SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**AUGUST 11, 2015**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Acosta, Moskowitz, Richter, Feinman, JJ.

14629 Edward Tom, Index 117208/06
Plaintiff-Respondent,

-against-

Robert N. Holtzman, M.D.,
Defendant-Appellant.

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Garson & Jakub LLP, New York (Susan M. McNamara of counsel), for appellant.

Law Offices of Annette G. Hasapidis, Mt. Kisco (Annette G. Hasapidis of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered October 30, 2013, which, after a jury verdict in defendant's favor, granted plaintiff's motion to set aside the verdict to the extent of ordering a new trial on one of plaintiff's three theories of liability, unanimously affirmed, without costs.

In this action for medical malpractice, the jury's verdict with regard to the timing of plaintiff's MRI was at odds with any fair interpretation of the evidence, requiring a new trial on his

theory that defendant departed from good and accepted standards of neurosurgical care by failing to immediately obtain an MRI (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]). Defendant failed to explain how waiting nearly 24 hours to examine plaintiff fell within the relevant standard of care. Upon his examination, defendant determined that plaintiff needed a transfer to a better equipped facility. Notably, defendant conceded that plaintiff needed an MRI "right away, that day," although he offered reasons for the delay. However, there were no MRI technicians available to perform scans on weekends at Cabrini, and he took no steps to either call a technician in or have an MRI performed elsewhere until the following day.

The jury's finding that defendant did not deviate from the standard of care by delaying surgery does not estop plaintiff from pursuing the theory at a second trial that defendant failed to timely obtain an MRI. Plaintiff's theory premised on the

timing of the MRI is independent from his theory regarding the timing of the surgery. To the extent that the questions could result in an inconsistent verdict, defendant failed to object to the wording of the special verdict sheet.

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

ENTERED: AUGUST 11, 2015

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15249N David Friedman, etc., Index 24793/13E
Plaintiff-Respondent,

-against-

The Hebrew Home for the Aged
at Riverdale,
Defendant-Appellant.
- - - - -
Continuing Care Leadership
Coalition and AARP,
Amici Curiae.

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Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellant.

Law Offices of Annette G. Hasapidis, Mt. Kisco (Annette G. Hasapidis of counsel), and Abend & Silber, PLLC, New York (Richard H. Abend of counsel), for respondent.

Roxanne Gregorio Tena-Nelson, New York, for Continuing Care Leadership Coalition, amicus curiae.

AARP, New York (Andrew Strickland of counsel), for AARP, amicus curiae.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered August 6, 2014, which denied defendant's motion to stay this action pending arbitration, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff brought this action alleging negligence after his mother was injured at defendant's facility. Defendant seeks to stay the action pending arbitration, pursuant to the arbitration

clause in the admission agreement that plaintiff executed in placing his mother in its care. Contrary to the motion court's finding, the arbitration clause is not invalidated by Public Health Law § 2801-d ("Private actions by patients of residential health care facilities"). Because defendant is engaged in interstate commerce, the Federal Arbitration Act preempts Public Health Law § 2801-d (*Ayzenberg v Bronx House Emanuel Campus, Inc.*, 93 AD3d 607 [1st Dept 2012]). The McCarran-Ferguson Act (15 USC § 1012[b]), which "reverse preempts" certain federal laws affecting insurance, is not implicated here, because Public Health Law § 2801-d "was not enacted 'for the purpose of regulating the business of insurance,' within the meaning of [the Act]" (*United States Dept. of the Treasury v Fabe*, 508 US 491, 493 [1993]; *see also Matter of Monarch Consulting, Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, 123 AD3d 51, 59-60 [1st Dept 2014]).

We find that the arbitration clause is not unconscionable, either procedurally or substantively (*see Lawrence v Graubard Miller*, 11 NY3d 588 [2008]).

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

ENTERED: AUGUST 11, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Richter, Gische, JJ.

15536 Rosemarie A. Herman, etc., et al., Plaintiffs-Appellants-Respondents, Index 652700/12

-against-

36 Gramercy Park Realty Associates, LLC, et al., Defendants-Respondents-Appellants,

"ABC Company #1," et al., Defendants.

- - - -

J. Maurice Herman, Intervenor-Respondent-Appellant.

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Jaspan Schlesinger, Garden City (Stanley A. Camhi of counsel), for appellants-respondents.

Sills Cummis & Gross P.C., New York (Trent S. Dickey of counsel), for 36 Gramercy Park Realty Associates, LLC; Cosmopolitan Property Acquisition Company, LLC; Mmann LLC; Mann Management, Inc.; and Maurice A. Mann, respondents-appellants.

Akerman LLP, New York (M. Darren Traub of counsel), for J. Maurice Herman, respondent-appellant.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 3, 2014, which granted defendants' motion to dismiss the cause of action for conspiracy as untimely and to dismiss the cause of action for replevin as insufficiently stated, and denied that part of the motion that sought to dismiss the causes of action to quiet title and for ejectment,

unanimously modified, on the law, to deny the motion with respect to the cause of action for conspiracy insofar as it is based on the primary torts alleged against Michael Offit and with respect to the cause of action for replevin insofar as it seeks recovery of membership interests in certain limited liability companies, and otherwise affirmed, without costs.

Because the underlying fraud, constructive fraud and breach of fiduciary duty claims against Michael Offit in his capacity as trustee, brought in a related action, had not accrued until his resignation as trustee less than six years before this action was commenced (*see Matter of Barabash*, 31 NY2d 76, 81 [1972]), the conspiracy cause of action that depended on those claims was timely. However, the cause of action insofar as it was based on the alleged primary wrongdoing by the intervenor was untimely, as the cause of action did not relate back to the commencement of the related 2011 action, which could have contained the instant allegations against defendants (*see Buran v Coupal*, 87 NY2d 173 [1995]). Contrary to defendants' contention, the alleged acts in furtherance of the conspiracy were sufficient to support the cause of action.

