of action under Business Corporation Law § 720, as plaintiff's conclusory claims of wrongdoing are not sufficient to establish demand futility (*Bildstein v Atwater*, 222 AD2d 545, 546 [2d Dept 1995]). At any rate, even had plaintiff established demand futility, the IAS court should have dismissed the cause of action outright because plaintiff sought individual relief and a claim under Business Corporation Law § 720 may be sustained only as a derivative action (*Romanoff v Superior Career Inst.*, 69 AD2d 856 [2d Dept 1979]).

The cause of action for an accounting also fails because, in that claim, plaintiff alleges harm to the corporation itself, rather than to her individually. Therefore, plaintiff should have brought the accounting cause of action as a derivative claim, not an individual one (see *Romanoff*, 69 AD2d at 856; see also *Fisher v Big Squeeze (NY), Inc.*, 349 F Supp 2d 483, 488 [ED NY 2004]).

Although the issues in the individual parties' divorce action differed from the ones in this action, plaintiff had a

full and fair opportunity in the divorce action to address her claims of improper loans and bonuses, and the trial court rejected those claims in that action (see *Genger v Arie Genger 1995 Life Ins. Trust*, 84 AD3d 471, 472 [1st Dept 2011] [relief not specifically granted is deemed denied]). Plaintiff improperly raises for the first time on appeal her contention that, because common law dissolution remains viable, her statutory dissolution claim should not have been dismissed on procedural grounds with leave to replead. Even apart from its procedural impropriety, plaintiff's argument ignores her failure to plead common law dissolution.

In view of the foregoing, it is unnecessary to address the parties' remaining contentions.

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

ENTERED: JULY 2, 2013

  
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principles at issue was inadequate or inaccurate.

The court properly exercised its discretion in denying defendant's motion for a mistrial or related relief, made after a prospective juror expressed a bias against defense counsel. In a sidebar outside the hearing of other panelists, this panelist criticized defense counsel's questioning as demeaning and repetitious. The court provided a sufficient remedy by excusing this prospective juror, issuing a curative instruction to the panel that the jurors' attitudes toward the attorneys were irrelevant and obtaining the panelists' assurances, as a group, that nothing in their impressions of the attorneys would affect their ability to be fair (see *People v Diakite*, 1 AD3d 283, 284 [1st Dept 2003], *lv denied* 2 NY3d 739 [2004]). Defendant did not preserve his claim that the court should have individually questioned the remaining prospective jurors, or the jurors already selected, and we decline to review these claims in the interest of justice. As an alternative holding, we find that the circumstances did not warrant such inquiries.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. An officer observed defendant making repeated adjustments to what appeared to be a heavy waistband bulge in the shape or outline of a pistol. The officer sufficiently explained

the basis for his belief that the bulge resembled a firearm. This observation provided reasonable suspicion to believe that defendant was armed, and it justified police pursuit when defendant fled upon the officer's approach, which led to the detention of defendant by other officers and the recovery of a pistol (see *People v Prochilo*, 41 NY2d 759, 762 [1977]).

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

ENTERED: JULY 2, 2013

A handwritten signature in black ink, appearing to read "Susan R. Jones", written over a horizontal line.

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Friedman, J.P., Sweeny, DeGrasse, Richter, Feinman, JJ.

10510 Jay D. Tini, Index 100244/12  
Plaintiff-Respondent,

-against-

AllianceBernstein L.P., et al.,  
Defendants-Appellants.

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Proskauer Rose LLP, New York (Joseph Baumgarten of counsel), for appellants.

Reilly & Reilly, LLP, Mineola (David T. Reilly of counsel), for respondent.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered June 22, 2012, which denied defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff alleges that he is owed salary, commissions, benefits, and other compensation by his former employer, AllianceBernstein L.P. (ABLP). The parties' agreements allow ABLP to terminate plaintiff's employment "at any time for any reason" and provides for a forfeiture of unvested Restricted Units (RUs) in ABLP, in the event of plaintiff's termination or resignation. While the foregoing reflects an "at will" employment, the parties' agreements also contain a provision which requires plaintiff to provide defendants with 60 days' notice of his resignation and that he would "continue to be eligible for base compensation (salary and/or commissions) and

benefits during the notice period," even though ABLP "may . . . require [that he] discontinue regular duties."

On or about October 11, 2011, plaintiff gave ABLP 60 days notice of his intent to resign on December 9, 2011, eight days after the expected vesting of his rights in certain RUs in ABLP. ABLP then unilaterally reduced the notice period by almost 30 days. Under these circumstances, the court properly determined that plaintiff stated a claim for breach of contract, as the controlling agreements may be interpreted to entitle him to the continued receipt of the benefits of his employment throughout the 60-day notice period. The construction that defendants seek to impose would render the provision of a 60-day notice period, during which he was to continue to receive his salary and compensation, meaningless and in contravention of rules of contractual construction (see *RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272, 274 [1st Dept 2007]).

Furthermore, as unpaid salary and commission constitute "[w]ages" under Labor Law § 190(1), plaintiff has stated a claim under Labor Law § 198 (see e.g. *Beach v Touradji Capital Mgt. L.P.*, 85 AD3d 674, 675 [1st Dept 2011]).

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

ENTERED: JULY 2, 2013

  
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Friedman, J.P., Sweeny, DeGrasse, Richter, Feinman, JJ.

10511 In re Cindy O.,  
Petitioner-Appellant,

-against-

Edna C., et al.,  
Respondents-Respondents.

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Andrew J. Baer, New York, for appellant.

Law Office of Rafael F. Andaluz, Bronx (Rafael F. Andaluz of  
counsel), for respondents.

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Order, Family Court, Bronx County (David Gilman, J.H.O.),  
entered on or about August 7, 2012, which, after a fact-finding  
hearing, dismissed the petitions for orders of protection against  
respondents, unanimously affirmed, without costs.

Petitioner failed to establish by a preponderance of the  
evidence that respondents, her mother and her uncle, committed  
acts that would constitute harassment in the second degree,  
menacing in the third degree, or disorderly conduct (Penal Law §§  
240.26[2], 120.15, 240.20; Family Court Act § 832). The evidence  
indicates that the parties had a single altercation at the  
entranceway to their apartment when petitioner returned in the  
late evening with an unknown man. During the incident,  
petitioner's uncle picked up a knife in the kitchen and told  
petitioner she could not come in with the man, while petitioner's

mother blocked the door. The incident ended with the arrest of petitioner. Petitioner's testimony, which was not credited by the court, was in any event insufficient to establish any of the alleged offenses (see *Matter of Rafael F. v Pedro Pablo N.*, \_\_AD3d\_\_, 2013 NY Slip Op 03787 [1st Dept May 28 2013]).

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

ENTERED: JULY 2, 2013

  
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Defendant argues that plaintiff's evidence failed to raise a triable issue that "but-for" defendant's negligence, plaintiff would have been successful in the underlying action.

