SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 16, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Richter, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2300 In re Maria L. Gonzalez, Index 401386/13
Petitioner,

-against-

New York City Housing Authority,
Respondent.

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Maria L. Gonzalez, petitioner pro se.

David I. Farber, New York (Laura R. Bellrose of counsel), for respondent.

_____

Determination of respondent, dated May 29, 2013, which denied petitioner succession rights as a remaining family member to the tenancy of her late grandmother, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Alice Schlesinger, J.], entered September 5, 2014), dismissed, without costs.

Substantial evidence supports the determination that petitioner is not entitled to succession rights as a remaining family member (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-182 [1978]). In February

2009, petitioner's grandmother requested permission for petitioner to permanently reside in the apartment. Petitioner's grandmother passed away one month later. Even if the request had been immediately granted, petitioner would still not have met the requirement that she continuously reside in the apartment, with respondent's written consent, for at least one year prior to the tenant of record's death, to entitle her to succession rights (*see Matter of Ortiz v Rhea*, 127 AD3d 665 [1st Dept 2015]; *Matter of Saad v New York City Hous. Auth.*, 105 AD3d 672 [1st Dept 2013]). The mitigating circumstances cited by petitioner do not provide a basis for annulling respondent's determination (see *Matter of Featherstone v Franco*, 95 NY2d 550, 554-555 [2000]; *Matter of Firpi v New York City Hous. Auth.*, 107 AD3d 523, 524 [1st Dept 2013]). Nor may estoppel be invoked against a governmental agency, such as respondent (*id.* at 524).

We have considered petitioner's remaining arguments, including that she is entitled to a new hearing, and find them unavailing.

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3095-
3095A

HDI-Gerling America Insurance Company, et al.,
Plaintiffs-Appellants,

-against-

Zurich American Insurance Co., et al.,
Defendants-Respondents.

Index 158475/13
155610/14

Littleton Joyce Ughetta Park & Kelly LLP, Purchase (Bryon L. Friedman of counsel), for appellants.

Coughlin Duffy LLP, New York (Adam M. Smith of counsel), for Zurich American Insurance Co., respondent.

Ochs & Goldberg, LLP, New York (Jeremiah M. Welch of counsel), for Skanska USA Civil Northeast, Inc., Tully Construction Co., Inc. and Skanska/Tully JV, Inc., respondents.

Orders, Supreme Court, New York County (Anil C. Singh, J.), entered May 21, 2015, which, inter alia, declared that defendant Zurich American Insurance Company's policy is excess to plaintiff HDI-Gerling's policy, unanimously affirmed, with costs.

In this action to determine priority of coverage, the IAS

court correctly found that Zurich's other insured endorsement rendered its policy excess to HDI-Gerling America Insurance Company's policy (*see e.g. County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1994]).

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

ENTERED: MARCH 16, 2017

CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3109 & M-6620 Kevin Capone, et al., Plaintiffs-Appellants, Index 651794/15

-against-

Castelton Commodities International LLC (formerly known as Louis Dreyfus Highbridge Energy LLC), et al., Defendants-Respondents,

LDH Management Holdings LLC, et al., Defendants.

Williams & Connolly LLP, New York (Steven M. Cady of counsel), for appellants.

Davis Polk & Wardwell, LLP, New York (Michael P. Carroll of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 29, 2016, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' (defendants) motion to dismiss the causes of action for tortious interference with contract, unjust enrichment, veil-piercing, and breach of the implied covenant of good faith and fair dealing, unanimously affirmed, with costs.

Section 9.9(a) of the relevant agreement contains a clear exculpatory provision that, standing alone, supports the motion court's dismissal of the claims alleged against defendants (*see e.g. Elf Atochem N. Am., Inc. v Jaffari*, 727 A2d 286, 291 [Del

1999]; 6 Del C § 18-1101). The Delaware Limited Liability Company (LLC) Act was designed to "give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements" (6 Del C § 18-1101[b]). Plaintiffs' public policy arguments that this section should not apply are unavailing, as the Delaware LLC Act's broad authorization to eliminate all liability also embraces the power to more narrowly specify the persons who may or may not be sued.

Plaintiffs' claims against defendants would fail even without this exculpatory provision. A nonsignatory to a valid contract, such as defendants here, cannot be held liable for unjust enrichment when the claim covers the same subject matter as covered in the written agreement (*Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]; *CIM Urban Lending GP, LLC v Cantor Commercial Real Estate Sponsor, L.P.*, 2016 WL 768904, *2, 2016 Del Ch LEXIS 47, *5-6 [Del Ch, Feb. 26, 2016, C.A. No. 11060-VCN]). The tortious interference claim fails because plaintiffs have not alleged that defendants have acted with malice (*Felson v Sol Cafe Mfg. Corp.*, 24 NY2d 682, 687 [1969]).

The implied covenant claim fails because the agreement expressly addresses the conduct at issue (*see Nationwide Emerging Mgrs., LLC v Northpointe Holdings, LLC*, 112 A3d 878, 896 [Del

2015]).

The motion court properly dismissed the veil-piercing claims, as plaintiffs' allegations are not sufficient to support such a claim, especially in light of their concession that the entities were established for a legitimate business purpose (*see Wallace v Wood,* 752 A2d 1175, 1184 [Del Ch 1999]; *3 E. 54th St. N.Y., LLC v Patriarch Partners, LLC,* 90 AD3d 418, 420 [1st Dept 2011]).

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

M-6620 – ***Kevin Capone, et al. v Castelton, etc., et al.***

Motion to take judicial notice of ruling in the Delaware Court of Chancery granted.

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

ENTERED: MARCH 16, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3219N In re Ameriprise Auto & Home Insurance Company, Petitioner-Respondent, Index 651494/13

-against-

Li Cao, Respondent-Appellant.

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The Altman Law Firm, PLLC, New York (Michael T. Altman of counsel), for appellant.

DeCicco, Gibbons & McNamara, P.C., New York (William A. Fitzgerald of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered on or about December 3, 2015, after a framed issue hearing, denying respondent's motion for, among other things, an order directing the parties to proceed to arbitration of respondent's claim for supplemental underinsured motorist (SUM) benefits, and granting the petition to permanently stay the SUM arbitration, unanimously reversed, on the facts, without costs, the judgment vacated, and the parties directed to proceed to arbitration.

Respondent Li Cao alleges that, on February 7, 2012, she was knocked down by a bicyclist as she was crossing Madison Avenue at East 43rd Street in Manhattan, and then struck again by a vehicle owned by Avis-Budget Group/PV Holding Corp. and operated by

Valencourt Dixon. After settling her claims against Avis and Dixon, Cao sought SUM benefits under her own policy with Ameriprise Auto & Home Insurance Company, and demanded arbitration. The Ameriprise policy provides SUM benefits, in relevant part, when the insured suffers bodily injury as a passenger in a vehicle or "as a pedestrian as a result of having been struck by an uninsured ... or an underinsured motor vehicle."

Ameriprise commenced a petition seeking a permanent stay of the SUM arbitration requested by Cao, arguing that the policy did not apply because the vehicle driven by Dixon did not come into "contact" with respondent within the meaning of the coverage. Supreme Court (Milton A. Tingling, J.) directed a framed issue hearing on the issue.

The court (Carol R. Edmead, J.) found that respondent had not suffered injuries as a pedestrian struck by the motor vehicle operated by Dixon, and permanently stayed the underinsured motorist's arbitration. The court found respondent to be "incredible" based on testimony that her English was not "so good" in responding to a question on an irrelevant issue. Although the court found a nonparty witness who appeared on behalf of petitioner to be "very credible," the court discounted his testimony that respondent was a pedestrian crossing the

intersection. Instead, the court credited the irreconcilable testimony of Dixon, whom the court found "forthcoming, if to some degree inconsistent," that respondent was not a pedestrian but a rider on a delivery bicycle who hit his vehicle's right fender. We now reverse.

The hearing court's determination that there was no direct contact between respondent and Dixon's car was not supported by a fair interpretation of the evidence. The nonparty witness, whom the hearing court found to be "very credible," testified that respondent pedestrian was struck by a food delivery bicyclist while crossing Madison Avenue from west to east at Forty-third Street.

The testimony of respondent was consistent with that of the nonparty witness in all material respects.[1] She explained that the incident occurred while she was walking from her office in midtown to Grand Central station to catch a train home to Connecticut. Respondent testified that while on Forty-third Street crossing Madison she was knocked to the ground by a bicyclist. Seconds later, she was struck by the driver's approaching vehicle and lost consciousness. When she awoke, she

[1]The witness testified that respondent crossed the street against the light; respondent maintained that when she started crossing the street the countdown light was on the number 8.

was en route to the hospital in an ambulance.

The driver testified that he observed a cyclist on a delivery bike traveling between lanes to his right. The bicyclist "fell," and her basket hit the front bumper of his vehicle. He maintained that at no time had the vehicle come into contact with the bicyclist, as opposed to the bicycle. He further maintained that the vehicle had not come into contact with any pedestrian; indeed, he testified that no pedestrians were crossing the street. After the accident, the driver exited the vehicle and observed an Asian woman lying in the roadway. He believed the woman to be the cyclist who had struck the vehicle.

While Dixon maintained that there was no contact between his bumper and the cyclist, he also testified that after he came to a stop, a guy came up to him and said, "I saw you. You ran her over." Further, on cross, Dixon acknowledged that once the woman tipped over, she went below the level of the car and that he lost sight of her for two seconds. He heard the contact with his bumper but was not able to see it. He was not sure what the woman's head came in contact with.

The driver's version of events – that respondent was the bicyclist he had "glanced" at in his mirror prior to the accident – defies logic and was contradicted by his admissions at the scene. The driver's version of events had respondent – a

professional with a masters degree who worked at Morgan Stanley – riding a delivery bicycle with a large basket. At the scene, the driver admitted that the accident occurred as respondent and the nonparty witness claimed, reporting that "[a] pedestrian was hit by a bicyclist and was knocked down," and he "was too close to [the] pedestrian to stop." Dixon's explanation that he erroneously used the word pedestrian when he meant to say bicyclist is suspect to say the least.

Given the differing versions of events, the hearing court should have accepted the "very credible" testimony of the disinterested nonparty witness, which was consistent in all material respects with that of respondent pedestrian, rather than the irreconcilable testimony of a party found to be "inconsistent."