The failure to include limited liability membership interests in the General Construction Law § 15 list of "chattel"

subject to replevin is not dispositive, given that the statutory list is by its terms not intended to be exclusive, and it predates by many years the 1994 enactment of the Limited Liability Company Law. We find this claim timely (*see* CPLR 214[3]; *Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 317-318 [1991]). However, replevin of the proceeds of the sales of condominium units does not lie, as the proceeds are not identifiable (*cf. Boyle v Kelley*, 42 NY2d 88 [1977]).

We reject defendants' contention that plaintiff ratified the allegedly void deed that purportedly conveyed her beneficial interest in light of numerous issues of fact as to her knowledge of the conveyance; while a filed deed is a matter of public record, plaintiff, unlike defendants, was not a party to any transaction that would have alerted her to the need to examine such records. Based on the 2002 contract provision stating that defendants had been provided the documents they requested in connection with the challenged 2002 contract, and their knowledge that a 1998 transaction mentioned in that contract involved property held by a trust, there is an issue of fact as to whether they were on notice of any unauthorized transfer by a trustee,

and, as a result, whether they were bona fide purchasers of the properties pursuant to the 2002 contract.

We have considered the parties' and the intervenor's other contentions and find them unavailing.

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

ENTERED: AUGUST 11, 2015

CLERK

Mazzarelli, J.P., Friedman, Richter, Manzanet-Daniels, Gische, JJ.

15593 Joseph Smith, Index 305191/11
Plaintiff-Appellant,

-against-

Craig Roberts, et al.,
Defendants-Respondents.

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Law Office of Arnold Treco, Jr. PLLC, Bronx (Arnold Treco Jr. of counsel), for appellant.

Law Offices of John Trop, Yonkers (David Holmes of counsel), for Craig Roberts, respondent.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for Mamadou Barry, respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered April 9, 2014, which, in an action for personal injuries sustained in a motor vehicle accident, granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law by submitting evidence showing that plaintiff did not sustain a serious injury to his spine and right knee (Insurance Law 5102[d]).

In opposition, plaintiff failed to offer evidence of permanent consequential limitations in his knee or spine.

Defendants met their burden on the 90/180-day category via plaintiff's testimony that he missed three days of work following the accident (*see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522 [1st Dept 2010]). That plaintiff subsequently missed approximately a year of work following surgery that was conducted several months after the accident is not determinative of a 90/180-day injury (*see Nicholas v Cablevision Sys. Corp.*, 116 AD3d 567, 568 [1st Dept 2014]).

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

ENTERED: AUGUST 11, 2015

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13190- Index 102774/11
13191-
13192 The Burlington Insurance Company,
Plaintiff-Respondent,

-against-

NYC Transit Authority, et al.,
Defendants-Appellants.

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Shein & Associates, P.C., Syosset (Charles R. Strugatz of counsel), for appellants.

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Joseph D'Ambrosio of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered December 28, 2012 and January 9, 2013, and order, same court and Justice, entered December 19, 2013, reversed, on the law, with costs, Burlington's motions for summary judgment and to amend the complaint denied, and defendants' cross motion for summary judgment on the first cause of action granted to the extent of declaring that defendants were entitled to coverage in the underlying personal injury action as additional insured under Burlington's policy number HGL0019305 issued to Breaking Solutions, Inc. The Clerk is directed to enter judgment accordingly.

Opinion by Friedman, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Karla Moskowitz
Paul G. Feinman
Judith J. Gische
Barbara R. Kapnick, JJ.

13190-
13191-
13192
Index 102774/11

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The Burlington Insurance Company,
Plaintiff-Respondent,

-against-

NYC Transit Authority, et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order and judgment (one paper) of the Supreme Court, New York County (Michael D. Stallman, J.), entered December 28, 2012 and January 9, 2013, which granted plaintiff summary judgment on its first cause of action declaring that it owes defendants no coverage in the underlying personal injury action, granted plaintiff leave to amend its complaint to assert a second cause of action against defendant New York City Transit Authority (NYCTA) for contractual indemnification as equitable subrogee of the City of New York, and denied defendants' cross motion for summary judgment on the first cause of action, and from the order of the same court and Justice, entered December 19, 2013, which, to the extent appealed from, granted plaintiff's motion for summary judgment for contractual indemnification

against NYCTA and directed judgment in favor of plaintiff.

Shein & Associates, P.C., Syosset (Charles R. Strugatz of counsel), for appellants.

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Joseph D'Ambrosio, Andrew I. Mandelbaum and John A. Mattoon, Jr. of counsel), for respondent.

FRIEDMAN, J.P.

The outcome of this appeal turns on whether defendants New York City Transit Authority (NYCTA) and Metropolitan Transit Authority (MTA) are entitled to coverage from plaintiff The Burlington Insurance Company (Burlington) for the subject loss under policy endorsements making defendants additional insureds, in pertinent part, "only with respect to liability for 'bodily injury,' . . . caused, in whole or in part, by [the named insured's] acts or omissions . . . [i]n the performance of [the named insured's] ongoing operations[.]" The record establishes that the injury to the plaintiff in the underlying action (who was not an employee of the named insured) was caused by an "act" of the named insured in its ongoing operations on behalf of defendants, even though the record also establishes that the named insured was not at fault for causing the accident. This Court's most recent precedents have construed additional insured endorsements containing substantially the same "acts and omissions" language as do the endorsements at issue here as providing additional insured coverage where there is a causal link between the named insured's conduct and the injury, regardless of whether the named insured was negligent or otherwise at fault for causing the accident. Adhering to these precedents, we hold that defendants were entitled to coverage as additional insureds in the underlying action under the subject

insurance policy. Given that the policy covers defendants for this loss, the anti-subrogation rule bars Burlington from recovering, as subrogee of the City of New York, contractual indemnification from defendant NYCTA, under the lease agreement between the City and NYCTA, for the amounts Burlington has paid to defend and settle the underlying action on behalf of the City.