Plaintiff's deposition testimony that she fell on loose gravel and/or small rocks on the paved surface of the driveway of the premises she rented, and that the area of the driveway on which she fell was somewhat obscured from view by a parked car, raises factual issues as to whether the cause of her fall was attributable to the loose gravel condition. Any inconsistencies in plaintiff's testimony as to the cause of her fall raise credibility issues for the jury (see *Cuevas v City of New York*, 32 AD3d 372, 373 [1st Dept 2006]).

Defendant's argument that plaintiff's preexisting medical conditions compromised her ability to ambulate and was the cause of her fall is not supported by the evidence and, in any event, the testimony by plaintiff alone raises triable issues as to whether her fall was attributable to the loose gravel/small rock condition on the driveway. There can be more than one proximate

cause of an accident, and a plaintiff need not exclude every other possible cause apart from the landowner's alleged breach of its duty owing to the plaintiff (see *Lopez v 1372 Shakespeare Ave. Hous. Dev. Fund Corp.*, 299 AD2d 230, 232 [1st Dept 2002]).

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

ENTERED: JULY 2, 2013

  
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*People v Gray*, 86 NY2d 10 [1995]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). An emergency room doctor's testimony established the element of serious physical injury. The doctor testified that the victim lost a great deal of blood and that intervention was urgently needed to save her life. The clear import of this testimony was that the injury created a substantial risk of death (see *People v Montimaire*, 91 AD3d 436 [1st Dept 2012], *lv denied* 19 NY3d 865 [2012]).

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

ENTERED: JULY 2, 2013

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", is written over a horizontal line.

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AD3d 314 [1st Dept 2007], *affd* 10 NY3d 846 [2008]; *Jayne Estates, Inc. v Raynor*, 22 NY2d 417, 422 [1968]). Petitioner's architect understood that DOB's interpretation of ZR § 23-49 permitted the building to be constructed along the property's side lot line, and DOB's plan examiner fully reviewed petitioner's plans for compliance with zoning regulations and approved them.

Thereafter, DOB issued construction permits and petitioner erected his building in reliance upon the approved plans and permits. DOB subsequently changed its interpretation of the ZR § 23-49 and issued a stop work order.

Contrary to the motion court's finding, DOB, not petitioner, was in the best position to avoid the erroneous issuance of the permit. BSA's determination denying petitioner's variance application on the ground that he did not rely, in good faith, on DOB's permit, must be annulled, and the matter remanded to BSA to consider whether petitioner satisfied the remaining elements required for a variance (see ZR § 72-21).

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

ENTERED: JULY 2, 2013

  
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the classification hearing defendant did not dispute the fact that he has a prior conviction for attempted sodomy in the second degree.

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

ENTERED: JULY 2, 2013

  
CLERK

Friedman, J.P., Sweeny, DeGrasse, Richter, Feinman, JJ.

10517- Index 116069/10

10517A In re Tenants Committee  
of 36 Gramercy Park,  
Petitioner-Appellant,

-against-

New York State Division of Housing  
and Community Renewal, et al.,  
Respondents-Respondents.

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Gary R. Connor, New York (Martin B. Schneider of counsel), for  
New York State Division of Housing and Community Renewal,  
respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of  
counsel), for 36 Gramercy Park Realty Associates, LLC,  
respondent.

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Appeal from judgment, Supreme Court, New York County  
(Michael D. Stallman, J.), entered October 3, 2011, denying the  
petition to annul the determination of respondent New York State  
Division of Housing and Community Renewal (DHCR), dated October  
14, 2010, which granted respondent owner's application for a  
major capital improvement rent increase, and dismissing the  
proceeding brought pursuant to CPLR article 78, and appeal from  
order, same court and Justice, entered May 21, 2012, which, upon  
reargument and renewal, adhered to the prior determination,  
unanimously dismissed, without costs, pursuant to CPLR 321(a).

Petitioner is a voluntary association comprised of rent-

regulated tenants in the subject building. Patricia Pillette is a member of the association and appears pro se purportedly on behalf of the association. However, Pillette is not an attorney, and a voluntary association may only be represented by an attorney and not by one of its members who is not an attorney admitted to practice in the state of New York (see CPLR 321[a]). Accordingly, petitioner's failure to appear by attorney requires dismissal of the appeals (see *Michael Reilly Design, Inc. v Houraney*, 40 AD3d 592 [2d Dept 2007]; *Matter of Oh v Westchester County Dept. of Consumer Protection*, 287 AD2d 721 [2d Dept 2001]; see also *Hilton Apothecary v State of New York*, 89 NY2d 1024 [1997]).

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

ENTERED: JULY 2, 2013

  
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program's intake director and defendant's own account of the events (*People v Fiammegta*, 14 NY3d 90, 98 [2010]; *People v Valencia*, 3 NY3d 714 [2004]; *People v Redwood*, 41 AD3d 275 [1st Dept 2007], *lv denied* 9 NY3d 880 [2007]). Accordingly, the court properly found that defendant had violated his plea agreement by absconding from the program and had thus forfeited the opportunity for a more lenient disposition.

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 2, 2013

  
CLERK

Friedman, J.P., Sweeny, DeGrasse, Richter, Feinman, JJ.

10519 Roberto Beltran, et al., Index 109873/08  
Plaintiffs-Respondents-Appellants,

-against-

Navillus Tile, Inc., et al.,  
Defendants-Respondents-Appellants,

Liro Engineering and Construction  
Management, et al.,  
Defendants-Appellants-Respondents.

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Raven & Kolbe, LLP, New York (Michael T. Gleason of counsel), for Liro Engineering and Construction Management and Liro Program and Construction Management PE, PC, appellants-respondents.

Epstein, Gialleonardo, Harms & Mcdonald, New York (James Feehan of counsel), for Unisys Electric, Inc., appellant-respondent.

Feld & Korman P.C., New York (John G. Korman of counsel), for Roberto Beltran and Yajahira Beltran, respondents-appellants.

Babchik & Young LLP, White Plains (Ephraim J. Fink of counsel), for Navillus Tile, Inc., URS Corporation, URS Corporation-New York, respondents-appellants.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered April 5, 2012, which, insofar as appealed from as limited by the briefs, denied defendants' motions for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, and denied defendant Liro Engineering and Construction Management and defendant Liro Program and Construction Management PE, P.C.'s (collectively, Liro) motion for summary judgment on its contractual indemnification and

defense claim against defendant Navillus Tile, Inc. (Navillus), unanimously affirmed, without costs. Plaintiffs' appeal from the same order, unanimously dismissed, without costs, as plaintiffs are not aggrieved parties.

The court properly denied all defendants' motions for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them. There are issues of fact about whether Navillus created a puddle of water on the floor, on which plaintiff allegedly slipped and fell, in a corridor in which defendants were performing renovation, by suspending a leaking hose above the floor. In light of the sharply conflicting testimony pertinent to this and other issues, summary judgment is unwarranted. There are also issues of fact about whether Navillus, URS, or Liro had constructive notice of the wet condition, since the testimony of plaintiff and two other witnesses indicated that the hose was slowly dripping water onto the floor near where plaintiff fell, and that the floor of the wide corridor was covered in water about half an inch deep (see *Edwards v BP/CG Ctr. I, Inc.*, 102 AD3d 413 [1st Dept 2013]; *Gonzalez v Port Auth. of N.Y. & N.J.*, 85 AD3d 550 [1st Dept 2011]). Further, there are issues of fact as to whether Unisys Electric Inc., as the electrical contractor responsible for providing temporary lighting in the building, had constructive

notice of the inadequate temporary lights in the corridor at the time of the accident (see *Schirmer v Athena-Liberty Lofts, LP*, 48 AD3d 223 [1st Dept 2008]).