Further, there was no basis for finding respondent to be "incredible." Respondent hypothesized that her failure to understand counsel's allegation of an inconsistency between her deposition and hearing testimony concerning whether or not the light was red when she began crossing the street was attributable to the fact that English was not her first language. She did not claim to have trouble understanding English, and confirmed that she had no trouble understanding counsel's questions at the hearing or at the deposition. Her inability to perceive a

contradiction that did not exist and her attempt to find an explanation for same does not undermine her credibility. Morever, the issue of whether she walked against the light was irrelevant to whether there was contact.

In any event, any issue of respondent's credibility should not have led the hearing court to reject the similar version testified to by the nonparty witness, which was confirmed by the driver's own admissions at the scene.

Respondent's failure to include certain exhibits in the appellate record does not preclude meaningful review (*see Gabriele v Edgewater Park Owners Coop. Corp., Inc.*, 67 AD3d 484, 485 [1st Dept 2009]), since Supreme Court's findings were largely based on testimony at the framed issue hearing.

In light of the above, we need not reach respondent's alternative arguments. We note that petitioner's policy only applies when, in relevant part, the insured suffers bodily injury

as a passenger in a vehicle or as a pedestrian. If respondent was neither a passenger nor a pedestrian, then the policy would not afford coverage.

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3271-
3272 The People of the State of New York,
Respondent,

-against-

Freddy White,
Defendant-Appellant.

Ind. 1860/11

_____

Robert S. Dean, Center for Appellate Litigation, New York (Lisa A. Packard of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith of counsel), for respondent.

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Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; Juan Merchan, J. at jury trial, sentencing, and resentencing), rendered October 25, 2012, as amended October 20, 2014, convicting defendant of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 18 years, unanimously affirmed.

Even if we agree with defendant that the court should have suppressed, as the product of custodial interrogation without *Miranda* warnings, a statement he made at the scene of his arrest acknowledging ownership of a jacket he had secreted, we find that the receipt of the admission was harmless beyond a reasonable doubt (*see People v Romero*, 27 NY3d 981 [2016]; *People v Crimmins*, 36 NY2d 230, 240-41 [1975]). The overwhelming proof

included not only the prompt and reliable identification made by the victim, who pursued defendant after the crime, but also a chain of circumstantial evidence having no reasonable explanation other than defendant's guilt. Moreover, defendant's admission added little to the People's case, and it was cumulative to an officer's testimony that he saw defendant take off and secrete the jacket.

Defendant's right of confrontation was not violated by evidence, admitted with an appropriate jury instruction, that a nontestifying store clerk falsely denied that the victim's phone was present in his store, which defendant had been seen entering and leaving. This undisputedly false declaration was not received for its truth (*see Tennessee v Street*, 471 US 409 [1985]). On the contrary, its falsity was established by evidence that the police found the phone in the store by dialing its number and hearing it ring. The clerk's declaration did not

incriminate defendant, and it completed the narrative of how the police recovered the phone. In any event, any error was likewise harmless.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3273 Elisha Lumpkin, Index 306647/08
Plaintiff-Respondent,

-against-

3171 Rochambeau Ave, LLC, et al.,
Defendants-Respondents,

Quality Construction Company & Contracting,
Defendant-Appellant.

_____

Weiner, Millo, Morgan & Bonanno, LLC, New York (Debra A. Profio of counsel), for appellant.

Isaacson Schiowitz & Korson LLP, Rockville Centre (Jeremy Schiowitz of counsel), for Elisha Lumpkin, respondent.

Barry, McTiernan & Moore LLC, White Plains (Laurel A. Wedinger of counsel), for 3171 Rochambeau Ave, LLC and D & J Management, respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about March 17, 2016, which denied defendant Quality Construction's motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, to the extent of dismissing the claim that Quality Construction's negligence in providing adequate illumination at the subject location proximately caused the accident, and otherwise affirmed, without costs.

Triable issues of fact exist as to whether Quality Construction created the complained-of danger by failing to erect

barricades around its work site to protect plaintiff from falling into a ditch (*see Hanrahan v Whiting Turner Constr., Inc.*, 33 AD3d 338 [1st Dept 2006]). Accordingly, the motion court correctly denied summary judgment dismissing the common-law negligence cause of action against Quality Construction.

There is also a question of fact as to whether putting caution tape in the area was sufficient or reasonable to warn or protect plaintiff from falling into the ditch (*see Fernandez v Rutman*, 120 AD3d 545, 546 [2d Dept 2014]). Even if the ditch were readily observable, such a fact would go to the issue of comparative negligence and would not negate defendant's duty to keep the premises reasonably safe (*Gaffney v Port Auth. of N.Y. & N.J.*, 301 AD2d 424 [1st Dept 2003]).

To the extent that plaintiff alleges that Quality Construction proximately caused the accident by failing to provide adequate illumination for the exterior stairs, that claim should be dismissed. Plaintiff admitted at her deposition that

she could see the stairs, and, in opposing the summary judgment motion, she offered no evidence that her fall was precipitated by any hazard she failed to see due to poor lighting (*see Beard v Themed Rests. Inc.*, 128 AD3d 458 [1st Dept 2015]).

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3274 In re Grazyna S.-G.,
Petitioner-Appellant,

-against-

Evelina G.,
Respondent-Respondent.

Tennille M. Tatum-Evans, New York, for appellant.

Andrew J. Baer, New York, for respondent.

Order and judgment (one paper), Family Court, New York County (Pamela Scheininger, Referee), entered on or about May 20, 2015, which, upon petitioner daughter's default, granted respondent mother's motion to dismiss the petition seeking an order of protection against respondent, unanimously affirmed, without costs.

Contrary to the Referee's conclusion, petitioner did not default; petitioner testified at the fact-finding hearing and her attorney appeared on May 20, 2015 and objected to the dismissal of the petition (*see Schlain v Women's Radiology*, 305 AD2d 173, 174 [1st Dept 2003]). In any event, petitioner failed to

establish a prima facie case that respondent's actions constituted the family offenses of harassment in the second degree or disorderly conduct (*see Matter of Kirsten G. v Melvin G.*, 143 AD3d 614, 614 [1st Dept 2016]).

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3275 Nelson Cepeda, Index 310903/11
Plaintiff-Appellant,

-against-

KRF Realty LLC,
Defendant-Respondent,

Bargain Team, Inc.,
Defendant.

_____

Jacob Oresky & Associates, PLLC, Bronx (Laurence D. Rogers of counsel), for appellant.

Miller, Leiby & Associates, P.C., New York (Jeffrey Miller of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered March 4, 2016, which, among other things, granted defendant KR Realty LLC's motion for summary judgment dismissing the complaint against it, and denied plaintiff's cross motion for summary judgment against KR on the issue of liability, unanimously affirmed, without costs.

KR established that it was an out-of-possession landlord which, pursuant to its lease with the tenant, codefendant Bargain Team, Inc., was not responsible for removing snow or ice from the sidewalk of the premises where plaintiff allegedly slipped and fell (*see Bing v 296 Third Ave. Group, L.P.*, 94 AD3d 413, 413 [1st Dept 2012], *lv denied* 19 NY3d 815 [2012]). Snow or ice is

not a significant structural or design defect for which an out-of-possession landlord may be held liable (*id.* at 414).

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

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3276-
3277 The People of the State of New York
Respondent,

-against-

David Everette,
Defendant-Appellant.

Ind. 1383/09

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Freshfields Bruckhaus Deringer US LLP, New York (Alan E. Guy of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber of counsel), for respondent.

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered February 23, 2011, convicting defendant, after a jury trial, of two counts of robbery in the first degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 25 years to life, unanimously affirmed. Order, same court and Justice, entered on or about December 23, 2015, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Based on our review of the photograph of the lineup viewed by the victim of one of the robberies, we find that the record supports the hearing court's conclusion that the lineup was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]). Given the actual appearances of

the lineup participants, the "numerical age difference[s]" were insufficient to show suggestiveness (*People v Holley*, 26 NY3d 514, 525 [2015]), and any height or weight disparity was sufficiently minimized (*see id.*).

At trial, the court properly permitted a police officer to testify that the victim of the other robbery identified defendant at a showup. This testimony was admissible, notwithstanding the general rule against third-party bolstering set forth in *People v Trowbridge* (305 NY 471 [1953]), because the victim's declaration qualified as an excited utterance. Shortly after the victim was robbed at gunpoint in his taxicab, he called 911 and was brought in a police vehicle to defendant, who was being detained. The victim immediately yelled, "[O]h my God[!] . . . [I]t is the same guy . . . . Thank God you caught him[!]" Under the circumstances, this identification was made "under the stress of excitement caused by an external event, and [was] not the product of studied reflection and possible fabrication" (*People v Johnson*, 1 NY3d 302, 306 [2003]). In any event, any error was harmless in light of the overwhelming evidence of guilt and the fact that the officer's testimony was cumulative to the victim's own testimony recounting his out-of-court identification (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court properly exercised its discretion in denying

defendant's severance motion (*see* CPL 200.20[2][b],[c]). Aside from being similar in law, the two cab robberies were joinable based on overlapping evidence regarding defendant's distinctive modus operandi. This was established by evidence that, among other things, the robber in both incidents, which occurred within one week of each other, asked to be dropped off at a location within a few blocks of defendant's actual address, engaged both drivers in a wide-ranging conversation on topics such as crime and current events, asked near the end of both rides to be dropped off in the middle of the block adjacent to the corner he had initially requested, immediately shifted to an angry demeanor after opening the door at the end of the ride, and demanded money while appearing to be concealing a weapon in his jacket pocket. These similarities demonstrated a sufficiently distinctive modus operandi, and there was no requirement that the crimes be identical (*see People v Screahben*, 35 AD3d 246 [1st Dept 2006], *lv denied* 8 NY3d 884 [2007]); *see also People v Medina*, 66 AD3d 555 [1st Dept 2009], *lv denied* 13 NY3d 908 [2009]; *People v Alexander*, 294 AD2d 118 [1st Dept 2002], *lv denied* 98 NY2d 694 [2002]; *People v Odenthal*, 217 AD2d 412 [1st Dept 1995], *lv denied* 86 NY2d 845 [1995]).