The underlying personal injury action arose from a subway construction project in Brooklyn, for which defendants NYCTA and MTA engaged nonparty Breaking Solutions to supply concrete-breaking excavation machines and personnel to operate the machines under NYCTA's direction. Pursuant to the insurance requirements of its contract, Breaking Solutions obtained a commercial general liability policy from Burlington for the period from July 17, 2008, through July 17, 2009. The Burlington policy includes endorsements designating NYCTA, MTA and the City (the fee owner of subway properties, which are leased to NYCTA) as additional insureds, with such additional insured coverage restricted to, in pertinent part, liability for bodily injury "caused, in whole or in part," by "acts or omissions" of Breaking Solutions.[1]

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[1]Two separate endorsements to the Burlington policy are in play, although the scope of coverage under each is not materially different for purposes of this appeal. The first, on ISO form CG 20 26 07 04, captioned "Additional Insured — Designated Person or Organization," designates NYCTA, but not MTA or the City, as an additional insured, and provides coverage in pertinent part

Also relevant to this appeal is NYCTA's 1953 lease of its transit facilities from the City (the 1953 lease), which contains a provision obligating NYCTA to indemnify the City for liability arising out of NYCTA's control of the leased property. Section 6.8 of the 1953 lease provides that NYCTA

> "covenants that, during the term of this Agreement, it shall be responsible for the payment of, discharge of, defense against, and final disposition of, any and all claims, actions, or judgments, including compensation claims and awards and judgments on appeal resulting from any accident or occurrence arising out of or in connection with the operation, management and control by [NYCTA] of the Leased Property."

On February 14, 2009, an explosion occurred in the Brooklyn subway tunnel that was being excavated by a Breaking Solutions machine. The explosion occurred when the excavator came into

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> "only with respect to liability for 'bodily injury,' . . . caused, in whole or in part, by your [i.e., Breaking Solutions'] acts or omissions or acts or omissions of those acting on your behalf:
>
> > A. In the performance of your ongoing operations[.]"

The other pertinent endorsement, on form IFG-I-0160 1100, designates NYCTA, MTA and the City as additional insureds and provides coverage in pertinent part

> "only with respect to liability for 'bodily injury,' . . . caused, in whole or in part, by:
>
> > 1. Your acts or omissions; or
> > 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured."

contact with an energized electrical cable buried below the concrete. It is undisputed that it had been NYCTA's responsibility to identify and mark or protect hazards in advance, so as to enable the excavator operator to avoid them, and to shut off power to electrical cables in the work area. Thomas Kenny, an employee of NYCTA, was injured when he fell from an elevated work platform as a result of the explosion.

In April 2009, Kenny and his wife (suing derivatively) commenced a personal injury action against the City and Breaking Solutions in the United States District Court for the Eastern District of New York (the *Kenny* action). The City was sued as owner of the subway property for alleged violations of its nondelegable duties under Labor Law § 240(1) and § 241(6). NYCTA was not named in the *Kenny* action, presumably because Kenny, as a NYCTA employee, was barred from suing it under the Workers' Compensation Law.

The City, as a putative additional insured under Breaking Solutions' policy, tendered its defense in the Kenny action to Burlington. While Burlington accepted the tender, it initially did so subject to a reservation of the right to withdraw from the City's defense, and to deny it indemnification, in the event it emerged that the loss was not caused in whole or in part by Breaking Solution's acts or omissions. In December 2009, however, NYCTA sent Breaking Solutions a letter warning that

outstanding and future payments under its contract would be withheld unless Burlington agreed to indemnify the City (to which, as previously noted, NYCTA had its own contractual indemnification obligation). Thereafter, Burlington stated that it would indemnify the City in the *Kenny* action, essentially withdrawing its previous reservation of rights. As a Burlington executive subsequently explained by affidavit in this action, Burlington withdrew its reservation of rights with respect to the City's coverage in the *Kenny* action "as an accommodation to its policyholder," Breaking Solutions.

In or about March 2010, the City commenced a third-party action against NYCTA and MTA, asserting claims for contractual indemnification pursuant to the 1953 lease and for common-law contribution. Burlington accepted tender of the defense of NYCTA and MTA as putative additional insureds under the policy issued to Breaking Solutions. As it had initially done with respect to the City's defense, Burlington assumed the defense of NYCTA and MTA subject to a reservation of the right to withdraw in the event it emerged that the loss did not fall within the scope of the additional insured coverage. Burlington never withdrew its reservation of rights with respect to NYCTA's and MTA's coverage.

In the course of discovery in the Kenny action, it emerged that, while the Breaking Solutions excavator had caused the explosion by disturbing the buried cable, there had not been any

negligence or other fault on the part of the Breaking Solutions employee who operated the excavator. Rather, because NYCTA had failed to identify and mark or protect the cable in preparation for the work, the Breaking Solutions operator had not known of the cable's presence, and NYCTA's failure to shut off power to the cable led to the explosion. NYCTA's internal documents essentially admitted that it was at fault for the incident. For example, in a February 17, 2009 memorandum, a NYCTA superintendent concluded that "the [excavation equipment] [o]perators were operating the equipment properly and had no way of knowing that the cable was submerged in the invert." Another internal NYCTA memorandum, dated March 16, 2009, concluded that "this accident was primarily due to an inadequate/ineffective inspection process for identifying job-site hazards involving buried energized cables."

The evidence that Breaking Solutions had not been at fault for the explosion prompted Burlington to disclaim coverage of NYCTA and MTA by letter dated December 10, 2010. Burlington took the position that, because there was no evidence that the explosion had resulted from negligence or other fault on the part of Breaking Solutions, Kenny's injury had not been "caused, in whole or in part," by any "act or omission" of Breaking Solutions (the named insured), and that NYCTA and MTA therefore were not, for purposes of the *Kenny* action, additional insureds of

Burlington under the relevant endorsements to Breaking Solutions' policy. Thereafter, in March 2011, Burlington commenced the present action in Supreme Court, New York County, asserting a single cause of action for a declaration that it does not owe NYCTA or MTA coverage with respect to the *Kenny* action under the Breaking Solutions policy.

In September 2011, the federal court granted a motion by the plaintiffs in the *Kenny* action to dismiss their own claims against Breaking Solutions with prejudice.[2] In the same order, the court also dismissed from the *Kenny* action, without prejudice, the City's third-party claims against NYCTA and MTA, for the purpose of expediting the adjudication of the main action against the City. The City's and Breaking Solutions' cross claims against each other were dismissed pursuant to stipulation.