Defendants argue that they cannot be held liable for constructive notice, since control and responsibility over the corridor had been turned over to the building owner prior to the accident. We disagree. Plaintiff's testimony that the floor was made of cement indicates otherwise, since a Navillus employee testified that vinyl tiles would be installed on the floor before the area was turned over to the owner. Moreover, in light of the issues of fact about whether Navillus was using the hose for its renovation in the front lobby of the building, it cannot be concluded as a matter of law that Navillus, URS, and Liro had no responsibility over the corridor if the hose was creating a hazardous condition therein (see *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]; *Badagliacca v Lehrer McGovern Bovis*, 267 AD2d 16 [1st Dept 1999]).

The court also properly denied Liro's motion for summary judgment on its cross claim seeking indemnification and defense from Navillus, pursuant to a contractual provision providing for such indemnification and defense for damages "arising out of or occurring in connection with" Navillus's performance of the work

or failure to perform the work, in light of the aforementioned issues of fact about whether any acts or omissions by Navillus contributed to the accident (see *Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

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

ENTERED: JULY 2, 2013

  
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Friedman, J.P., Sweeny, DeGrasse, Richter, Feinman, JJ.

10521 Leonard W. Hutchings, et al., Index 29494/02  
Plaintiffs-Respondents,

-against-

Morton G. Yuter, et al.,  
Defendants-Appellants.

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Pillinger Miller & Tarallo, LLP, Elmsford (Adam T. Newman of counsel), for Morton G. Yuter and Ten Seventy One Home Corp., appellants.

Henderson & Brennan, White Plains (Lauren J. DeMase of counsel), for Josh Neustein, appellant.

Law Offices Of Daniel Chavez, Bronx (Elizabeth Mark Meyerson of counsel), for respondents.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered May 15, 2012, which denied defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In denying defendants' motions, the motion court did not violate the doctrine of law of the case (*see Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]). In a prior order, decided by a different judge who was not available to hear the motions at issue, the IAS court granted defendant Neustein's motion for summary judgment to the extent of striking the negligence claim against him, but also determined that plaintiff could proceed against him at trial on the theory of *res ipsa loquitur*. In the

order now on review, the motion court properly clarified that the prior order necessarily implied that a cause of action for negligence remained against Neustein, since "without a cause of action for negligence there is no viable cause of action to which to apply the doctrine of res ipsa loquitur" (*Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d 297, 299 [1st Dept 2007]). In any event, this Court, in reviewing the motion court's order, is not bound by law of the case (see *Grullon v City of New York*, 297 AD2d 261, 265 [1st Dept 2002]), and we find that the motion court's clarification of the prior order was correct.

The doctrine of collateral estoppel is inapplicable, since the issue of Neustein's negligence based on the doctrine of res ipsa loquitur was never decided in the prior action (see *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). Further, the issue of defendants Yuter's and Ten Seventy's negligence was not before the court in the prior action, as they were not parties in that action (*id.*).

The motion court correctly determined that res ipsa loquitur applies in this action involving an accident that occurred, according to plaintiff's testimony, when a garage door suddenly fell and struck him on the head, since this is the type of event that does not normally occur in the absence of negligence (*Gutierrez v Broad Fin. Ctr., LLC*, 84 AD3d 648, 649 [1st Dept

2011]; *Allen v Thompson Overhead Door Co.*, 3 AD3d 462, 465 [2d Dept 2004]). Notwithstanding defendants' contentions that others could have had access to the garage door, plaintiff demonstrated sufficient exclusivity of control. "[R]es ipsa loquitur does not require sole physical access to the instrumentality causing the injury and can be applied in situations where more than one defendant could have exercised exclusive control" (*Singh v United Cerebral Palsy of N.Y. City, Inc.*, 72 AD3d 272, 277 [1st Dept 2010]; see *Mejia v New York City Tr. Auth.*, 291 AD2d 225, 227-228 [1st Dept 2002]).

Defendant Yuter's contradictory testimony concerning whether he was present and whether he activated the garage door was insufficient to warrant summary judgment dismissing the action as against him. Indeed, issues of credibility are not to be resolved on summary judgment (see *Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226 [1st Dept 2002]).

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

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

ENTERED: JULY 2, 2013

  
CLERK



Money?" Plaintiff alleges libel based on the ad's statements that plaintiff, in its purported prior incarnation as SHAC Philly and Hugs For Puppies, had ties to SHAC USA (an animal rights organization whose leaders undisputedly were convicted of, among other things, conspiracy to violate the Animal Enterprise Protection Act); that plaintiff's organizers have been involved in violence; and that the media had reported that plaintiff's leader, Nicholas Cooney, threatened to kill the child of a pharmaceutical company that works with Huntingdon Life Sciences, an animal research lab targeted by SHAC USA for its animal testing practices.

The court should have dismissed the amended complaint as against all of the defendants. Contrary to plaintiff's contention, it is a public figure (see *James v Gannett Co.*, 40 NY2d 415, 422 [1976]). It thrust itself to the forefront of the public controversy on animal cruelty and sought to influence public action on this issue. Accordingly, as a public figure, plaintiff must show by clear and convincing evidence that defendants published the ad at issue with actual malice in order to prevail on any claim of libel (*Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 353-354 [2009]).

"[A] libel defendant's burden in support of summary judgment is not . . . to prove as a matter of law that it did not publish

with actual malice, but to point to deficiencies in the record that will prevent plaintiff from proving that fact by clear and convincing evidence" (*id.* at 354). Here, defendants were entitled to summary judgment because they cited deficiencies in the record that prevent plaintiff from proving actual malice (i.e., that defendants "entertained serious doubts as to the truth of [its] publication or acted with a high degree of awareness of . . . probable falsity . . . at the time of publication") by clear and convincing evidence (*see Kipper*, 12 NY3d at 354-355 [internal quotation marks omitted]). Indeed, defendant David Martosko wrote the ad and stated his belief in the veracity of the statements therein, and submitted documentation corroborating his beliefs. The motion court largely credited the veracity of those statements as of 2007. The court, however, focusing on the lack of evidence of misconduct in 2008, during which restraining orders were in place against plaintiff and Cooney, erred in suggesting that the statements were no longer accurate as of 2008. Contrary to the motion court's conclusion, defendants' failure to mention or address the lack of violent acts during this period does not raise a triable issue of fact as to whether they printed the ad with actual malice. Indeed, defendants never even mentioned any misconduct in 2007, and the 2008 events mentioned are

undisputedly accurate. Further, the court and plaintiff cite no facts suggesting that defendants had serious doubts about the truth of any of the statements, in 2008 or any other year.