Defendant's arguments concerning the People's summation are unpreserved, and we decline to review them in the interest of

justice. As an alternative holding, we conclude that the People's arguments on the common modus operandi of the two crimes were permissible for the above-discussed reasons, and that the summation otherwise provides no basis for reversal (*see People v D'Alessandro*, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

After a thorough hearing, the court properly denied defendant's CPL 440.10 motion claiming ineffective assistance of counsel. Defendant has not established that his trial counsel's alleged deficiencies were objectively unreasonable or that they resulted in prejudice under the state or federal standards (*see People v Benevento*, 91 NY2d 708 [1998]; *see also Strickland v Washington*, 466 US 668, 688, 694 [1984]). At the hearing, counsel explained, in detail, the reasoning behind his strategic decision not to call an expert on eyewitness identifications, instead seeking to cast doubt on the victims' identifications through cross-examination, and he described his extensive experience with such matters. The record establishes that counsel pursued a legitimate strategy that was objectively reasonable (*see People v Evans*, 16 NY3d 571, 575 [2011], *cert denied* __ US __, 132 S Ct 325 [2011]). Furthermore, defendant has not shown a reasonable probability that calling an expert would have affected the outcome or fairness of the trial (*see*

e.g. People v Bracey, 123 AD3d 419 [1st Dept 2014], *lv denied* 25 NY3d 1198 [2015]). Even if counsel mistakenly believed that the court had denied, with leave to renew, his predecessor's pretrial motion to present such expert testimony, when in fact the court had merely deferred the decision to the trial court, this did not affect either the reasonableness of the strategy or the absence of prejudice.

For the reasons already stated, counsel's failure to object to the summation remarks challenged on appeal did not constitute ineffective assistance (*see People v Cass*, 18 NY3d 553, 564 [2012]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Richter, Manzanet-Daniels, Kahn, JJ.

3284 Mautner-Glick Corporation, et al., Index 570981/15
Petitioners-Appellants,

-against-

Haley Glazer,
Respondent-Respondent.

_____

The Price Law Firm LLC, New York (Joshua C. Price of counsel), for appellants.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for respondent.

_____

Order, Appellate Term of the Supreme Court, First Department, entered on or about January 27, 2016, which affirmed an order of the Civil Court, New York County (Peter M. Wended, J.) (the Housing Court), entered on or about November 21, 2013, granting tenant-respondent's motion for summary judgment dismissing the petition in a summary holdover proceeding, unanimously affirmed, without costs.

Petitioners' threshold argument that tenant waived her right to contest service of the notice of nonrenewable (the *Golub* Notice) because she failed to raise it in her preanswer motion to dismiss is misplaced. Tenant's defense that she was not properly served with the *Golub* Notice was not a defense based on lack of personal jurisdiction, but on landlords' failure to comply with a condition precedent to suit (*W54-7 LLC v Schick*, 14 Misc3d 49, 50

[App Term, 1st Dept 2006]). Compliance with a statutory notice requirement represents a condition precedent to maintenance of a summary eviction proceeding, and the "burden remains with the landlord to prove that element of its case" (*id.*). Tenant timely raised the objection in her answer and again in her cross motion for summary judgment despite not having raised it in her preanswer motion (*id.; see* CPLR 3211[e]).

Appellate Term also correctly affirmed the Housing Court's determination that proper service of the *Golub* Notice was not established at the hearing. In primary residence cases, "the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*409-411 Sixth St. LLC v Mogi*, 112 AD3d 558, 558 [2013]). This is particularly true where, as here, the findings of fact "rest in large measure on considerations relating to the credibility of

witnesses" (*id.* [internal quotation marks omitted]). A fair interpretation of the evidence supported the Housing Court's determination.

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3285 Bonnie Loren, et al., Index 152558/13
Plaintiffs-Appellants,

-against-

Church Street Apartment Corp.,
Defendant-Respondent,

Ashkenazy Acquisition Corp., et al.,
Nonparty Respondents.

_____

Boatti PLLC, New York (Richard Stephen Boatti of counsel), for appellants.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Patrick Frank Palladino of counsel), for Church Street Apartment Corp., respondent.

Nicoletti, Gonson, Spinner, LLP, New York (Kevin M. Ryan of counsel), for Ashkenazy Acquisition Corp. and 257 Church Retail, LLC, respondents.

_____

Order, Supreme Court, New York County (Jennifer G. Schechter, J.), entered January 8, 2016, which, to the extent appealed from as limited by the briefs, granted that portion of defendant Church Street Apartment Corp.'s (CSA) motion to dismiss any claims previously made in a 2002 action, those claims for breach of lease accruing prior to March 20, 2007, those claims for constructive eviction accruing prior to March 20, 2012, and those claims for personal injury, trespass and property damage accruing prior to March 20, 2010, with the exception of latent exposure personal injury claims, unanimously affirmed, without

costs.

The court correctly found that the release signed by plaintiffs in a prior bankruptcy proceeding encompassed any and all damages that accrued through the date of execution of that release. Plaintiffs' contention that its 2002 action based upon, inter alia, a flood from broken pipes, was not released because that action did not "derive[] from the Bankruptcy Code and arise[] [from the bankruptcy case]," as per the release's qualifying language, is unpersuasive since that 2002 state action had been removed under the authority of the Bankruptcy Code to join that bankruptcy case.

Plaintiffs' argument that their claims are subject to the continuing wrong doctrine is unavailing (*see e.g. Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1029-1031 [2013]). The allegation that plaintiffs suffered damages due to vermin, sidewalk issues, flooding and electrical issues, is not a claim derived from a single point of origin, but consists of sufficiently distinct occurrences. And while plaintiffs also claim that defendants conspired, the conspiracy to commit a tort is not, of itself, a cause of action (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011]), and such an action is time-barred when the substantive tort

underlying it is time-barred (*see Schlotthauer v Sanders*, 153 AD2d 731 [2d Dept 1989], *lv denied* 75 NY2d 709 [1990]).

We have considered the plaintiffs' remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3287 The People of the State of New York, Ind. 5680/13
Respondent,

-against-

Steven Baez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered April 25, 2014, convicting defendant, upon his plea of guilty, of burglary in the third degree and auto stripping in the third degree, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

Defendant did not preserve his challenge to his plea allocution, and we decline to review it in the interest of justice. The narrow exception to the preservation rule explained in *People v Lopez* (71 NY2d 662, 665-666 [1988]) does not apply because defendant's factual recitation did not negate any element of the crime or cast significant doubt on his guilt. Defendant admitted his guilt of the precise conduct with which he was charged. The essence of defendant’s argument is that the

admitted acts did not, as a matter of statutory interpretation, satisfy the "building" element of burglary as defined in Penal Law § 140.00(2). However, such a claim is forfeited by a guilty plea (*see People v Levin*, 57 NY2d 1008 [1982]; *People v Mendez*, 25 AD3d 346 [1st Dept 2006]), and it cannot be revived by characterizing it as a challenge to the plea allocution (*see People v Greeman*, 49 AD3d 463, 464 [2008], *lv denied* 10 NY3d 934 [2008]). As an alternative holding, we find that the plea was knowing, intelligent and voluntary. Apart from the foreclosed statutory interpretation argument, the record does not otherwise support defendant's assertion that the plea was the product of "confusion" about any elements of the burglary charge.

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3288 X-Act Contracting Corporation, Index 157719/14
Plaintiff-Appellant,

-against-

Susan Flanders, et al.,
Defendants-Respondents.

_____

The Law Offices of Paul J. Solda, New York (Paul J. Solda of counsel), for appellant.

Goodman & Jacobs LLP, New York (Sue C. Jacobs of counsel), for Susan Flanders, respondent.

Abrams Garfinkel Margolis Bergson, LLP, New York (Eric B. Post of counsel), for Kenneth L. Kutner and Law Offices of Kenneth L. Kutner, respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered December 21, 2015, which, to the extent appealed from as limited by the briefs, granted the motions of defendants Susan Flanders and Kenneth L. Kutner and Kenneth L. Kutner d/b/a Law Offices of Kenneth L. Kutner (together, Kutner) to dismiss the abuse of process cause of action against them, unanimously modified, on the law, to deny the Kutner defendants' motion, and otherwise affirmed, without costs.

The doctrine of res judicata does not bar the abuse of process claim at issue, since X-Act's claims do not arise "out of the same transaction or series of transactions" as the prior negligence and breach of contract action against Flanders (*see*

Zito v Harding, 110 AD3d 628, 629 [1st Dept 2013]). The prior action involved a dispute between X-Act and Flanders over X-Act's work on a renovation project, and the present complaint involves allegations that Kutner obtained a judgment upon a so-ordered stipulation of settlement, based on a false affirmation, and then served restraining notices and refused to vacate the judgment, even after receiving proof of payment. Moreover, there was no point at which X-Act could have asserted the instant claim in the prior Civil Court action, since the case had settled by the time the alleged wrongdoing occurred. Further, in this action, X-Act is not seeking sanctions or attorneys' fees that have already been recovered, but rather damages proximately flowing from a material misrepresentation in the prior action (*see Melcher v Greenberg Traurig LLP*, 135 AD3d 547, 553 [1st Dept 2016]).

The Kutner defendants are not entitled to dismissal of the abuse of process claim on the alternate grounds that the cause of action is not adequately pleaded (CPLR 3211[a][7]). At the pleading stage, X-Act's complaint sufficiently states a claim for abuse of process. Kutner's false affirmation, which served as the foundation for obtaining the judgment, taken together with the allegation of malice, suffices to state a cause of action for abuse of process (*see Phillipe v American Express Travel Related Servs. Co.*, 174 AD2d 470 [1st Dept 1991]; *and see Cunningham v*

State of New York, 77 AD2d 756, 757 [3rd Dept 1980], *mod on other grounds* 53 NY2d 851 [1981]). However, the complaint, together with the documentary evidence in the record, is insufficient to sustain the claim against Flanders, particularly in light of X-Act's assertions in the prior action that Kutner failed to make inquiry of his client before obtaining the judgment.

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3289-
3290 Index 350373/10

Janelle M., an Infant By Her Mother and Natural Guardian, Brenda M.,
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation (Lincoln Hospital),
Defendant-Respondent.

_____

The Fitzgerald Law Firm, P.C., Yonkers (Mitchell Gittin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered March 16, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 16, 2015, which, in effect, granted plaintiff's motion for reargument and, upon reargument, adhered to the prior determination, unanimously dismissed, without costs, as academic.

In opposition to defendant's prima facie showing that it did not deviate from good and accepted medical practice in its diagnosis and treatment of the infant plaintiff's mother, plaintiff failed to raise a triable issue of fact. Her expert affirmation opining that the failure to order and perform a

cervical cerclage at the start of the mother's prenatal care was a departure from the applicable standard of care included significant factual errors misconstruing the record, failed to address the detailed affirmation by defendant's expert explaining why the mother was not a candidate for cerclage, and made conclusory and speculative assertions (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]; *Mignoli v Oyugi*, 82 AD3d 443 [1st Dept 2011]). Further, defendant established that the mother's pre-term delivery was most likely caused by pre-term labor brought on by an infection, rather than an incompetent cervix, and therefore that any alleged failure to perform a cerclage was not the proximate cause of plaintiff's injuries.