In June 2012, Burlington settled the *Kenny* action on behalf of the City, paying the plaintiffs $950,000. The following month, Burlington moved for leave to amend its complaint in this action to add a second cause of action, seeking to recover, as subrogee of the City's contractual indemnification rights under the 1953 lease, the amounts Burlington had expended on behalf of the City in the settlement and defense of the *Kenny* action.

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[2]NYCTA and MTA, which were by then paying for their own defense in the *Kenny* action, did not object to the dismissal of Breaking Solutions from the case. NYCTA also consented to the settlement in its capacity as holder of a lien for the workers' compensation benefits it had paid Kenny.

NYCTA and MTA opposed the motion to amend the complaint and cross-moved for summary judgment on the declaratory judgment claim pleaded in the original complaint. While that motion and cross motion were still pending, Burlington made a second motion for summary judgment declaring that it does not owe NYCTA and MTA coverage under the Breaking Solutions policy because Kenny's injury was not caused by any negligence on the part of Breaking Solutions.

In the first decision under review, which was first entered as an order on December 28, 2012, and then as a judgment on January 9, 2013, Supreme Court granted Burlington leave to amend the complaint to add a contractual indemnification claim against NYCTA (but not MTA, which is not a party to the 1953 lease) and summary judgment declaring that NYCTA and MTA were not covered by the Breaking Solutions policy for purposes of the *Kenny* action. The court also denied the cross motion by NYCTA and MTA for summary judgment in their favor on the coverage issue. The court first held that NYCTA and MTA were not additional insureds under the Breaking Solutions policy for purposes of the *Kenny* action, relying on this Court's decision in *Crespo v City of New York* (303 AD2d 166 [1st Dept 2003]) (more fully discussed below), which construed "acts and omissions" language in an additional insured endorsement. The court also rejected NYCTA's contention that Burlington could not be subrogated to the City's

indemnification rights because, assuming the correctness of Burlington's position on the coverage issue (with which the court had agreed), Burlington's settlement of the *Kenny* action on the City's behalf would have been voluntary.[3] Having found that NYCTA and MTA were not additional insureds for purposes of the *Kenny* action, the court rejected their alternative argument that the anti-subrogation rule bars Burlington from pursuing the contractual indemnification claim as the City's subrogee.[4]

In the second decision and order under review, entered on December 19, 2013, the court, insofar as relevant to this appeal, granted Burlington's motion for partial summary judgment as to liability in its favor on its cause of action against NYCTA, as subrogee of the City, for contractual indemnification pursuant to the 1953 lease. The court directed entry of judgment in favor of Burlington in the amount of its $950,000 settlement payment, with 3% interest from June 2012. The court also granted Burlington summary judgment on its claim for indemnification for the City's

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[3]With regard to NYCTA's contention that Burlington's payment to settle the *Kenny* action had been voluntary, the court observed: "This argument overlooks the circumstance that, at NYCTA's insistence that Breaking Solutions indemnify the City, Burlington waived its rights to dispute that the City was an additional insured under the additional insured endorsement. . . . Given that [NYCTA] insisted that Burlington waive its rights and indemnify the City, [NYCTA] shall not be heard to complain of the consequences of the waiver."

[4]We do not here summarize Supreme Court's reasoning insofar as it addressed arguments we find it unnecessary to reach for purposes of deciding this appeal.

defense costs, in an amount to be determined after further discovery.

As stated at the outset of this opinion, we reverse on the ground that, under this Court's recent precedents, and contrary to Supreme Court's view, NYCTA and MTA are additional insureds under the subject policy for purposes of a loss that was "caused, in whole or in part," by an "act[] or omission[]" of the named insured, even though the named insured's causal "act[]" was not negligent. It is undisputed that Kenny's injury was causally connected to an "act[]" of the named insured, specifically, the Breaking Solutions excavator's disturbance of the buried electrical cable, which triggered the explosion that led to Kenny's fall.[5] While it is true that, because NYCTA had not warned the Breaking Solutions' operator of the cable's presence,

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[5]Although Burlington has argued vigorously throughout this action that Breaking Solutions did not act negligently, nowhere in the record or in its appellate brief do we understand Burlington to have argued that there was no causal connection between the explosion triggered by the Breaking Solutions excavator and Kenny's fall. Kenny's deposition testimony certainly supports the view that the explosion was a direct cause of his fall. Kenny testified that, while he was working on the elevated platform (called a "bench wall") in the subway tunnel, he sensed "a foam of heat, like a flash of light occurred with a big explosion. That's when I felt the heat come from like the ceiling behind me and I lost my balance and I landed on the invert [the foundation of the tunnel] heels first." He also testified that, when he arrived at the hospital, he told the triage nurse that "I was just in an explosion and I fell from a bench wall." Similarly, he testified that he told the track supervisor that, "[a]t the time of the explosion, it caused me to lose my balance and fall off the wall, off the bench wall."

Breaking Solutions' "act[]" did not constitute negligence, this does not change the fact that the act of triggering the explosion, faultless though it was on Breaking Solutions' part, was a cause of Kenny's injury. The language of the relevant endorsement, on its face, defines the additional insured coverage afforded in terms of whether the loss was "caused by" the named insured's "acts or omissions," without regard to whether those "acts or omissions" constituted negligence or were otherwise actionable.

In at least three decisions issued within the three years before this appeal was argued (although not cited by the parties), this Court has held that, where a policy endorsement (like the ones here at issue) extends coverage to additional insureds for losses "caused by" the named insured's "acts or omissions" or "operations," the existence of coverage does not depend upon a showing that the named insured's causal conduct was negligent or otherwise at fault. In *W & W Glass Sys., Inc. v Admiral Ins. Co.* (91 AD3d 530 [1st Dept 2012]), for example, where the relevant endorsement provided that a general contractor was covered under its subcontractor's policy "'only with respect to liability *caused by* [the subcontractor's] ongoing operations performed for that [additional] insured'" (*id.* at 530 [emphasis added]), we held that "[t]he language in the additional insured endorsement granting coverage *does not require a negligence*