Plaintiff cites to Martosko's conduct in other cases and urges this Court to discredit his affidavit, asserting that he and defendants are likely to knowingly publish a false advertisement. However, given defendants' detailed and far more specific documentary evidence and testimony, plaintiff's claims are too vague and speculative to defeat defendants' motion. Moreover, a plaintiff's assertions that a jury "might, and legally could, disbelieve the defendant's denial . . . of legal malice are not enough" to defeat a summary judgment motion (*Khan v New York Times Co.*, 269 AD2d 74, 79 [1st Dept 2000] [internal quotation marks omitted]; *Kipper*, 12 NY3d at 357; see also *Bose Corp. v Consumers Union of United States, Inc.*, 466 US 485, 512 [1984]). Further, Martosko's good faith reliance on newspaper articles precludes a finding of actual malice (see *Liberty Lobby, Inc. v Dow Jones & Co., Inc.*, 838 F2d 1287, 1297 [DC Cir 1988], cert denied 488 US 825 [1988]). Plaintiff's alleged denials and warnings regarding the truth of the statements in the ad are also insufficient to raise an issue of fact (see *Edwards v Natl. Audubon Socy., Inc.*, 55 F2d 113, 120-121 [2d Cir 1977], cert denied 434 US 1002 [1977]).

Given the foregoing determination, we need not decide whether plaintiff has raised a triable issue of fact regarding the falsity of the statements at issue in the ad.

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

ENTERED: JULY 2, 2013

  
CLERK

Friedman, J.P., Sweeny, DeGrasse, Richter, Feinman, JJ.

10523N Coby Electronics Co., Ltd., Index 653625/11  
Petitioner-Appellant,

-against-

Toshiba Corporation,  
Respondent-Respondent.

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Holland & Knight LLP, Washington, D.C. (John P. Moran of the bar of the District of Columbia admitted pro hac vice of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Carey R. Ramos of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Bernard J. Fried, J.), entered April 10, 2012, which, to the extent appealed from as limited by the briefs, denied the petition to partially vacate an arbitration award, confirmed the award, and granted respondent's request for attorneys' fees and costs in this litigation, deemed an appeal from judgment, same court and Justice, entered June 14, 2012, and, so considered, the judgment unanimously modified, on the law, to deny respondent's request for attorneys' fees and costs, and otherwise affirmed, without costs.

Assuming, due to the state of the appellate record (see M-2185 [2013 NY Slip Op 74962(U) (1st Dept 2013)]), that petitioner was served with the judgment shortly after it was entered – as opposed to on March 8, 2013 – we exercise our discretion pursuant

to CPLR 5520(c) to deem the appeal from the order an appeal from the judgment, as the two are "not materially different" (*Matter of General Motors Corp. [Sheikh]*, 41 AD3d 993, 994 [3d Dept 2007]).

Petitioner should not be heard to argue that the arbitrator exceeded his power (see 9 USC § 10[a][4]) by awarding respondent royalties based on petitioner's underreporting of sales. In the parties' contract, petitioner agreed that arbitration would take place pursuant to the International Arbitration Rules of the International Centre for Dispute Resolution, and article 15(1) of those rules provides that the arbitrator "shall have the power to rule on its own jurisdiction, including any objections with respect to the . . . scope . . . of the arbitration agreement." In addition, petitioner prevented respondent from conducting the audit that petitioner now contends, in essence, was a condition precedent to awarding underreported royalties. "[A] party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition" (*ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490 [2006] [internal quotation marks omitted]; see also *DeCapua v Dine-A-Mate, Inc.*, 292 AD2d 489, 491 [2d Dept 2002] ["The plaintiff was not entitled to enforce the restrictive covenant in the contract since he breached the contract first . .

. ."). In any event, the audit clause is permissive, not mandatory (see *Toshiba Corp. v American Media Intl., LLC*, 2012 WL 3822759, \*5, 2012 US Dist LEXIS 125344, \*16 [SD NY, Sept. 4, 2012, No. 12-Civ-800 (DLC)]).

Even if we were to reach the merits, we would find that the arbitrator did not exceed his power. Indeed, the parties agreed to arbitrate "[a]ll claims . . . to enforce the terms of th[eir License] Agreement." In the arbitration, respondent was seeking to enforce a term of the agreement – namely, petitioner's obligation to pay royalties. Respondent's claim that petitioner was underreporting royalties involved matters covered by the parties' agreement. Accordingly, the claim was subject to arbitration (see *Collins & Aikman Products Co. v Building Sys., Inc.*, 58 F3d 16, 21 [2d Cir 1995]). Article 2.15 of the parties' agreement providing for an independent audit did not preclude the arbitrator's award of royalties based on petitioner's underreporting of sales (see *Matter of Lamotte v Beiter*, 34 AD3d 356 [1st Dept 2006]).

Petitioner improperly argues for the first time on appeal that the award was irrational because it was not supported by reliable evidence. In any event, petitioner should not be heard to argue that the governmental import/export data on which respondent relied in the arbitration were unreliable, given that

petitioner refused to comply with respondent's document requests in the arbitration.

Respondent, the prevailing party in this litigation, is not entitled to attorneys' fees and costs, as there is no statute, agreement or court rule authorizing that award (see *Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 204 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]). 22 NYCRR 130-1.1 does not entitle respondent to recoup attorneys' fees in this special proceeding. Indeed, the IAS court explicitly concluded that there was no basis for respondent's request for sanctions against petitioner pursuant to 22 NYCRR 130-1.1, and respondent did not cross-appeal. Petitioner opposed respondent's request and did not waive this issue.

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

ENTERED: JULY 2, 2013

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

10526 Elvin Valentin, Index 14500/07  
Plaintiff-Appellant,

-against-

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

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Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of  
counsel), for appellant.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for  
respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.),  
entered May 25, 2012, which denied plaintiff's motion for summary  
judgment as untimely, unanimously affirmed, without costs.

Contrary to plaintiff's contention, the 120-day limit  
imposed by CPLR 3212(a) applies to cases that have been stricken  
from the trial calendar, at least where, as here, the 120-day  
period had expired before the case was struck from the calendar  
(see *Rivera v City of New York*, 73 AD3d 413 [1st Dept 2010],  
citing *Brill v City of New York*, 2 NY3d 648 [2004]).

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

ENTERED: JULY 2, 2013

  
CLERK

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

10527      In re Jaelyn V.L.G.,  
            A Child Alleged to be Neglected, etc.,  
            Christopher G.,  
                    Respondent-Appellant,  
            McMahon Services for Children, etc.,  
                    Petitioner-Respondent.

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Patricia W. Jellen, Eastchester, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Law Office of Kenneth Walsh, New York (Kenneth Walsh of counsel), attorney for the child.

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Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about April 26, 2012, which, to the extent appealed from as limited by the briefs, following a hearing, determined that respondent father had permanently neglected the subject child, unanimously affirmed, without costs.