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

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3291 Arthur Wiscovitch, Index 151274/13
Plaintiff-Appellant,

-against-

Lend Lease (U.S.) Construction LMB Inc. formerly known as Bovis Lend Lease LMB, Inc., et al.,
Defendants-Respondents.

_____

Kazmierczuk & McGrath, Forest Hills (Joseph Kazmierczuk of counsel), for appellant.

Cerussi & Spring, P.C., White Plains (Christa D'Angelica of counsel), for respondents.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered December 9, 2015, which granted defendants' motion to dismiss the complaint as abandoned, unanimously affirmed, without costs.

The motion court providently exercised its discretion in dismissing the complaint as abandoned (*see* CPLR 3215). Plaintiff did not establish a viable excuse for the delay in moving for a default judgment against defendants, nor demonstrate a meritorious cause of action (*see Utak v Commerce Bank Inc.*, 88 AD3d 522 [1st Dept 2011]). Any indeterminate extensions of time to answer the complaint ended by March 17, 2014, more than a year before the motion, after plaintiff wrote to defendants asking defendant LIC Site B2 Owner, L.L.C. to answer within two weeks,

and informing defendant Lend Lease (U.S.) Construction LMB Inc. that it was in default (*see Zenzillo v Underwriters at Lloyd's London*, 78 AD3d 1540 [4th Dept 2010]). Furthermore, the excerpt of deposition testimony given by plaintiff in another action, which merely reflects that he sustained a work-related injury at a construction site, for which one of the defendants was a general contractor, does not establish a meritorious claim.

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3292 The People of the State of New York, Ind. 669/08
Respondent,

-against-

John Blum,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Nancy Killian of counsel), for respondent.

_____

Order, Supreme Court, New York County (John S. Moore, J.), entered December 15, 2010, which, upon granting defendant's motion for reargument and rehearing to the extent of conducting a rehearing of his risk level determination, adhered to its prior order entered on or about August 10, 2010, adjudicating defendant a level three sexually violent offender pursuant to the Sexual Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Regardless of whether defendant's correct point score is 145 or, as he claims, 125 points, we find no basis for a downward

departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant, including scientific and medical evidence, were outweighed by the seriousness of the underlying sexual offense.

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3293 American Casualty Company of Reading, Pennsylvania, etc., et al., Plaintiffs-Respondents, Index 157562/14

-against-

Motivated Security Services, Inc., Defendant-Appellant.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellant.

Canter Law Firm, P.C., White Plains (Nelson E. Canter of counsel), for respondents.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about August 16, 2016, which denied defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

Although, in support of its motion to dismiss, defendant demonstrated that plaintiff SBF is not an intended third-party beneficiary of defendant's security contract with a nonparty (*see generally Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 43-45 [1985]; *see also Bernal v Pinkerton's, Inc.*, 52 AD2d 760 [1st Dept 1976], *affd* 41 NY2d 938 [1977]), plaintiffs' complaint, as supplemented by the affidavit of SBF's president (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]), sufficiently alleges a cause of action for negligence. In particular,

plaintiff sufficiently alleges that SBF detrimentally relied upon defendant's performance of its contractual duties (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). While defendant contends that the security contracts did not require it to patrol the lot where the subject crane was stored, the documents do not conclusively establish that its responsibilities were so limited (*see Leon*, 84 NY2d at 88). Further, the complaint and affidavit adequately show that plaintiffs had "actual knowledge" of the security contracts, as required to establish detrimental reliance (*Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 246 [1st Dept 2013]).

The motion court properly considered the out-of-state affidavit of SBF's president, even though it lacks a certificate of conformity (CPLR 2309[c]). The lack of such certification is not a fatal defect and the irregularity may be corrected later (*see Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]; CPLR 2001).

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3294 The People of the State of New York, Respondent, Ind. 2142/11

-against-

Raymond Alexander, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Renee A. White, J.), rendered August 13, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and promoting prison contraband in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously dismissed as moot.

Defendant seeks a reduction of his sentence, claiming that it was excessive and based on an incomplete presentence report. Since he has completed his entire sentence, including parole supervision, this appeal is moot.

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3295 Roxana Robinson, Index 106847/11
Plaintiff-Appellant, 590387/12
590834/13

-against-

Brooks Shopping Centers, LLC,
et al.,
Defendants-Respondents.

- - - - -

Macerich Management Co., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Montesano Bros., Inc.,
Third-Party Defendant-Respondent.

- - - - -

Macerich Management Co., et al.,
Second Third-Party Plaintiffs-Appellants,

-against-

UGL Services Unicco Operations Co.,
formerly known as Unicco Service
Company doing business as UGL Unicco,
Second Third-Party Defendant-Respondent.

_____

Irwin & Streiner, LLC, Manhasset (Veronica Renta Irwin of counsel), for appellant.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Carolyn Comparato of counsel), for respondents/appellants.

Mauro Lilling Naparty LLP, Woodbury (Seth M. Weinberg of counsel), for Montesano Bros., Inc., respondent.

Rende, Ryan & Downs, LLP, White Plains (Roland T. Koke of counsel), for UGL Services Unicco Operations Co., respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez,

J.), entered September 23, 2015, which, to the extent appealed and cross-appealed from, granted the respective motions of defendants/third-party plaintiffs/second third-party plaintiffs (defendants), third-party defendant, and second third-party defendant insofar as they sought summary judgment dismissing the complaint, denied defendants' motion to the extent it sought summary judgment on claims for common law and contractual indemnification against third-party defendant and second third-party defendant, granted second third-part defendant's motion for summary judgment dismissing the second third-party claims for common law and contractual indemnification, and dismissed defendants' third-party claims for common law and contractual indemnification against third-party defendant, unanimously modified, on the law, to vacate the dismissal of defendants' third-party claim for contractual indemnification against third-party defendant Montesano Brothers, Inc. (Montesano), and otherwise affirmed, without costs.

Plaintiff's description of the alleged defect that caused her fall as an "uneven spot" that "wasn't as level as the other side" of a "little ridge" of concrete in the ground, without more, establishes that the alleged defect was trivial and nonactionable (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015]; *Marcus v Namdor, Inc.*, 46 AD3d 373, 374 [1st Dept

2007]). Moreover, defendants established that they had no notice of the alleged defect (*see Coleman v New York City Hous. Auth.*, 12 AD3d 281 [1st Dept 2004]).

The third-party and second third-party claims for common-law indemnification were properly dismissed, since the complaint alleges that defendants were liable based on their own wrongdoing in failing to maintain the premises (*Great Am. Ins. Cos. v Bearcat Fin. Servs., Inc.*, 90 AD3d 533 [1st Dept 2011], *lv dismissed* 18 NY3d 951 [2012]).

The second third-party claim for contractual indemnification was also properly dismissed. The indemnification provision in UGL Services Unicco Operations Co.'s (UGL) contract requires UGL to indemnify defendants for property damage, bodily injury, or death only arising out of or related to UGL's negligence. Because UGL was not negligent, defendants are not entitled to contractual indemnification from it.

The indemnification provision in Montesano's contract was more broad and required Montesano to indemnify defendants for liability, damage, etc., "resulting from, arising out of or occurring in connection with the execution of the Work," including attorneys' fees. Thus, although there was no negligence here, to the extent defendants incurred costs connected with Montesano's execution of its work, which included

constructing/resurfacing roads and sidewalks on this shopping center renovation project, Montesano is required to indemnify defendants. Accordingly, the order should be modified to vacate the dismissal of defendants' contractual indemnification claim against Montesano.

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

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3296 Drew Doscher, Index 650469/15
Plaintiff-Appellant,

-against-

Mannatt, Phelps & Phillips, LLP,
et al.,
Defendants-Respondents.

Merolla & Gold, LLP, Garden City (Angelo Todd Merolla of counsel), for appellant.

Frankfurt Kurnit Klein & Selz, P.C., New York (Ronald C. Minkoff of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 20, 2015, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The doctrine of collateral estoppel precludes plaintiff from asserting his Judiciary Law § 487 claim (*see Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 415 [1st Dept 2011]). The claim is premised on alleged discovery abuses during a prior arbitration between plaintiff and his employers, who were represented by defendants. Plaintiff had a full and fair opportunity to litigate the issues he raises in this action in two motions for sanctions before the arbitration panel, both of which were denied (*see Pentalpha Enters., Ltd. v Cooper & Dunham LLP*, 91 AD3d 451 [1st Dept 2012]; *Gillen v McCarron*, 126 AD3d 670 [2d Dept 2015];

God's Battalion of Prayer Pentecostal Church, Inc. v Hollander, 24 Misc 3d 1250[A], 2009 Slip Op 51939[U], *7-9 [Sup Ct, Nassau County 2009], *affd* 82 AD3d 1156 [2d Dept 2011], *lv denied* 17 NY3d 714 [2011]). Contrary to plaintiff's contention, the arbitration award constitutes a valid final judgment for collateral estoppel purposes, notwithstanding the pendency of plaintiff's petition to vacate (*Acevedo v Holton*, 239 AD2d 194 [1st Dept 1997]; *Franklin Dev. Co., Inc. v Atlantic Mut. Ins. Co.*, 60 AD3d 897 [2d Dept 2009]).

Plaintiff also failed to state a cause of action under Judiciary Law § 478, because the statute does not apply to attorney misconduct during an arbitral proceeding. The plain text of § 478 limits the statute's application to conduct deceiving "the *court* or any party" (emphasis added), and, because the statute has a criminal component, it must be interpreted narrowly (*see People v Thompson*, 26 NY3d 678, 687-688 [2016]; *Amalfitano v Rosenberg*, 12 NY3d 8, 14 [2009]). Moreover, courts have held that the statute does not apply to conduct outside New York's territorial borders or to administrative proceedings, observing that its purpose is to regulate the manner in which litigation is conducted before the courts of this State (*see Schertenleib v Traum*, 589 F2d 1156, 1166 [2d Cir 1978] [proceedings outside New York]; *Alliance Network, LLC v Sidley*

Austin LLP, 43 Misc 3d 848, 864-865 [Sup Ct, NY County 2014] [same]; *Southern Blvd. Sound v Felix Storch, Inc.*, 165 Misc 2d 341, 344 [Civ Ct, NY County 1995], *mod on other grounds* 167 Misc 2d 731 [App Term 1996] [same]; *Kallista, S.A. v White & Williams LLP*, 51 Misc 3d 401, 419 [Sup Ct, Westchester County 2016] [administrative proceedings]).