*trigger*" (*id.* at 531 [emphasis added]).[6] Similarly, in *National Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co.* (103 AD3d 473 [1st Dept 2013]), where the additional insured endorsement applied to "bodily injury caused, in whole or in part, by [the named insured's] acts or omissions or the acts or omissions of those acting on the [named insured's] behalf" (*id.* at 474), in holding the additional insured covered for the loss in question, we expressed the view that the phrase "caused by" "does not materially differ" from the phrase, 'arising out of'" (*id.* [internal quotation marks omitted]), necessarily excluding any requirement of a negligence trigger for coverage. Finally, in *Strauss Painting, Inc. v Mt. Hawley Ins. Co.* (105 AD3d 512 [1st Dept 2013], *mod on other grounds* 24 NY3d 578 [2014]), we expressly held that a finding of negligence against the named insured was not required to support additional insured coverage where

> "[t]he additional insured endorsement speaks in terms of 'acts or omissions,' not negligence. Thus, in the unlikely event that it would be found that some nonnegligent act by plaintiff [the named insured] caused the accident, the Met [the additional insured] would still be entitled to coverage under the

[6]Notably, while the endorsement at issue in *W & W Glass* "further provided that it 'does not apply to liability caused by the sole negligence of the person or organization [named as an additional insured]'" (91 AD3d at 530), Breaking Solutions' Burlington policy contains no such limitation on additional insured coverage.

additional insured endorsement" (*id.* at 513).[7]

Notably, last year, in *Liberty Mut. Ins. Co. v Zurich Am. Ins. Co.* (2014 WL 1303595, 2014 US Dist LEXIS 42471 [SD NY, March 28, 2014, No. 11-Civ-9357 (ALC) (KNF)]), the federal district court considered the question of whether, under New York law, the negligence of the named insured is a prerequisite for additional insured coverage under an endorsement restricting coverage to losses "caused, in whole or in part, by . . . [the named insured's] acts or omissions; or . . . [t]he acts or omissions of those acting on [the named insured's] behalf; in the performance of [the named insured's] ongoing operations for the additional insured(s)" (2014 WL 1303595, *2, 2014 US Dist LEXIS 42471, *6 [internal quotation marks omitted]). The *Liberty Mutual* court concluded — expressly relying on our above-cited decisions in *W & W Glass*, *National Union* and *Strauss Painting* — that "[i]t is not necessary to determine that Schindler [the named insured] was somehow negligent as any act or omission by Schindler or someone acting on its behalf will suffice [to trigger additional insured coverage] if it was 'in the performance of [Schindler's] ongoing

[7]The *Strauss Painting* record shows that the additional insured endorsement in that case afforded coverage, in pertinent part, "only with respect to liability for 'bodily injury,' . . . caused, in whole or in part, by . . . [the named insured's] acts or omissions[.]" This is essentially the same language at issue here. As indicated, the Court of Appeals' modification of our decision in *Strauss Painting* was on a different issue, and the Court of Appeals did not discuss this aspect of our *Strauss Painting* decision.

operations for the additional insured . . .'" (2014 WL 1303595 *5, 2014 US Dist LEXIS 42471, *14-15).

More recently, in *Kel-Mar Designs, Inc. v Harleysville Ins. Co. of N.Y.* (127 AD3d 662 [1st Dept 2015]), this Court reaffirmed that endorsement language predicating additional insured coverage on "liability caused, in whole or in part, by the acts or omissions of [the named insured]" (*id.* at 663 [internal quotation marks omitted]) does not require a showing of negligence on the part of the named insured. We explained:

> "The loss at issue in the underlying action — a personal injury suffered by an . . . employee [of the named insured, Arcadia] when he lost his footing on a stairway while working on a construction project — resulted, at least in part, from 'the acts or omissions' of the Arcadia employee while performing his work (i.e., his loss of footing while on the stairway), regardless of whether the Arcadia employee was negligent or otherwise at fault for his mishap" (*id.*, citing *Strauss Painting* and *W & W Glass*).

While the loss in the present case does not involve an injury to an employee of the named insured (Breaking Solutions), given that a Breaking Solutions employee operated the machine that set off the explosion, here, no less than in *Kel-Mar*, the loss "resulted, at least in part, from 'the acts or omissions' of [Breaking Solutions, the named insured] . . . , regardless of whether [Breaking Solutions] was negligent or otherwise at fault for [the] mishap."

In reaching a contrary conclusion, Supreme Court relied on an older decision of this Court, *Crespo v City of New York* (303

AD2d 166 [1st Dept 2003], *supra*), where we held that the additional insured's right to indemnification could not be determined without first determining whether the loss "was caused by negligence by S & P [the named insured]" (*id.* at 167). In our view, *Crespo*, even without regard to the subsequent countervailing authority, is distinguishable. The additional insured endorsement in *Crespo* provided coverage "only to the extent that [the additional insured] is held liable *for* [S & P's] acts or omissions" (*id.* [emphasis added and internal quotation marks omitted]), language suggesting that the wrongful conduct of the named insured must provide the basis for the imposition of liability on the additional insured. In any event, to the extent *Crespo* conflicts with this Court's more recent authority, we are obliged to follow the latter.[8]

Although it may be that the insurance service institution that drafted the endorsement forms defining additional insured

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[8]Also distinguishable is *American Guar. & Liab. Ins. Co. v CNA Reins. Co.* (16 AD3d 154 [1st Dept 2005]), where we held that the putative additional insured, a landlord, was covered under its security contractor's liability policy "only for injuries arising from security guard negligence" (*id.* at 155). The plaintiff in the personal injury action underlying *American Guarantee* was a tenant who had been shot by intruders. To accept the landlord's position in *American Guarantee* would have been tantamount to treating the security contractor as the cause of any intrusion into the building its employees failed to prevent. In this case, NYCTA's and MTA's claim to additional insured coverage is based on an affirmative act by Burlington's named insured that triggered the loss, not on the named insured's failure to prevent wrongdoing by an unrelated third party.

coverage in terms of "acts or omissions" intended that language to restrict coverage to liability arising, at least in part, from the fault of the named insured (*see* William Cary Wright and Clifford Shapiro, *Construction Contract Indemnities, the "Insured Contract," and Additional Insured Coverage*, in Construction Insurance: A Guide for Attorneys and Other Professionals, at 162-163, 175 n 94 [2011]), the fact remains that no words referring to the negligence or fault of the named insured were included in the endorsement itself. We construe only the actual language used in the policy forms itself, without reference to extrinsic evidence of the subjective intentions of those who drafted the forms years before the parties contracted.