The finding of permanent neglect against the father is supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). The record establishes that petitioner agency made diligent efforts to encourage and strengthen the parental relationship by, among other things, attempting to contact the father for the purpose of formulating a service plan, directing and encouraging weekend and other visitation between the father

and the child, and referring the father for drug testing, psychological evaluation and family therapy (see *Matter of Calvario Chase Norall W. [Denise W.]*, 85 AD3d 582, 583 [1st Dept 2011]; see also *Matter of Aisha C.*, 58 AD3d 471, 471-472 [1st Dept 2009], *lv denied* 12 NY3d 706 [2009]). Despite these diligent efforts, the father failed during the statutorily relevant time period to plan for the child's future or maintain substantial and continuous contact with the child. Indeed, the father failed to visit with the child on a regular, consistent basis, respond to the agency's attempts to contact him, or comply with the agency's requirements for him to be granted custody of the child, who had never lived with him (see *Matter of Amilya Jayla S. [Princess Debbie A.]*, 83 AD3d 582, 583 [1st Dept 2011]; *Aisha*, 58 AD3d at 472; compare *Matter of Amber W.*, 105 AD2d 888, 891 [3d Dept 1984]).

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

ENTERED: JULY 2, 2013

  
CLERK

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

10530 Manuel Mayo, et al., Index 115545/08  
Plaintiffs-Respondents,

-against-

Metropolitan Opera  
Association, Inc., et al.,  
Defendant-Appellants-  
Respondents.

- - - - -

Metropolitan Opera Association, Inc.,  
Third-Party Plaintiff-  
Appellant-Respondent,

-against-

Strauss Painting, Inc., et al.,  
Third-Party Defendants-  
Respondents-Appellants,

Nova Casualty Company,  
Third-Party Defendant-  
Respondent.

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O'Connor O'Connor Hintz & Deveney, L.L.P., Melville (Eileen M. Baumgartner of counsel), for Metropolitan Opera Association, Inc., appellant-respondent.

London Fischer LLP, New York (Christopher Ruggiero of counsel), for Lincoln Center for The Performing Arts, Inc., appellant-respondent.

Richard Janowitz, Mineola, for Strauss Painting, Inc., respondent-appellant.

Shayne, Dachs, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for Creative Finishes Limited, respondent-appellant.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for Manuel Mayo and Isabel Mayo, respondents.

Melito & Adolfsen, PC, New York (Ignatius John Melito of

counsel), for Nova Casualty Company, respondent.

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Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered November 4, 2011, which, to the extent appealed from, granted plaintiffs' motion for summary judgment on the issue of liability under Labor Law § 240(1), denied defendant Lincoln Center's motion to dismiss the Labor Law §§ 240(1) and 200 and common-law negligence causes of action as against it, granted defendant/third-party plaintiff Metropolitan Opera Association's (the Met) motion for summary judgment on its claims against third-party defendants Strauss Painting and Creative Finishes for breach of an agreement to procure insurance, denied Strauss's and Creative's motions for summary judgment dismissing the third-party complaint as against them, denied the Met's and Creative's motions for summary judgment declaring that third-party defendant Nova Casualty Company is obligated to indemnify and defend them, and granted Nova's motion for summary judgment declaring that it has no obligation to indemnify the Met or Creative, and so declared, unanimously modified, on the law, to deny the Met's motion for summary judgment on its breach of contract cause of action as against Creative, and otherwise affirmed, without costs.

On or about September 3, 2008, the Met contracted to have

the steel carriage rail for its automated window-washing system, which goes around the roof of the Opera House, stripped and repainted. The contract identified the "Contractor" as "Strauss Painting, Inc./Creative Finishes, Ltd.," but the only signature under "Contractor" was that of Strauss's vice president. Strauss subcontracted with Creative to perform the work.

To access the roof and the steel carriage rail, Creative's employees, including plaintiff Manuel Mayo (plaintiff), had to climb a ladder located on the sixth floor of the Opera House and exit onto the roof through a hatch door in the ceiling. Plaintiff and his witnesses testified that the hatch door was easy to open, but difficult to close, in part because of a broken hinge, and that two hands were required to close it. Indeed, Lincoln Center's chief engineer, who had used the hatch at least 100 times, testified that to close the hatch a worker had to break three-point contact with the ladder and somehow wedge his body up against the concrete side of the hatch so as to safely reach up with both hands to close the door. On or about September 16, 2008, plaintiff fell off the ladder while trying to close the hatch using both hands.

The record demonstrates that the Met and Lincoln Center failed to provide adequate safety devices to protect plaintiff from the risks associated with gaining access to the Opera House

roof and the steel carriage rail, and therefore they are liable for plaintiff's injuries under Labor Law § 240(1) (see *Felker v Corning Inc.*, 90 NY2d 219 [1997]). Not only did plaintiff have to be elevated to the roof of the Opera House from the sixth floor, for which a ladder was provided, but he also had to use both hands to close the hatch door while standing on the ladder. No safety device was provided to protect him against the risk associated with breaking three-point contact with the ladder so as to use both hands to close the hatch door.

Lincoln Center argues that the Labor Law § 200 and common-law negligence claims should be dismissed as against it because it did not create or have any notice of a defect in the hatch door. However, its chief engineer's testimony that a worker standing on the ladder had to wedge his body against the wall to avoid falling while reaching up with both hands to close the hatch door raises an issue of fact whether Lincoln Center had notice of the defect in the hatch door. Lincoln Center also argues that it was an out-of-possession landlord not responsible for the maintenance of the Opera House. However, since it raises this argument for the first time on appeal, we decline to consider it. Were we to consider it, we would reject it. Lincoln Center contends that since it has a contractual right to reenter, inspect and repair, it can be held liable for a

dangerous condition on the premises only if it had notice of a significant structural or design defect that is contrary to a specific statutory safety provision (citing *Heim v Trustees of Columbia Univ. in the City of N.Y.*, 81 AD3d 507 [1st Dept 2011]). As indicated, the aforementioned testimony of its chief engineer is sufficient to raise an issue of fact as to its notice of the defect in the hatch door.

The Met seeks indemnification and contribution from Strauss and Creative and damages arising from their failure to procure owner's and contractor's liability insurance. Strauss's vice president, who signed the general contract, testified that he was also a vice president of Creative and had authority to bind Creative to the general contract. However, the presidents of Strauss and Creative dispute this; they claim that Creative is not bound by the general contract. Thus, while the record demonstrates that Strauss is liable to the Met for its failure to procure insurance, issues of fact whether Creative was contractually obligated to procure insurance preclude a finding that Creative too is liable to the Met for a failure to procure insurance.

With respect to Nova's obligation to defend or indemnify either the Met or Creative, the issue of fact whether Creative is bound by the general contract precludes a finding that the Met is

an additional insured under the policy issued to Creative by Nova. However, Nova is not in any event obligated to defend or indemnify the Met or Creative, because the Met's notice of claim was untimely. Of course, if Creative is not bound by the general contract, then Nova is not obligated to defend or indemnify the Met because the Met is not an additional insured under the policy. It does not avail the Met that the subcontract incorporates the general contract by reference, because the policy requires that there be a written agreement between Creative and the Met, as the organization seeking coverage, that the Met will be named an additional insured under the policy (*AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425 [1st Dept 2013]).