In any event, plaintiff failed to allege the elements of a cause of action under the statute, i.e., intentional deceit and damages proximately caused by the deceit (*see* Judiciary Law § 487; *Facebook, Inc. v DLA Piper LLP [US]*, 134 AD3d 610, 615 [1st Dept 2015], *lv denied* 28 NY3d 903 [2016]). The misconduct that plaintiff alleges is not "egregious" or "a chronic and extreme pattern of behavior" (*Facebook*, 134 AD3d at 615 [internal quotation marks omitted]), and the allegations regarding scienter lack the requisite particularity (*id.*; *see also* CPLR 3016[b]). Moreover, plaintiff was given the opportunity to subpoena a third

party for documents that he was unable to obtain from defendants, but he declined it. He cannot blame defendants for his tactical decision.

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

ENTERED: MARCH 16, 2017

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Kahn, JJ.

3297N Carolyn Roberts, et al., Index 150612/13
Plaintiffs-Respondents,

-against-

Ocean Prime, LLC, et al.,
Defendants-Appellants,

Ocean Car Park, LLC doing business as
CGMC Parking, LLC,
Defendant.

_____

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for Ocean Prime, LLC, Ocean Partners, LLC, Ocean Partners SPE Corp. and Battery Commercial Associates, LLC, appellants.

Baxter Smith & Shapiro, P.C., Hicksville (Renee E. DeMott of counsel), for Residential Management Group, LLC, appellant.

Hardin Kundla McKeon & Poletto, New York (Stephen J. Donahue of counsel), for Newmark Knight Frank Global Management Services, LLC, appellant.

Napoli Shkolnik PLLC, New York (Hunter Shkolnik of counsel) and Imbesi Law PC, New York (Brittany Weiner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 21, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for class certification, appointed the named plaintiffs as class representatives, and designated Hunter J. Shkolnik, Brian H. Brick, and Vincent Imbesi as class counsel, unanimously affirmed, without costs.

Plaintiffs seek to represent a class of residential and commercial tenants of a building located in lower Manhattan, which is owned and/or managed by defendants. The complaint alleges that defendants were negligent in failing to properly secure the building prior to Superstorm Sandy and with respect to the remediation efforts following the storm.

The court properly concluded that plaintiffs satisfied the criteria of CPLR 901, and the factors enumerated in CPLR 902 support class certification.

It is undisputed that the building has more than 400 residential apartments above 15 floors of commercial space. Thus, the numerosity requirement is met and joinder of all class members is impracticable (*see Stecko v RLI Ins. Co.*, 121 AD3d 542 [1st Dept 2014]).

The commonality requirement is also satisfied in that the proof at trial will consist of evidence of defendants' efforts to prevent damage in advance of the storm and to repair damage after the storm. Since the class consists of tenants of the building, common questions predominate over individual questions concerning the amount and type of damages sustained by each class member (*see Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 535, 536 [1st Dept 2011]). Any differences in proof with respect to the applicability of the warranty of habitability in Real Property

Law § 235-b as between residential tenants and commercial tenants is insufficient to overcome the significant common questions, and the court may, in its discretion, establish subclasses (*see City of New York v Maul*, 14 NY3d 499, 513 [2010]).

The claims of the putative class representatives are typical of the class's claims since each resides or leases space in the building and their injuries, if any, derive from the same course of conduct by defendants (*see Stecko*, 121 AD3d at 543). Moreover, the record reflects that they are sufficiently informed about the facts, have no conflicts of interest with the class they seek to represent, and are able to act as a check on counsel (*see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399-400 [2014]).

The court properly found that the allegations arising from a partnership dispute at one of the firms proposed as class counsel did not implicate the specific attorneys seeking to be appointed class counsel, and the size of the other firm does not suggest that it will be unable to adequately represent the class.

Class action treatment will conserve judicial resources, reduce litigation expenses, and avoid inconsistent outcomes. Any individual that wishes to bring a separate action may opt out of the class.

Plaintiffs' counsel stated that they did not foresee any difficulties in managing the action, and defendants have failed to point to significant potential problems in this regard.

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

ENTERED: MARCH 16, 2017

CLERK

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

3415 The People of the State of New York, Respondent, Ind. 4029/13

-against-

Melvin Vidro, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Charity L. Brady of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered May 22, 2014, as amended July 22, 2014, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of four years, unanimously affirmed.

The court properly denied defendant's motion to suppress physical evidence and the confirmatory identifications made by undercover police officers. The arresting officer had probable cause to arrest defendant under the fellow officer rule because "the radio transmission [of] the undercover officer . . . provided details of the defendant's race, sex, clothing, as well as his location and the fact that a 'positive buy' had occurred"

and defendant was the only person in the area who matched the description at the location (*see People v Young*, 277 AD2d 176, 176-177 [1st Dept 2000], *lv denied* 96 NY2d 789 [2001]). Although the arresting officer did not testify at the suppression hearing, "the only rational explanation for how defendant came to be arrested . . . is that [the arresting officer] heard the radio communication [heard by the testifying officer] and apprehended defendant on that basis" (*People v Poole*, 45 AD3d 501, 502 [1st Dept 2007], *lv denied* 10 NY3d 815 [2008] [internal quotation marks and citation omitted]; *People v Myers*, 28 AD3d 373 [1st Dept 2006], *lv denied* 7 NY3d 760 [2006]). The inference of mutual communication (*see People v Gonzalez*, 91 NY2d 909, 910 [1998]) does not turn on what kind of radios the officers were using, or how well the radios were working, but on the simple fact that, without hearing the radio transmission, the arresting officer would have had no way of knowing where to go or whom to arrest.

Defendant's challenges to the prosecutor's summation are entirely unpreserved because, during the summation, defendant made only unspecified generalized objections. Although defendant's postsummation mistrial motion made some specific claims, this was insufficient to preserve those issues, which

should have been raised during the summation (*see People v Romero*, 7 NY3d 911, 912 [2006]; *People v LaValle*, 3 NY3d 88, 116 [2004]). We decline to review any of defendant's challenges to the summation in the interest of justice.

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

ENTERED: MARCH 16, 2017

CLERK

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

3420 L.E.K. Consulting LLC, Index 652430/11
Plaintiff-Respondent,

-against-

Menlo Capital Group, LLC,
Defendant-Appellant.

- - - - -

Menlo Capital Group, LLC,
Third-Party Plaintiff,

-against-

Citi Venture Capital International,
an unincorporated division of Citibank, N.A.,
Third-Party Defendant.

_____

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Ellyde R. Thompson of counsel), for appellant.

Kleinberg, Kaplan, Wolff & Cohen, P.C., New York (Joshua K. Bromberg of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered December 11, 2015, in favor of plaintiff and against defendant in the amount of $699,479.09, unanimously affirmed, with costs.

Supreme Court properly considered plaintiff's second summary judgment motion as plaintiff's claims could be disposed of quickly without further burdening the resources of the court (*Varsity Tr. v Board of Educ. of City of N.Y.*, 300 AD2d 38, 39 [1st Dept 2002]), and the court is free to "reconsider its [own]

prior interlocutory orders during the pendency of the action, and may do so regardless of statutory time limits concerning motions to reargue" (*Kleinser v Astarita*, 61 AD3d 597, 598 [1st Dept 2009] [internal citation and quotation marks omitted]; *see also Komolov v Segal*, 101 AD3d 639, 639 [1st Dept 2012]).

The Letter Agreement, dated May 13, 2010, entered into by plaintiff and defendant was not ambiguous. It clearly provided that plaintiff would provide certain due diligence services and would receive payment from defendant for such services. Because the letter agreement is not ambiguous, there is no need to look to extrinsic evidence (*see Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). While defendant may have had a side agreement with third-party defendant Citi Venture Capital International (CVCI) that CVCI was to ultimately bear the costs of plaintiff's services, such agreement does not affect defendant's liability under the May 13, 2010 letter agreement. Plaintiff also provided prima facie evidence that it performed the services detailed in the letter agreement, and that it has not been paid for such services. Accordingly, Supreme Court properly granted summary judgment on plaintiff's breach of contract claim. Defendant's argument that it was acting as an agent of a disclosed principal, CVCI, is without merit as there is no evidence of such agency relationship in the contract.

Indeed, there is evidence that defendant was the beneficiary of the letter agreement.

Plaintiff also established prima facie entitlement to summary judgment on its account stated claim as it provided evidence of the invoices, receipt by defendant, and lack of objection by defendant for a substantial period of time (*see Matter of Lawrence*, 24 NY3d 320, 343 [2014] [citing *Whiteman, Osterman & Hanna, LLP v Oppitz*, 105 AD3d 1162, 1163 [3d Dept 2013]).

Supreme Court should have dismissed the quantum meruit claim as plaintiff's recovery on this claim is precluded by the fact that the letter agreement is a valid contract (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *Metro Found. Contrs., Inc. v Marco Martelli Assoc., Inc.*, 145 AD3d 526, 526 [1st Dept 2016]).

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

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

ENTERED: MARCH 16, 2017

CLERK

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

3425 The People of the State of New York, Respondent, Ind. 194/12

-against-

Jose Capriata, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Thomas M. Nosewicz of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered May 1, 2012, convicting defendant, upon his plea of guilty, of two counts of criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of six years, unanimously affirmed.

The indictment alleged, and defendant's plea allocution established, that defendant committed a continuing possessory crime (*see Johnson v Morgenthau*, 69 NY2d 148 [1987]) that began when he was 18 but ended when he was 19, and whose elements persisted during that time span. Accordingly, he was not eligible for youthful offender treatment (*see People v White*, 131 AD3d 891, 892 [1st Dept 2015], *lv denied* 26 NY3d 1093 [2015]), and there was no reason for the court to consider it (*see People v Middlebrooks*, 25 NY3d 516, 525 [2015]). A youthful offender

sentence would have been an illegal sentence; accordingly, we find defendant's procedural arguments to be unavailing.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of his excessive sentence claim. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: MARCH 16, 2017

CLERK

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

3426 1626 2nd Ave LLC, et al., Index 651425/14
Plaintiffs-Respondents,

-against-

National Specialty Insurance Co., Inc., et al.,
Defendants,

Starr Indemnity & Liability Co., et al.,
Defendants-Appellants.