For the reasons discussed above, Breaking Solutions' Burlington policy affords NYCTA coverage as an additional insured for liability arising from the injury to Kenny. It necessarily follows that the anti-subrogation rule bars Burlington from recovering, as the City's subrogee, contractual indemnification from NYCTA under the 1953 lease for amounts expended in the settlement and defense of the *Kenny* action on behalf of the City (*see North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993] ["An insurer . . . has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered"]).

In view of the foregoing, we need not reach the remaining

issues discussed by the parties.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Michael D. Stallman, J.), entered December 28, 2012 and January 9, 2013, which granted plaintiff Burlington summary judgment on its first cause of action declaring that Burlington owes defendants NYCTA and MTA no coverage in the underlying personal injury action, granted Burlington leave to amend its complaint to assert a second cause of action against NYCTA for contractual indemnification as equitable subrogee of the City of New York, and denied defendants' cross motion for summary judgment on the first cause of action, and the order of the same court and Justice, entered December 19, 2013, which, to the extent appealed from, granted Burlington's motion for summary judgment for contractual indemnification against NYCTA and directed judgment in favor of Burlington in the amount of $950,000, plus prejudgment interest, fees and costs, should be reversed, on the law, with costs, Burlington's motions for summary judgment and to amend the complaint denied, and defendants' cross motion for summary judgment on the first cause of action granted to the extent of declaring that defendants were entitled to coverage in the underlying personal injury action as additional insured under

Burlington's policy number HGL0019305 issued to Breaking Solutions, Inc. The Clerk is directed to enter judgment accordingly.

All concur.

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

ENTERED: AUGUST 11, 2015

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

14905N In re B&M Kingstone, LLC, Index 158577/14
Petitioner-Respondent,

-against-

Mega International Commercial Bank Co., Ltd.,
Respondent-Appellant.

_____

Satterlee Stephens Burke & Burke LLP, New York (Alun W. Griffiths of counsel), for appellant.

The Law Firm of Elias C. Schwartz, PLLC, Great Neck (Elias C. Schwartz of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered September 19, 2014, affirmed, with costs.

Opinion by Acosta, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
David B. Saxe
Rosalyn H. Richter
Judith J. Gische
Barbara R. Kapnick, JJ.

14905N
Index 158577/14

_____x

In re B&M Kingstone, LLC,
Petitioner-Respondent,

-against-

Mega International Commercial
Bank Co., Ltd.,
Respondent-Appellant.

_____x

Respondent appeals from the order of the Supreme Court, New York County (Geoffrey D. Wright, J.), entered September 19, 2014, which, to the extent appealed from, granted petitioner's motion to direct respondent to fully respond to an information subpoena.

Satterlee Stephens Burke & Burke LLP, New York (Alun W. Griffiths and Susie Kim of counsel), for appellant.

The Law Firm of Elias C. Schwartz, PLLC, Great Neck (Elias C. Schwartz, Michelle Englander and Sarah A. Chussler of counsel), for respondent.

ACOSTA, J.P.

Petitioner, B&M Kingstone, LLC (B&M), served an information subpoena on the New York branch of respondent, Mega International Commercial Bank, Co., Ltd. (Mega), in order to enforce a money judgment obtained against a group of judgment debtors more than 10 years ago. Although it complied with demands for information pertaining to its New York branch, Mega refused to produce similar information regarding accounts and records at its branches outside New York State. It argued, among other things, that New York courts lack personal jurisdiction over it with respect to that information. We hold that Mega's New York branch is subject to jurisdiction requiring it to comply with the appropriate information subpoenas, because it consented to the necessary regulatory oversight in return for permission to operate in New York. Moreover, Mega does not contend that compliance with the information subpoena would be onerous or unduly expensive or that the requested information is not available in New York.

Background

In 2003, a court in Florida entered judgment in excess of $39 million in favor of Super Vision International, Inc. (Super Vision) and against individual and corporate entities (the judgment debtors) in the matter of *Super Vision Intl., Inc. v*

*Caruso* (Fla. Cir. Ct., June 16, 2003, W. Thomas Spencer, Case No. CI-99-9392). Super Vision claimed that the judgment debtors had engaged in counterfeiting, civil theft, and misappropriation of its proprietary information. Judgment debtor Samson Wu subsequently executed a Consent to Disclosure of Bank Account Information (Consent) authorizing the disclosure of any account information for all accounts belonging to him and upon which he was authorized to draw.[1]

On March 24, 2009, Super Vision assigned its rights against the judgment debtors to B&M. Approximately five years later, the Florida judgment was entered and recorded in Nassau County in the State of New York in favor of B&M.

Mega is an international banking corporation, organized under the laws of Taiwan, with a principal place of business in Taipei City. It has 128 branches worldwide, 107 of which are located in Taiwan. The remaining branches are located in 14 other countries. Mega operates one branch in New York.

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[1]The Consent, signed and notarized on January 7, 2004, contains the notarized signature of Samson Wu, and states that he directs any bank at which he may have an account of any kind to disclose and deliver copies of all documents that relate to those accounts to the law firm of Fisher, Rushmer, Werrenrath, Dickson, Talley & Dunlap, P.A., "for the period of January 2002 to the present date." The Consent states, "Such disclosures are authorized in connection with any request to enforce the Judgment" in the *Super Vision* case.

Believing that Mega maintains bank accounts for the judgment debtors and is in possession of assets belonging to the judgment debtors, B&M served Mega with a subpoena duces tecum and an information subpoena, with restraining notice and questionnaire, on August 7, 2014. The questionnaire asked, among other things, whether Mega had a record of any account in which each judgment debtor may have an interest and whether the judgment debtor was indebted to Mega in any manner.

On August 11, 2014, a representative of Mega called B&M's counsel and said that Mega could not and would not access accounts maintained outside the State of New York. By letter dated August 14, 2014, Mega served its responses to the questionnaire, together with responsive documents. In response to the information subpoena, Mega stated that its New York branch was not in possession of any judgment debtor's assets. It also stated that its New York branch was not holding any account or other property for the judgment debtors and that the judgment debtors were not indebted to it.