Nova's disclaimer of coverage within 30 days of receiving notice of the claim was timely as a matter of law (see e.g. *Public Serv. Mut. Ins. Co. v Harlen Hous. Assoc.*, 7 AD3d 421, 423 [1st Dept 2004]).

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

ENTERED: JULY 2, 2013

  
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foreclosure auction, specifically listed the mortgage among the prior liens of record. In addition, the transcript of the auction reveals that the terms of sale, which were announced before the bidding began, made clear that the unit was being sold subject to plaintiff's mortgage.

We have considered Louzon's remaining arguments and find them to be unavailing.

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appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment on the issue of liability, and granted defendants' cross motion for summary judgment dismissing all but the negligence and breach of contract causes of action as against defendants Cayre Synergy 73rd LLC (the sponsor) and Steven Cayre (Steven), unanimously modified, on the law, to grant plaintiffs' motion as against the sponsor on the breach of contract claim and as against the sponsor and Steven on the negligence claim, and to deny defendants' cross motion as to the nuisance and gross negligence claims as against the sponsor, and otherwise affirmed, without costs.

The fraud claim (the first cause of action) is duplicative of the breach of contract claim (the seventh cause of action) (see e.g. *Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 118 [1st Dept 1998]).

Plaintiffs are entitled to summary judgment as to liability on the negligence claim as against the sponsor and Steven. The sponsor owed a nondelegable duty to plaintiffs to keep the condominium, including its roof, in good repair (see *Multiple Dwelling Law § 78[1]*; *Jacobson v 142 E. 16 Coop. Owners*, 295 AD2d 211 [1st Dept 2002]). The sponsor breached that duty: Its principal, defendant Jack Cayre (Jack), admitted that the original roof that the sponsor had caused to be installed did not

render the condominium watertight and that there were instances of water infiltration into plaintiffs' unit that needed to be addressed by the sponsor. Plaintiffs presented evidence (an affidavit by architect Howard L. Zimmerman) that the leaks in their unit were a direct result of inadequate installation and workmanship on the part of the sponsor. Contrary to defendants' contention, there is no triable issue of fact whether the leaks were caused by third-party defendant Alcon Builders Group Inc., since the work that Alcon was doing in plaintiffs' unit in December 2007 was in the master bedroom, and the leak occurred in the living room. It is undisputed that Steven owned the unit above plaintiffs' unit, that he was having plumbing work done in his unit on June 19, 2008, that water infiltrated plaintiffs' unit on that date, and that the water infiltration stopped once the plumbing work stopped. Jack admitted that a pipe that served Steven's unit leaked into plaintiffs' unit.

There is no basis for holding the other defendants liable for negligence. Plaintiffs have not established that the sponsor's corporate veil should be pierced to reach its members and managers (defendants Cayre 73rd LLC and Synergy 73rd Street Development LLC), that Cayre 73rd LLC's and Synergy's corporate veils should be pierced to reach their owners and managers (defendants David Mallenbaum, Joe Cayre, Jack, and Steven in his

capacity as part owner of Cayre 73rd LLC), or that the condominium's selling agent (defendant CORE Group Marketing LLC), its employee (defendant Thomas Postillo) or the remaining defendant (Michael Haddad) had any responsibility for the water leaks.

The third cause of action (nuisance) should not be dismissed as against the sponsor. Plaintiffs are correct that nuisance can be negligent; it does not have to be intentional (*see Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 569, 571-572 [1977]). In any event, they raised a triable issue of fact whether the sponsor's allowing water to continue infiltrating their unit was intentional (*see Berenger v 261 W. LLC*, 93 AD3d 175, 183-184 [1st Dept 2012]). However, as noted, plaintiffs have not shown that the sponsor's corporate veil should be pierced, and none of the other defendants, except Steven in his capacity as plaintiffs' upstairs neighbor, had any responsibility for water leaks. And the leak from Steven's unit was a one-time occurrence, rather than "a continuous invasion of rights - a pattern of continuity or recurrence of objectionable conduct" (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 124 [2003] [internal quotation marks omitted]).

The motion court and the parties consider the fourth cause of action a gross negligence claim. So considered, it should not

be dismissed as against the sponsor. A jury could reasonably find that the sponsor was grossly negligent because a normally prudent person does not wait three years to replace his or her leaky roof (see *Dalton v Hamilton Hotel Operating Co.*, 242 NY 481, 487 [1926]).

Plaintiffs have not demonstrated that a cause of action for "tortious interference with possessory interest in property" (the fifth cause of action) exists.

Nor is there a cause of action for failure to repair (the sixth cause of action). In *Jacobson v 142 E. 16 Coop. Owners* (295 AD2d at 211), this Court upheld a cause of action supported by the plaintiff's allegation, inter alia, that the defendants "failed to repair the water leaks in his apartment." However, contrary to plaintiffs' contention, the actual cause of action sounded in negligence (see 1997 WL 34628121 [Sup Ct, NY County, Nov. 20, 1997]).

Defendants raise no argument as to plaintiffs' contract claim (the seventh cause of action). The facts described above in connection with the negligence claim show that the sponsor breached its contract with plaintiffs, which incorporated the representations and warranties made in the offering plan for the subject condominium. However, the sponsor is the only defendant that was a party to the contract.

The breach of the implied covenant of good faith and fair dealing claim (the eighth cause of action) is duplicative of the contract claim (see e.g. *Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). In *Frydman & Co. v Credit Suisse First Boston Corp.* (272 AD2d 236, 236, 238 [1st Dept 2000]), on which plaintiffs rely, this Court sustained a cause of action for breach of contract and a cause of action for breach of the implied covenant related to a different contract.

The mental anguish claim (the ninth cause of action) may not be maintained as a separate cause of action (see e.g. *Stanley v Smith*, 183 AD2d 675 [1st Dept 1992]). However, plaintiffs may be able to recover for "discomfort and inconvenience caused by the disturbance of the property" under their nuisance claim (see *Dixon v New York Trap Rock Corp.*, 293 NY 509, 514 [1944]).

The motion court correctly dismissed all claims for damages that have been paid to plaintiffs by their insurer (see CPLR 4545[a]; *Fisher v Qualico Contr. Corp.*, 98 NY2d 534, 539 [2002]). Of course, plaintiffs may still try to recover damages to their unit that have not been reimbursed.

The court also correctly dismissed all claims that duplicate claims brought by the condominium's board, which were settled.

Of course, not all of the claims in the instant case duplicate the ones in the board's case.

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

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ENTERED: JULY 2, 2013

  
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accomplice was going to add additional cocaine so that the aggregate amount sold to the undercover officer would exceed two ounces. We reject this argument because the evidence established defendant's accessorial liability (see Penal Law § 20.00) for the accomplice's sale of cocaine to the officer, and under the circumstances presented this accessorial liability was not necessarily limited to the particular package of cocaine that defendant, himself, provided. Thus, under the facts, defendant was accessorially liable for the sale, regardless of whether he knew how many packages the accomplice would choose to transfer to the purchaser. Defendant had knowledge of the nature of the controlled substance to be sold, and it is not a defense that he did not know the aggregate weight to be sold (see Penal Law § 15.20[4]), regardless of how it was to be packaged or divided.