- - - - -

[And a Third-Party Action]

_____

Methfessel & Werbel, New York (Christian R. Baillie of counsel), for appellants.

Kushnick Pallaci PLLC, Melville (Vincent T. Pallaci of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 25, 2016, which, insofar as appealed from as limited by the briefs, denied the motion of defendants Starr Indemnity & Liability Co. and U.S. Adjustment Corp. for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs.

In this action to recover losses resulting from a flood at a mixed-use building, plaintiff 1626's business interruption losses sustained due to its resulting inability to collect rent from its commercial tenant were covered under the plain terms of the relevant policy. Defendants' various theories as to why

plaintiff may not recover from them are laden with factual questions and particularly inappropriate for resolution prior to the completion of discovery. Accordingly, Supreme Court properly denied defendants' motion as premature (*see Brooks v Somerset Surgical Assoc.*, 106 AD3d 624 [1st Dept 2013]; CPLR 3212[f]).

We have considered the remaining contentions, and find them unavailing.

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

ENTERED: MARCH 16, 2017

CLERK

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

3429- Index 850179/15
3430- 850119/15
3431 Deutsche Bank National Trust Company, 850120/15
as Trustee for American Home Mortgage
Asset Trust 2006-6, Mortgage-Backed Pass-Through
Certificates Series 2006-6,
Plaintiff-Appellant,

-against-

Royal Blue Realty Holdings, Inc.,
Defendant-Respondent,

John Souto, etc., et al.,
Defendants.

- - - - -

Deutsche Bank National Trust Company,
as Trustee for American Home Mortgage
Asset Trust 2007-1, Mortgage-Backed Pass-Through
Certificates 2007-1,
Plaintiff-Appellant,

-against-

Unknown Heirs of the Estate of Serge Souto,
et al.,
Defendants,

Royal Blue Realty Holdings, Inc.
Defendant-Respondent.

- - - - -

Deutsche Bank National Trust Company, as Trustee for
American Home Mortgage Asset Trust 2006-6,
Mortgage-Backed Pass-Through Certificates Series
2006-6,
Plaintiff-Appellant,

-against-

Unknown Heirs of the Estate of Serge Souto,
et al.,
Defendants,

Royal Blue Realty Holdings, Inc.
Defendant-Respondent.

_____

Houser & Allison, APC, New York (Jacqueline Aiello of counsel), for appellant.

Shaw & Associates, New York (Martin Shaw of counsel), for respondent.

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Orders, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about July 6, 2016, which granted the motions of defendant Royal Blue Realty Holdings, Inc. for summary judgment dismissing the complaints as time-barred, and denied plaintiff's cross motions for summary judgment, unanimously affirmed, with costs.

The motion court properly determined that the actions are time-barred since they were commenced more than six years from the date that all of the debt on the mortgages was accelerated (CPLR 213[4]). The letters from plaintiff's predecessor-in-interest provided clear and unequivocal notice that it "will" accelerate the loan balance and proceed with a foreclosure sale, unless the borrower cured his defaults within 30 days of the letter. When the borrower did not cure his defaults within 30 days, all sums became immediately due and payable and plaintiff

had the right to foreclose on the mortgages pursuant to the letters. At that point, the statute of limitations began to run on the entire mortgage debt (*see CDR Créances S.A. v Euro-American Lodging Corp.*, 43 AD3d 45, 51 [1st Dept 2007]).

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

ENTERED: MARCH 16, 2017

CLERK

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

3432 The People of the State of New York, Respondent, Ind. 136N/13

-against-

Judd White, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (David A. Crow of counsel) and Cozen O'Connor, New York (Alexander Selarnick of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Susan Gliner of counsel) and Gibson Dunn, New York (Mary Beth Maloney of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered January 15, 2015, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second violent felony offender, to a term of six years, unanimously affirmed.

The court providently exercised its discretion in denying, without a hearing, defendant's CPL 330.30(2) motion to set aside the verdict on the ground of improper jury conduct. The only support for the motion was a letter from, and counsel's phone conversation with, one juror. Viewing the information supplied by this juror in a light most favorable to defendant, it only demonstrated that, during deliberations, two other jurors cited matters that were permissibly within the realm of personal life

experiences, albeit ones not shared by all jurors (*see People v Arnold*, 96 NY2d 358, 364-368 [2001]; *People v Brown*, 48 NY2d 388, 393-394 [1979]), rather than the type of specialized training and expertise described in *People v Maragh* (94 NY2d 569, 574 [2000]). Furthermore, a "motion is no substitute for an investigation to be made by counsel . . . and a defendant is not entitled to a hearing based on expressions of hope that a hearing might reveal the essential facts" (*People v Brunson*, 66 AD3d 594, 596 [1st Dept 2009], *lv denied* 13 NY3d 937 [2010] [internal quotation marks and citations omitted]).

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

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

ENTERED: MARCH 16, 2017

CLERK

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

3435N Harold Peerenboom, Index 162152/15
Petitioner-Respondent-Appellant,

-against-

Marvel Entertainment, LLC,
Respondent,

Isaac Perlmutter,
Nonparty Appellant-Respondent.

_____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Allan J. Arffa of counsel), for appellant-respondent.

Kasowitz, Benson, Torres & Friedman, LLP, New York (Marc E. Kasowitz of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered October 17, 2016, which granted nonparty Isaac Perlmutter's motions for protective orders against disclosure of certain allegedly privileged items to the extent of directing respondent Marvel Entertainment, LLC (Marvel) to produce certain privilege log items allegedly subject to the marital privilege for in camera review, and otherwise denied the motions, unanimously modified, on the law and the facts, to deny so much of Perlmutter's motions as sought protective orders on the ground of marital privilege, to direct Marvel to produce to Supreme Court all items in Perlmutter's privilege log in which he asserts attorney work product protection, and to remand the matter to

Supreme Court for in camera review and a determination of whether such documents are in fact protected attorney work product, and otherwise affirmed, without costs.

Application of the four factors set forth in *In re Asia Global Crossing, Ltd.* (322 BR 247, 257 [Bankr SD NY 2005]), which we endorse (*see also e.g. Scott v Beth Israel Med. Ctr. Inc.*, 17 Misc 3d 934, 941 [Sup Ct, NY County 2007]), indicates that Perlmutter lacked any reasonable expectation of privacy in his personal use of the email system of Marvel, his employer, and correspondingly lacked the reasonable assurance of confidentiality that is an essential element of the attorney-client privilege (*see Matter of Priest v Hennessy*, 51 NY2d 62, 69 [1980]). Among other factors, while Marvel's email policies during the relevant time periods permitted "receiving e-mail from a family member, friend, or other non-business purpose entity . . . as a courtesy," the company nonetheless asserted that it "owned" all emails on its system, and that the emails were "subject to all Company rules, policies, and conduct statements." Marvel "reserve[d] the right to audit networks and systems on a periodic basis to ensure [employees'] compliance" with its email policies. It also "reserve[d] the right to access, review, copy and delete any messages or content," and "to disclose such messages to any party (inside or outside the Company)." Given,

among other factors, Perlmutter's status as Marvel's Chair, he was, if not actually aware of Marvel's email policy, constructively on notice of its contents (*see People v Puesan*, 111 AD3d 222, 229 [1st Dept 2013], *lv denied* 22 NY3d 1202 [2014]; *Long v Marubeni Am. Corp.*, 2006 WL 2998671, *3, 2006 US Dist LEXIS 76594, *9 [SD NY, Oct. 19, 2006, No. 05-Civ-639(GEL)(KNF)]).

Perlmutter's use of Marvel's email system for personal correspondence with his wife waived the confidentiality necessary for a finding of spousal privilege (*see* CPLR 4502[b]; *In re Reserve Fund Sec. & Derivative Litig.*, 275 FRD 154, 159-160 and n 2, 164 [SD NY 2011]; *United States v Etkin*, 2008 WL 482281, *5, 2008 US Dist LEXIS 12834, *19-20 [SD NY, Feb. 19, 2008, No. 07-CR-913(KMK)]).

Given the lack of evidence that Marvel viewed any of Perlmutter's personal emails, and the lack of evidence of any other actual disclosure to a third party, Perlmutter's use of Marvel's email for personal purposes does not, standing alone, constitute a waiver of attorney work product protections (*see People v Kozlowski*, 11 NY3d 223, 246 [2008], *cert denied* 556 US 1282 [2009]; *Bluebird Partners v First Fid. Bank, N.J.*, 248 AD2d 219, 225 [1st Dept 1998], *lv dismissed* 92 NY2d 946 [1998]). We accordingly modify to the extent indicated (*see Kozlowski*, 11

NY3d at 244 n 12; *Matter of Subpoena Duces Tecum to Jane Doe*, 99 NY2d 434, 442 [2003]).

There is no accountant-client privilege in this state (*see First Interstate Credit Alliance v Andersen & Co.*, 150 AD2d 291, 292 [1st Dept 1989]). Perlmutter has failed to bear his burden of showing that the evidentiary law of Florida, which he asserts does recognize an accountant-client privilege, should govern this issue (*see Schultz v Boy Scouts of Am.*, 65 NY2d 189, 202 [1985]; *Hyatt v State of Cal. Franchise Tax Bd.*, 105 AD3d 186, 204 [2d Dept 2013]; *First Interstate Credit Alliance*, 150 AD2d at 292-293).

Perlmutter's reliance on the agency and common interest doctrines is unavailing, as those doctrines do not in and of themselves constitute a source of privilege, and there is no basis for applying them in this case (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 630 [2016] [common

interest]; *People v Osorio*, 75 NY2d 80, 84 [1989] [agency]).

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

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

ENTERED: MARCH 16, 2017

CLERK

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

3437-
3438N Index 350638/09

Alex M., an Infant Over the Age of 14 Years, by His Natural Guardian and Father, Gennaro M., et al.,
Plaintiffs,

-against-

City of New York,
Defendant.

- - - - -

The Law Office of Fred Lichtmacher, P.C.,
Nonparty Appellant,

Irom Wittels Freund Berne & Serra, P.C.,
Nonparty Respondent.

_____

The Law Office of Fred Lichtmacher, PC, New York (Fred Lichtmacher of counsel), for appellant.

Sclar Adler LLP, New York (Richard W. Berne of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about December 2, 2015, which granted nonparty respondent's (Irom) motion to confirm a referee's report, dated September 14, 2015, recommending an apportionment of fees between outgoing and incoming counsel, unanimously affirmed, without costs. Appeal from order, dated March 19, 2015, but apparently never entered, unanimously dismissed, without costs, as taken from a nonappealable paper.