On August 19, 2014, B&M told Mega that the responses to the subpoenas were inadequate, in that they pertained only to one branch of Mega, and not Mega worldwide.

On August 27, 2014, B&M's counsel received Mega's response to the subpoena duces tecum, which addressed Mega's New York

branch only. Mega stated that its New York branch was not in possession of assets belonging to any judgment debtor, and objected to the subpoena to the extent it sought records located in Mega branches outside New York.

On September 10, 2014, B&M commenced this proceeding by filing a petition signed by Brett Kingstone, the founder of Super Vision. Kingstone alleges that the judgment debtors have been deliberately evading enforcement of the judgment, including by filing Chapter 11 bankruptcy petitions, destroying material evidence, relocating inventory from Florida to Shanghai, China, and continuing to make use of Super Vision's proprietary equipment in Shanghai. Judgment debtor Wu had been found in criminal contempt of court in Florida in 2004 for attempting to avoid an order through a sham transaction. Kingstone set forth information that had been learned by a private investigator allegedly showing that Mega was intimately involved with the judgment debtors, especially Wu, and was involved in efforts to conceal the judgment debtors' assets, including through transactions in Panama, where the manager of the Free Zone branch of Mega was an officer of companies owned by Wu.

The petition seeks an order compelling compliance with the subpoena duces tecum and the information subpoena and questionnaire, and restraining any accounts held by judgment

debtors.

B&M also moved for an order restraining bank accounts pursuant to CPLR 5222(b) and compliance with the subpoena duces tecum and the information subpoena restraining notice and questionnaire pursuant to CPLR 5224, and finding Mega in contempt for its failure to fully respond to the subpoenas pursuant to CPLR 5251.

B&M argued that Mega had failed to respond properly to the subpoenas when it limited its responses to its New York branch, and sought a preliminary injunction to prevent Mega from transferring or otherwise disposing of the assets of the judgment debtors. In the alternative, it requested an order compelling Mega's compliance or holding Mega in contempt. B&M argued that, pursuant to CPLR 5223 and 5224, Mega was required to fully comply with the subpoenas, regardless of where in the world the assets of the judgment debtors were held.

Citing *Daimler AG v Bauman* (__ US __, __, 134 S Ct 746, 760 [2014]), Mega argued that B&M had no jurisdiction over Mega as a whole. It argued that pursuant to *Daimler*, a court could not exercise general jurisdiction over an entity unless the entity could fairly be regarded as at home in the forum jurisdiction. Thus, merely operating a branch office in the forum jurisdiction was insufficient to establish general jurisdiction. Mega argued

that, in this case, it was incorporated and had its principal place of business in Taiwan, and its operations in New York were so narrow and limited that it could not fairly be regarded as at home in New York.

Mega also argued that the "separate entity" rule precluded enforcement of subpoenas and restraining notices as to Mega branches outside New York. The separate entity rule provides that postjudgment subpoenas served on branches of banks in New York are operative only as to branches within New York State (*see Matter of National Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Empl. Concepts*, 269 AD2d 101 [1st Dept 2000]).

Finally, Mega argued that principles of international comity precluded compelling international compliance with the subpoenas. It contended that compliance with the subpoenas could require Mega to violate banking regulations in multiple jurisdictions, and cited Panama and Taiwan as two jurisdictions that could impose fines on it if it were to comply with the subpoenas.

In support, Mega submitted a declaration by Huei-Ying Chen, a Vice President and Deputy General Manager of its New York branch. Chen stated that New York branch personnel were primarily responsible for banking operations pertaining to the New York branch; that New York branch personnel did not have decision-making authority for Mega as a whole or any other

branches, and that no senior Mega executives were located in New York.

Mega also submitted declarations by two foreign legal experts. Hsiao-Ling Fan, an attorney in Taiwan, stated that it was his professional opinion that compelling Mega to comply with the subpoenas would place Mega in violation of portions of Taiwanese banking laws, specifically, Article 28.2 of Taiwan's Banking Act. He further asserted that disclosing personal information related to customer accounts would expose Mega to criminal liability in Taiwan. Fan argued that any subpoena seeking information about assets held in Taiwan should be delivered and served in accordance with the Taiwanese Law in Supporting Foreign Courts on Consigned Cases.

Luis Guinard, an attorney licensed to practice law in the Republic of Panama, stated that it was his professional opinion that compelling Mega to comply with the subpoenas as to accounts and assets of judgment debtors located in Panama would place Mega in violation of Article 111 of Executive Decree No. 52 of the Panamanian Banking Law. Guinard further stated that Wu's consent did not warrant disclosure of any accounts of assets that Wu may have had in Mega branches in Panama.

The IAS court found that it did not have jurisdiction over Mega, and the turnover aspect of the petition was therefore

denied. However, since Mega had the ability to access information concerning accounts around the world, the court ordered it to comply with the information subpoena. The court also relied upon CPLR 5223, which permits a judgment creditor to demand information from any person. The court found that foreign laws were not cited with sufficient specificity to invoke the doctrine of international comity and furthermore that Wu had agreed in writing to the disclosure of any accounts that he may have owned or used.

Analysis

In *Daimler AG v Bauman* (__ US __, 134 S Ct 746), the Supreme Court held that general, or all-purpose, jurisdiction allowed a court to hear any and all claims against a foreign corporation "only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive as to render [it] essentially at home in the forum state" (134 S Ct at 751).

Applying *Daimler* in *Gucci Am., Inc. v Bank of China* (768 F3d 122 [2d Cir 2014]), the Second Circuit concluded that the District Court did not have general jurisdiction over the Bank of China to enforce a prejudgment asset freeze injunction. The bank had branch offices in New York, but it was incorporated and headquartered elsewhere, and its contacts were not so continuous and systematic as to render it essentially at home in New York.

The bank had only four branch offices in the United States, and only a small portion of its worldwide business was conducted in New York.