Defendant claims that his trial counsel rendered ineffective assistance by failing to raise the above-discussed sufficiency issue. This claim is unreviewable on direct appeal because there are indications, not fully developed on the present record, that counsel may have had strategic reasons for not raising the issue (see *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (see *People v*

*Taylor*, 1 NY3d 174, 175-176 [2003]; *People v Benevento*, 91 NY2d 708, 713-714 [1998]; see also *Strickland v Washington*, 466 US 668 [1984]). As indicated, this sufficiency claim is unavailing. Furthermore, it was within "the wide range of professionally competent assistance" (*Strickland*, 466 US at 690) for counsel to forego this sufficiency argument, and, regardless of whether counsel should have made it, defendant has not shown that the lack of this argument affected the outcome of the case or deprived defendant of a fair trial.

Defendant did not preserve his claims that the court should have instructed the jury on accomplice corroboration (see CPL 60.22) and accessorial liability for different degrees of an offense (see Penal Law § 20.15), and we decline to review them in the interest of justice. As an alternative holding, we find that defendant was not prejudiced by the absence of either or both of these instructions. We note that the record indicates that counsel may have had sound strategic reasons for not requesting these charges.

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interest in the apartment through defendant, who purchased it as his nominee. However, plaintiffs failed to submit any documentary evidence to substantiate the alleged nominee agreement which is required to be in writing (*id.*; see *Baker v Latham Sparrowbush Assoc.*, 129 AD2d 667, 668 [2d Dept], *lv denied* 70 NY2d 606 [1987]).

Plaintiffs have, however, raised issues of fact with respect to their claim for constructive trust (see *Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *Palazzo v Palazzo*, 121 AD2d 261, 264 [1st Dept 1986]). The record contains ample evidence of defendant's promise to convey legal title to the apartment to plaintiffs, and defendant does not dispute that she made the promise. Defendant argues that plaintiffs failed to establish that they made any transfer in reliance on her promise. However, the record establishes that in reliance on defendant's promise, plaintiffs satisfied the mortgage and paid the property taxes and common charges for several years (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). We note that defendant does not dispute that she has a confidential relationship with plaintiffs, her brother and sister-in-law.

We reject defendant's argument that she was not unjustly enriched by plaintiffs' payment of the mortgage. The payment of the mortgage conferred very real benefits to defendant, including discharging the bank's mortgage lien on the apartment and saving

defendant \$35,000 in mortgage payments. Defendant's characterization of the mortgage payment as the equivalent of rent, at most, raises an issue of fact as to plaintiffs' motivation in making the payment and defendant's reasons in seeking and accepting plaintiffs' satisfaction of the mortgage and subsequent payment of property taxes and common charges.

Contrary to defendant's argument, plaintiffs' claims are not barred by the applicable six-year statute of limitations (see CPLR 213[1]). The limitations period did not begin to run until May 2010, when defendant unequivocally repudiated her promise to convey legal title by demanding that plaintiffs vacate the premises (see *Quadrozzi v Estate of Quadrozzi*, 99 AD3d 688, 690 [2d Dept 2012]).

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

THIS CONSTITUTES THE DECISION AND ORDER  
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Mazzarelli, J.P., Acosta, Saxe, Freedman, Clark, JJ.

10536 Daniel Purcell, et al., Index 113495/09  
Plaintiffs-Respondents-Appellants, 590061/10  
590282/11

-against-

Metlife Inc., et al.,  
Defendants-Respondents,

Brause Realty Inc.,  
Defendant.

- - - - -

Metlife Inc., et al.,  
Third-Party Plaintiffs-Respondents,

-against-

North Eastern Fabricators, Inc.,  
Third-Party Defendant-Appellant-Respondent.

[And a Second Third-Party Action]

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Malapero & Prisco, LLP, New York (Frank J. Lombardo of counsel),  
for appellant-respondent.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for  
respondents-appellants.

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina of  
counsel), for Metlife Inc., respondent.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Maureen M. Stampf  
of counsel), for JRM Construction Management LLC, respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.),  
entered April 24, 2012, which, to the extent appealed from as  
limited by the briefs, granted defendants-respondents' motions  
for summary judgment dismissing plaintiff Daniel Purcell's Labor  
Law § 200 claim as against defendant JRM Construction Management  
LLC and the Labor Law § 241(6) claim against both defendants to

the extent predicated upon alleged violations of Industrial Code (12 NYCRR) §§ 23-1.7(e), 23-1.11 and 23-1.22(b)(2), granted third-party plaintiffs' motions for conditional summary judgment on their contractual indemnification claim against third-party defendant, and denied so much of third-party defendant's cross motion for summary judgment as sought dismissal of third-party plaintiffs' contractual indemnification claim against it, unanimously affirmed, without costs.

The motion court properly dismissed plaintiff's Labor Law § 200 claim against defendant JRM, because there is no evidence that JRM supervised the means or methods of plaintiff's work (see *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]), and no evidence that it created or had actual or constructive notice of the allegedly dangerous condition that caused plaintiff's injury (see *Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 [1st Dept 2004]; see generally *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

The motion court also properly dismissed plaintiff's Labor Law § 241(6) claims to the extent indicated. Industrial Code (12 NYCRR) § 23-1.7(e)(1) is inapplicable, since plaintiff testified that he slipped on wet plywood while carrying a heavy steel beam, and there is no evidence in the record that plaintiff tripped. Moreover, plaintiff's accident did not take place in a "passageway" within the meaning of that provision; rather, it

occurred in an open-work area on the eighth-floor roof setback of the work site (see *Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]). Section 23-1.7(e)(2) is inapplicable because the wet plywood on which plaintiff slipped is not “debris” or any of the other obstructions listed in that provision; plaintiff does not claim to have slipped or tripped on any scattered tools or other materials (see *Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592, 593 [1st Dept 2013]). Section 23-1.11 is inapplicable, since plaintiff does not claim that his accident was caused by defects in the lumber and nail fastenings used in the construction of the plywood (see *Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207, 208 [1st Dept 2002]). Section 23-1.22(b)(2) is also inapplicable, since the plywood is neither a runway nor a ramp (see *Gray v City of New York*, 87 AD3d 679, 680 [2d Dept 2011], *lv denied* 18 NY3d 803 [2012]).

The motion court correctly found that third-party plaintiffs are entitled to conditional summary judgment on their contractual indemnification claim against third-party defendant. The indemnity provision at issue does not violate General Obligations Law § 5-322.1, as it does not require third-party

defendant to indemnify third-party plaintiffs for their own negligence (*cf. Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 794 [1997]).

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

ENTERED: JULY 2, 2013

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

10537 Sebastian Holdings, Inc., Index 603431/08  
Plaintiff-Appellant,

-against-

Deutsche Bank, AG.,  
Defendant-Respondent.

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Zaroff & Zaroff LLP, Garden City (Richard A. Lafont of counsel),  
for appellant.

Cahill Gordon & Reindel LLP, New York (David G. Januszewski of  
counsel), for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick,  
J.), entered November 9, 2012, which, to the extent appealed  
from, granted in part defendant's motion to dismiss the  
complaint, unanimously affirmed, with costs.