The referee's findings are supported by the record (*see Lai*

Ling Cheng v Modansky Leasing Co., 73 NY2d 454, 458 [1989]; *Board of Mgrs. of Boro Park Vil.-Phase I Condominium v Boro Park Townhouse Assoc.*, 284 AD2d 237, 238 [1st Dept 2001]). He considered the relevant factors (*Lai Ling Cheng*, 73 NY2d at 458; *Board of Mgrs.*, 284 AD2d at 237). As the trier of fact, he was in the best position to determine the issues referred to him (*Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705 [1st Dept 1985]).

The appeal from the March order should be dismissed, because the order was never entered (*see Jemzura v Jemzura*, 24 AD2d 809 [3d Dept 1965]). Furthermore, nonparty appellant does not object to the reference directed by the order, but rather to the fact that, in a transcript that was not entered, the court ruled that Irom was not discharged for cause. That ruling is not appealable (*Matter of Juan Alejandro R.*, 221 AD2d 183 [1st Dept 1995]; *see also Clemons v Schindler El. Corp.*, 87 AD3d 452 [1st Dept 2011]).

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

ENTERED: MARCH 16, 2017

CLERK

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

3439N In re AutoOne Insurance Company, Index 24343/15E
Petitioner-Appellant-Respondent,

-against-

Martin Negron,
Respondent-Appellant,

New Market Logistics, LLC,
Proposed Additional Respondent,

American Millennium Insurance Co.,
Proposed Additional Respondent-Respondent.

_____

Picciano & Scahill, P.C., Westbury (Albert J. Galatan of counsel), for AutoOne Insuance Company, appellant.

Robinson & Yablon, P.C., New York (Lawrence T. Yablon of counsel), for Martin Negron, appellant.

Melick & Porter, LLP, New York (Charles C. Gardner of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered July 13, 2016, which, to the extent appealed from as limited by the briefs, denied the petition to permanently stay an uninsured motorist arbitration, and "discharged" the proposed additional respondents New Market Logistics, LLC and American Millennium Insurance Co. (AMIC), unanimously reversed, on the law, without costs, and the petition granted to the extent of temporarily staying the arbitration pending a hearing as to whether there is personal jurisdiction over AMIC, and, in the

event there is jurisdiction, temporarily staying the arbitration pending a framed issue hearing as to the validity of AMIC's disclaimer of coverage.

Respondent Martin Negron was allegedly injured when a truck owned by New Market backed into a double-parked vehicle in which Negron was a passenger. New Market's insurer, AMIC, disclaimed coverage on the ground that New Market failed to cooperate in AMIC's investigation of the accident. Consequently, Negron demanded an uninsured motorist arbitration with petitioner, his own insurer. Petitioner sought a permanent stay of the arbitration, on the ground that the offending vehicle was insured. AMIC opposed the part of the petition that sought to add AMIC as a respondent, arguing that the court lacked personal jurisdiction over it. Without resolving the jurisdictional issue, the motion court determined that AMIC had validly disclaimed coverage.

AMIC's letters to petitioner raise issues of fact whether AMIC validly disclaimed coverage on the ground of noncooperation (*Matter of Nationwide Ins. Co. v Sillman*, 266 AD2d 551, 552 [2d Dept 1999]; *see also Matter of New York Cent. Mut. Fire Ins. Co. [Rozenberg]*, 281 AD2d 330, 331 [1st Dept 2001]; *see generally Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159 [1967]). Petitioner's argument regarding the timeliness of AMIC's

disclaimer is not preserved for appellate review, since it was raised for the first time on appeal (*Matter of Brodsky v New York City Campaign Fin. Bd.*, 107 AD3d 544, 545 [1st Dept 2013]).

AMIC properly raises the jurisdictional issue as an alternate ground for affirmance of the portion of the order that denied petitioner's request to add AMIC as a respondent. In opposition to petitioner's request, AMIC made a prima facie showing that it cannot be added to the proceedings because the court lacks personal jurisdiction over it, as it is a New Jersey corporation that does not transact any business in New York (*see Matter of American Tr. Ins. Co. v Hoque*, 45 AD3d 329, 329 [1st Dept 2007]). Neither petitioner nor Negron had an opportunity to rebut AMIC's showing, because AMIC's opposition papers were submitted after petitioner had submitted its reply. Accordingly, the issue cannot be determined on the record, and the matter is remanded for a hearing on the issue. Since AMIC is a necessary party to the hearing on the issue of the validity of its

disclaimer (*Matter of New York Cent. Mut. Fire Ins. Co. [Rozenberg]*, 281 AD2d at 331), the jurisdictional issue must be resolved before any hearing on the issue of its disclaimer can be held.

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

ENTERED: MARCH 16, 2017

CLERK

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

3440 In re Samuel Encarnacion, Index 93/17
[M-287] Petitioner,

-against-

Hon. Richard J. Price, etc.,
Respondent.

_____

Samuel Encarnacion, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Alissa S. Wright of counsel), for respondent.

_____

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: MARCH 16, 2017

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Kahn, JJ.

2235 Gregory Scavetta, et al., Index 155262/14
Plaintiffs-Appellants,

-against-

Stuart Wechsler,
Defendant-Respondent.

_____

Seiden & Kaufman, Carle Place (Steven J. Seiden of counsel), for appellants.

Devitt Spellman Barrett, LLP, Smithtown (Maggie O'Connor of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 28, 2016, affirmed, without costs.

Opinion by Acosta, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
Karla Moskowitz
Paul G. Feinman
Marcy L. Kahn, JJ.

2235
Index 155262/14

_____x

Gregory Scavetta, et al.,
Plaintiffs-Appellants,

-against-

Stuart Wechsler,
Defendant-Respondent.
_____x

Plaintiffs appeal from the order of the Supreme Court, New York County (Carol R. Edmead, J.), entered April 28, 2016, which granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiffs' cross motion for summary judgment on the issue of liability.

Seiden & Kaufman, Carle Place (Steven J. Seiden of counsel), for appellants.

Devitt Spellman Barrett, LLP, Smithtown (Maggie O'Connor and John M. Denby of counsel), for respondent.

ACOSTA, J.P.

The primary question raised in this appeal is whether a negligence claim may be asserted against a defendant who attached a dog's leash to an unsecured bicycle rack, which was put into motion when the dog dragged it through the streets and into the plaintiff, causing injury. We answer in the negative, on constraint of the Court of Appeals' *Bard* rule that "'when harm is caused by a domestic animal, its owner's liability is determined *solely* by application of the rule' . . . of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal's vicious propensities" (*Petrone v Fernandez*, 12 NY3d 546, 550 [2009], quoting *Bard v Jahnke*, 6 NY3d 592, 599 [2006]). Therefore, we must affirm the order of the motion court, which, inter alia, granted defendant's motion for summary judgment dismissing the complaint.

At the same time, we take this opportunity to acknowledge plaintiffs' persuasive argument that the *Bard* rule may be neither prudent law nor prudent policy. As this case illustrates, a plaintiff cannot recover for injuries caused by a dog that has not demonstrated vicious propensities, even when the injuries are proximately caused by the owner's negligent conduct in controlling or failing to control the dog. This rule immunizes careless supervision of domestic animals by their owners and

leaves those harmed in the State of New York without recourse.

Facts and Background

On March 24, 2014, defendant was walking his dog on the way to meet a friend at a pizzeria on Lexington Avenue between 93rd and 94th Streets in Manhattan. Upon arriving at the restaurant, he tied the 35-pound dog by its leash to a metal bicycle rack, which weighed about five pounds and had dimensions of approximately 3 feet by 3 feet by 2 feet. The rack was of the sort to which cyclists or bicycle delivery workers ordinarily lock their bicycles for security outside of buildings.

Defendant did not assure himself, however, that the rack was secured to the ground or to anything else. As he reached the entrance of the pizzeria, defendant heard the rack scraping against the sidewalk and turned to see his dog running down the street, pulling the rack with its leash. It appeared to defendant that the dog started to follow him as he approached the restaurant but was frightened by the noise of the rack scraping against the sidewalk and began to run. The dog was not chasing anything, but it was running "[v]ery fast" and was "panicked." Defendant started running after his dog, but was unable to catch up to it.

Meanwhile, plaintiff Gregory Scavetta was on his way to work, walking north on Lexington Avenue, and began to cross 93rd

Street in the crosswalk. As he crossed the street, Scavetta heard the scraping of the rack and saw the dog running straight towards him, dragging the rack behind it. The dog ran past Scavetta and hid underneath a car. Scavetta then took one or two steps toward the dog, to see if it was injured and whether he could disconnect the rack from the leash, but the dog immediately "sprung back out from underneath the car and took off again." The dog ran back towards Scavetta, still dragging the rack, which struck him. One of Scavetta's legs got caught in the rack's crossbars, and, as the dog continued to pull the rack, Scavetta was spun around so that both of his feet went up in the air and he landed on his back.

The dog ran off toward Park Avenue. Defendant recovered the dog approximately two hours later, after his dog walker found the dog at Lexington Avenue and 86th Street. Scavetta was taken to Mt. Sinai Hospital and treated for an injury to his left leg.

Scavetta and his wife commenced this action, alleging among other things that defendant was negligent or reckless in tying his dog to the unsecured bicycle rack, because he knew or should have known that the dog could pull it. Plaintiffs did not assert a cause of action sounding in strict liability, and stated in their verified bill of particulars that "the dog's viciousness is not an element of plaintiff[s'] cause of action."

Defendant moved for summary judgment dismissing the complaint, arguing among other things that New York State does not recognize negligence as a cause of action for injuries caused by domestic animals. Plaintiffs cross-moved for summary judgment on the issue of liability, noting that they "intentionally did not comment about strict liability in their Bill of Particulars," since the action "does not involve vicious propensities of the dog." To the contrary, plaintiffs argued, defendant is liable "for negligently creating an extremely dangerous condition and unreasonable risk of harm to others." Plaintiffs explained that, "[b]y attaching the dog's eight-foot leash to an unsecured, flimsy, light metal bicycle rack that defendant knew, or should have known, the dog could easily drag through the crowded streets and sidewalks of New York City, defendant turned the otherwise innocuous metal rack into a dangerous instrumentality."