Thus, under *Daimler*, New York does not have general jurisdiction over Mega's worldwide operations. However, that does not end the inquiry. Like Banco Bilboa Vizcaya Argentina (BBVA) in *Vera v Cuba* (__ F Supp 3d __, 2015 WL 1244050, 2015 US Dist LEXIS 32846 [SD NY 2015]), Mega "consented to the necessary regulatory oversight in return for permission to operate in New York, and therefore is subject to jurisdiction requiring it to comply with the appropriate Information Subpoenas" (__ F Supp 3d at __, 2015 WL 1244050 at *8, 2015 US Dist LEXIS 32846 at *26). As the *Vera* court explained in finding that BBVA was subject to jurisdictiion:

> "The state of New York in general, and New York City in particular, is a leading world financial center. In order to benefit from the advantages of transacting business in this forum, a foreign bank must register with and obtain a license from the Superintendent of the Department of Financial Services ('DFS'), and file a written instrument 'appointing the superintendent and his or her successors its true and lawful attorney, upon whom all process in any action or proceeding against it on a cause of action arising out of a transaction with its New York agency or agencies or branch or branches.' N.Y. Bnk. Law § 200(a). BBVA is registered with the DFS as a foreign branch. The Second Circuit recognized that the privileges and benefits

> associated with a foreign bank operating a branch in New York give rise to commensurate, reciprocal obligations. Foreign corporations which do business in New York are bound by the laws of both the state of New York and the United States, and are bound by the same judicial constraints as domestic corporations. Under New York Banking Law, foreign banks operating local branches in New York can both sue and be sued (*see, e.g., Greenbaum v Svenska Handlesbanken*, 26 F. Supp. 2d 649 [S.D. N.Y. 1998]). This legal status also confers obligations to participate as third-parties in lawsuits which involve assets under their management" (__ F Supp 3d at __, 2015 WL 1244050 at *7, 2015 US Dist LEXIS 32846 at *24-25; *but see Gliklad v Bank Hapoalim B.M.*, 2014 NY Slip Op 32117[U] [Sup Ct, NY County 2014] [Banking Law §200(a) only provides specific jurisdiction for a cause of action arising out of a transaction with its New York agency or agencies or branch or branches]).

The issue is whether the separate entity rule bars New York courts from compelling Mega's New York branch to produce information pertaining to Mega's foreign branches.

The separate entity rule is that "each branch of a bank is a separate entity, in no way concerned with accounts maintained by depositors in other branches or at the home office" (*Cronan v Schilling*, 100 NYS 2d 474, 476 [Sup Ct, NY County 1950]; *see also Matter of National Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Empl. Concepts*, 269 AD2d 101 [1st Dept 2000]; *Therm-X-Chem. & Oil Corp. v Extebank*, 84 AD2d 787 [2d Dept 1981]). The continuing validity of this arcane rule was recently

upheld by the Court of Appeals in *Motorola Credit Corp. v Standard Chartered Bank* (24 NY3d 149 [2014]), solely with respect to restraining notices and turnover orders affecting assets located in foreign branch accounts (*id.* at 159 n 2 ["(t)he narrow question before us is whether the rule prevents the restraint of assets held in foreign branch accounts, and we limit our analysis to that inquiry"]). "In other words, a restraining notice or turnover order on a New York Branch will be effective for assets held in accounts at that branch but will have no impact on assets in other branches" (*id.* at 159). Thus, *Motorola's* expressly limited affirmation of the separate entity rule does not apply to the instant case, and the rule does not bar the court's exercise of jurisdiction over Mega to compel a full response to the information subpoena.

Moreover, public policy interests and innovations in technology support such an exercise of jurisdiction. As the *Vera* court noted, "[B]road post-judgment discovery in aid of execution is the norm in federal and New York state courts" (__ F Supp 3d at __, 2015 WL 1244050 at *6, 2015 US Dist LEXIS 32846 at *21 [internal quotation marks omitted]), and "New York law entitles judgment creditors to discover all matters relevant to the satisfaction of a judgment" (__ F Supp 3d at __, 2015 WL 1244050 at *6, 2015 US Dist LEXIS 32846 at *23 [internal quotation marks

omitted]).

The court reasoned that

> "Daimler and Gucci should not be read so broadly as to eliminate the necessary regulatory oversight into foreign entities that operate within the boundaries of the United States. There is no reason to give advantage to a foreign bank with a branch in New York, over a domestic bank . . . . When corporations receive the benefits of operating in this forum, it is critical that regulators and courts continue to have the power to compel information concerning their activities" (__ F Supp 3d at __, 2015 WL 1244050 at *8, 2015 US Dist LEXIS 32846 at *25).

As the Vera court concluded, "The information requested by the Information Subpoena can be found via electronic searches performed in BBVA's New York office, and [is] within this jurisdiction" (*id.*).

Mega does not claim that compliance with the information subpoena would be onerous or unduly expensive or that the requested information is not available in New York. Thus, the court's general personal jurisdiction over the bank's New York branch permits it to compel that branch to produce any requested information that can be found through electronic searches performed there (*compare Ayyash v Koleilat*, 115 AD3d 495, 495 [1st Dept 2014] [affirming denial of motion to compel where,

among other things, it "would likely cause great annoyance and expense" to the New York branch of the financial institution]; *see also* CPLR 5223).

The court properly determined that Mega did not show that principles of international comity preclude enforcement of the subpoena (*see Morgenthau v Avion Resources Ltd.*, 11 NY3d 383, 389-390 [2008]). In particular, Mega's submissions were insufficient to show that the bank could face liability for violating Taiwanese or Panamanian law if it were required to comply with the subpoena. Nor did Mega show that the interest of any other state or country is greater than New York's interest in enforcing its judgments and regulating banks operating within its jurisdiction (*see Gucci Am., Inc. v Bank of China*, 768 F3d at 139 and n 20). In any event, at least with respect to Wu, any concerns about comity are overcome by the terms of the Consent.

Accordingly, the order of the Supreme Court, New York County (Geoffrey D. Wright, J.), entered September 19, 2014, which, to

the extent appealed from, granted petitioner's motion to direct respondent to fully respond to an information subpoena, should be affirmed, with costs.

All concur.

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

ENTERED: AUGUST 11, 2015

CLERK