Plaintiff's sixth and ninth claims for breach of contract  
arising from unauthorized trades were properly dismissed. The  
agreements expressly absolved defendant from any liability for  
unauthorized trades by plaintiff's agent. Indeed, as a general  
matter, the agent's knowledge and conduct would have been imputed  
to plaintiff at any rate, under basic agency principles  
(*Kirschner v KPMG LLP*, 15 NY3d 446, 465 [2010]). The parallel  
negligence claim (eighth cause of action) was properly dismissed  
as duplicative of the contract claims (*Clark-Fitzpatrick, Inc. v  
Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). Nor was there any  
showing that the defendant was subject to duties beyond the

roughly thirteen written agreements between the parties (see *Sommer v Federal Signal Corp.*, 79 NY2d 540, 551-553 [1992]).

The conversion claim and quasi contract claims (eleventh through thirteenth causes of action) were also properly dismissed. The conversion claim was duplicative of the contract claim in the ninth cause of action and the quasi contract claims covered the same subject matter as the express contract among the parties (*Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320 [1st Dept 2008]; *Clark-Fitzpatrick*, 70 NY2d at 388). Nor was there any dispute as to the validity or enforceability of those agreements, as opposed to their interpretation. Similarly, the seventh cause of action, for breach of the implied covenant of good faith and fair dealing, was properly dismissed as duplicative of the breach of contract claims (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). Finally, given that the conversion claim was properly dismissed, the claim for punitive damages based on that conduct was also properly dismissed.

THIS CONSTITUTES THE DECISION AND ORDER  
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proceeding or a prospective official proceeding, and intending to prevent such production or use, he suppresses it by any act of concealment" (Penal Law 215.45[2]).

The offense of tampering does not require the actual suppression of physical evidence, but only that a defendant perform an act of concealment while intending to suppress the evidence (*see People v Sandy*, 236 AD2d 104, 112-113 [1st Dept 1997], *lv denied* 91 NY2d 977 [1998]). Regardless of whether the defendant is successful in suppressing the evidence, once an act of concealment is completed with the requisite mens rea, the offense of tampering has been committed. Accordingly, the attempted crime requires only that the defendant engage in conduct that tends to effect, and comes dangerously near to accomplishing, an act of concealment intended to suppress the physical evidence. Here, the evidence supports the conclusion that when defendant discarded bags of heroin he engaged in conduct that satisfied those requirements, even though he was ultimately unsuccessful in concealing the evidence because the police saw where he threw the drugs and promptly recovered them.

Defendant's remaining sufficiency arguments, and his challenge to the court's response to a jury note, are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

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

ENTERED: JULY 2, 2013

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

10540 Fenwick-Keats Realty Index 111290/11  
LLC, etc., et al.,  
Plaintiffs-Appellants,

-against-

212 East 29 St. LLC, etc.,  
Defendant-Respondent.

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Kreinik Associates, LLC, New York (Daniel G. Heyman of counsel),  
for appellants.

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle of  
counsel), for respondent.

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Order, Supreme Court, New York County (Doris Ling-Cohan,  
J.), entered July 17, 2012, which denied plaintiffs' motion for  
summary judgment on its cause of action for breach of an  
agreement to pay a broker's commission, unanimously reversed, on  
the law, with costs and the motion granted.

Defendant's attorney prepared a proposed brokerage agreement  
and forwarded it to plaintiffs. Plaintiffs executed the  
agreement and performed in accordance with its terms. Defendant  
never executed the agreement, but its attempt to repudiate it  
came only after closing, i.e., after it had derived the full  
benefit of the agreement. Thus, defendant is bound by the  
agreement (*see Ambrose Mar-Elia Co. v Dinstein*, 151 AD2d 416, 419  
[1st Dept 1989], *lv denied* 74 NY2d 615 [1989]). Moreover, the

contract of sale contained a brokerage provision stating that the seller (defendant) and the purchaser had dealt with no broker who might be entitled to a commission in connection with this transaction other than plaintiffs "(collectively, the 'Broker')" and that "Seller shall pay the commission due to the Broker pursuant to a separate agreement between Seller and the Broker." This language constitutes an admission that plaintiffs were due a broker's fee from defendant (see *id.* at 418; *Helmsley-Spear, Inc. v New York Blood Ctr.*, 257 AD2d 64 [1st Dept 1999]).

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ENTERED: JULY 2, 2013

  
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offenses and undermine respect for the law" (see Executive Law § 259-i[2][c][A]; *Matter of Silmon*, 95 NY2d at 476). While "less detailed than it might be, [the determination] is not merely 'conclusory'" (see *Matter of Siao-Pao v Dennison*, 11 NY3d 777, 778 [2008]).

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contractual notice provisions as well as time requirements in the grievance procedure are issues to be determined by the arbitrator" (*Matter of United Nations Dev. Corp. v Norkin Plumbing Co.*, 45 NY2d 358, 363-64 [1978]).

Plaintiff contends that defendant waived its right to arbitrate the disputed contingent payment by defending itself in this litigation. Approximately one year after plaintiff commenced this action, the parties settled the litigation with respect to Count I of the complaint which was not arbitrable and defendant amended its answer to remove the affirmative defenses relating to Count I and reflect its position that the parties should arbitrate Count II. Although the parties had previously exchanged requests for document production, and defendant agreed to exchange documents relative to the contingency payment, no documents were exchanged, except for documents previously produced by defendant in a separate litigation regarding the contingent payment to one of plaintiff's former partners.

Defendant's defensive actions before the motion court do not support a finding of a waiver of arbitration (*see Sherrill v Grayco Bldrs.*, 64 NY2d 261, 273 [1985]). Defendant's agreement to produce documentation related to its affirmative defenses, i.e., that plaintiff fraudulently induced the purchase price of the company for an excessive sum, and "[i]n addition to the

weighty purchase price, a small number of former Phoenix employees were also entitled to a revenue-based contingent payment if certain revenue targets were met during 2010 (the "Contingent Payment") did not involve litigating the merits of the disputed contingent payment (see *DeSapio v Kohlmeyer*, 35 NY2d 402, 405 [1974]).

Further, settling Count I and arbitrating Count II has not been prejudicial to plaintiff (see *Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 67 [2007] [finding no waiver based on defendant's limited participation in litigation absent demonstrable prejudice to opposing party]), and it was in the interest of judicial economy that defendant waited until the non-arbitrable claim was settled before moving to arbitrate the arbitrable one.

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

ENTERED: JULY 2, 2013

  
CLERK

Friedman, J.P., Sweeny, Degrasse, Richter, Feinman, JJ.

10544 & In re Anthony Jenkins,  
[M-2772] Petitioner,

Ind. 4318/12

-against-

Hon. Maxwell Wiley, et al.,  
Respondents.

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Anthony Jenkins, petitioner pro se.

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

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The above-named petitioner having presented an application  
to this Court praying for an order, pursuant to article 78 of the  
Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding,  
and due deliberation having been had thereon,

It is unanimously ordered that the application be and the  
same hereby is denied and the petition dismissed, without costs  
or disbursements.

ENTERED: JULY 2, 2013

  
CLERK