The court granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiffs' cross motion on the issue of liability, citing Court of Appeals precedent holding that negligence is not a viable cause of action where an injury is caused by a domestic animal and that a plaintiff may only recover in strict liability based upon a showing that the owner knew or should have known that the animal had a vicious propensity. The court noted that plaintiffs did not cite any

case law to support the proposition that the case was distinguishable on the ground that defendant converted the metal rack into an instrument of harm. The court concluded that it was constrained to dismiss the complaint because "negligence is no longer a basis for imposing liability, and plaintiffs expressly state that they do not pursue a strict liability claim premised upon any propensities of defendant's dog."

Plaintiffs appeal.

Discussion

The "vicious propensity" doctrine, which provides for strict liability against an owner of a domestic animal that causes harm, where the owner knows or should have known of the animal's vicious propensities, has been the law in New York since at least 1816 (*Collier v Zambito*, 1 NY3d 444, 446 [2004], citing *Vrooman v Lawyer*, 13 Johns 339 [1816]). The term "vicious propensity" has become a term of art, having expanded from its ordinary definition to "include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation" (*id.* [internal quotation marks omitted]), and even includes a nondangerous proclivity where "such proclivity results in the injury giving rise to the lawsuit" (*id.* at 447). For many years, however, the question lingered whether a plaintiff could bring a common-law negligence claim against an

owner of a domestic animal that caused injury, in the event that strict liability was unavailable due to a lack of evidence regarding the animal's propensities (*but see Hyland v Cobb*, 252 NY 325, 326-327 [1929] [acknowledging that "negligence by an owner, even without knowledge concerning a domestic animal's evil propensity, may create liability"]).

The Court of Appeals addressed this question in *Bard v Jahnke* (6 NY3d 592 [2006], *supra*), where a carpenter who was working on the defendant's farm was attacked and injured by the defendant's breeding bull. The Court rejected the plaintiff's strict liability claim because there was no evidence that the bull had ever exhibited threatening behavior toward other farm animals or humans (*id.* at 597). In addition, the Court rejected the plaintiff's alternative argument that the defendant was negligent in failing to restrain the bull or warn the plaintiff of the bull's presence, holding that "when harm is caused by a domestic animal, its owner's liability is determined solely by application of the [strict liability] rule articulated in *Collier*" (*id.* at 599).

The *Bard* rule was not established without controversy. In its analysis, the four-judge majority of the Court rejected the rule stated in Restatement (Second) of Torts § 518 permitting liability where an owner of a domestic animal is negligent in

failing to prevent harm caused by the animal (or intentionally causes the animal to do harm), irrespective of whether any vicious propensity exists (*Bard*, 6 NY3d at 597-599). Three judges dissented, reasoning that it would have been "wiser to follow the Restatement rule, as ha[d] almost every other state that ha[d] considered the question" (*id.* at 603 [R.S. Smith, J., dissenting]).[1] In the dissenters' view, the Court had left our state "with an archaic, rigid rule, contrary to fairness and common sense, that will probably be eroded by ad hoc exceptions" (*id.* at 599 [R.S. Smith, J., dissenting]).

Despite the discord over the *Bard* rule, it has persisted. For example, in *Petrone v Fernandez*, the Court of Appeals relied on *Bard* and confirmed that, even where a plaintiff presents "some evidence of negligence" – e.g., the defendant's violation of a local leash law – the evidence is irrelevant because "negligence is no longer a basis for imposing liability after *Collier* and *Bard*" (12 NY3d at 550 [internal quotation marks omitted]). Two judges concurred in the result "on constraint of *Bard*," expressing their view that "it was wrong to reject negligence altogether as a basis for the liability of an animal owner" (*id.*

[1] New York has continued to be "a unique outlier in its rejection of the Restatement (Second) of Torts § 518" (*Doerr v Goldsmith*, 25 NY3d 1114, 1149 [2015, Fahey, J., dissenting]).

at 551, 552 [Pigott, J., concurring]).

Thus far, the Court of Appeals has carved out only one exception to *Bard*'s bright-line rule. In *Hastings v Sauve* (21 NY3d 122 [2013]), the plaintiff was driving her van and was injured when she struck the defendants' cow, which had wandered from the farm and onto a public road. The Court held

> "that a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal—i.e., a domestic animal as that term is defined in Agriculture and Markets Law § 108(7)—is negligently allowed to stray from the property on which the animal is kept" (*id.* at 125-126).[2]

However, the *Hastings* Court declined to decide "whether the same rule applies to dogs, cats or other household pets," adding that "that question must await a different case" (*id.* at 126).

The question was answered in *Doerr v Goldsmith* (25 NY3d 1114 [2015], *supra*), in which the plaintiff was injured by a dog while riding his bicycle in Central Park (*see id.* at 1117 [Abdus-Salaam, J., concurring]). The dog's owner called the dog from one side of the road, while her boyfriend released the dog from

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[2] This indicates that the rule is not as broad as when it was originally devised in *Bard*, and could be properly rephrased as follows: When harm is caused by a domestic animal, its owner's liability is determined in accordance with the vicious propensity doctrine, *unless* the animal is a domestic farm animal subject to an owner's duty to prevent it from wandering off the farm, in which case common-law negligence applies (*see Doerr*, 25 NY3d at 1154 [Fahey, J., dissenting]).

the other side, and the dog ran into plaintiff's way; plaintiff struck the dog and fell from his bike, sustaining injuries (*id.*). This Court, which vacated its original decision finding for the defendants and issued a new decision in light of *Hastings*, held that a negligence claim could lie "because it was defendants' actions, and not the dog's own instinctive, volitional behavior, that most proximately caused the accident" (*Doerr v Goldsmith*, 110 AD3d 453, 455 [1st Dept 2013], *revd* 25 NY3d 1114 [2015]). The case, according to this Court, was "not about the particular actions of an animal that led to a person's injury. Rather, it [wa]s about the actions of a person that turned an animal into an instrumentality of harm" (*id.* at 455). This Court reasoned that "the dog was in the control of defendants at all times in the split second before the accident occurred. Had [the one defendant] not called the dog, and [the other defendant] not let it go, plaintiff would have ridden past them without incident" (*id.*).

However, a majority of the Court of Appeals reversed in a short memorandum decision, declaring that "[u]nder the circumstances of [*Doerr* and its companion case] and in light of the arguments advanced by the parties, [*Bard*] constrains us to reject plaintiffs' negligence causes of action against defendants arising from injuries caused by defendants' dogs" (25 NY3d at

1116). The Court further clarified that the *Hastings* exception to the *Bard* rule is confined to cases involving "domestic farm animals subject to an owner's duty to prevent such animals from wandering unsupervised off the farm" (*id.*).[3]

The *Doerr* Court was deeply divided over whether another exception to the *Bard* rule should have applied in the circumstances of that case, and whether the rule should be abandoned altogether. Judge Abdus-Salaam (joined by Judges Read and Stein) concurred, relying on *Bard* as stare decisis and explaining that "[b]ecause *Bard* does not impose a duty on a pet owner to exercise reasonable care in the control of a pet that has no known vicious propensity, the owner's failure to exercise such care, whether by act or omission, does not furnish a basis for liability" (25 NY3d at 1132). In addition, the concurrence determined that the plaintiffs' "negligence claims must fail because the particular exceptions to the *Bard* rule proposed by

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[3] In *Doerr*'s companion case, *Dobinski v Lockhart*, the defendants' dogs left their farm and wandered onto a road (25 NY3d at 1120 [Abdus-Salaam, J., concurring]). One of the plaintiffs, riding her bicycle, struck one of the dogs and was severely injured. The Court affirmed the Fourth Department's grant of summary judgment dismissing the plaintiffs' strict liability claim, because the plaintiffs failed to raise triable issues of fact with regard to defendants' knowledge of the dogs' "harmful proclivities" (*id.* at 1116). Thus, the Court refused to apply the *Hastings* exception where dogs, rather than farm animals, wandered from the property on which they were kept.

plaintiffs are incompatible with *Bard* and its progeny" (*id.* at 1138-1139). Chief Judge Lippman, dissenting in *Doerr* but concurring in the companion case, concluded that *Doerr* itself was an exceptional case that should not have been engulfed by *Bard*, because the injury was caused by the dog acting under the owner's direction and control, not by its threatening or menacing behavior (*see* 25 NY3d at 1141-1142).

In a separate dissent, Judge Fahey (joined by Judge Pigott) concluded that *Bard* was wrongly decided and should be overruled, and that "[w]e should return to the basic principle that the owner of an animal may be liable for failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation" (25 NY3d at 1142). Judge Fahey observed that, prior to *Bard*, several Court of Appeals decisions and "three of the Departments of the Appellate Division recognized that a negligence claim for animal-induced injuries could be brought as an alternative to a strict liability claim" (*id.* at 1143-1144). He further noted that "the legacy of the *Bard* decision" is "'that the strict liability involved in *Collier* is the *only* kind of liability the owner of a domestic animal may face – that, in other words, there is no such thing as negligence liability where harm done by domestic animals is concerned'" (*id.* at 1150-1151, quoting *Bard*, 6 NY3d at 601 [R.S. Smith, J.,

dissenting] [adding emphasis]).

In light of this Court of Appeals precedent, we must reject plaintiffs' negligence claim. Plaintiffs argue that the instant matter is distinguishable from *Bard*, *Doerr*, and similar cases involving harm caused by domestic animals, because this case does not involve the nature of an animal acting of its own volition, but concerns an injury that was caused by its owner's conduct. To be sure, the majority in *Doerr* left open the possibility that other exceptions to the *Bard* rule could be recognized where a domestic animal was involved in an injury; indeed, the Court explicitly limited its holding to the particular circumstances of that case (*id.* at 1116).[4] And, of course, there are notable factual distinctions between this case and *Doerr*: Here, plaintiffs allege that defendant caused the injury not by commanding the dog as in *Doerr*, but by mobilizing a dangerous object when he attached his dog's leash to the unsecured rack.

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[4] Additionally, as plaintiffs emphasize, the *Doerr* concurrence stated that, insofar as those plaintiffs had offered "no alternative theory of recovery, [it] neither reject[ed] nor endorse[d] any other potential legal theory or exception to the *Bard* rule not advanced by the parties" (25 NY3d at 1138-1139).

It may be that the concurrence was suggesting that it might have distinguished *Bard* under a different factual scenario (as plaintiffs would have us do here), but it seems more likely that it was alluding to the possibility that other causes of action, such as a reckless or intentional tort, could apply where a person directs a dog into another's path (*see id.* at 1139 n 4).

In other words, plaintiffs argue that defendant launched an instrumentality of harm that was not the dog itself but an inanimate object that was put into motion by defendant (*cf. Doerr*, 110 AD3d at 455). However, the exception plaintiffs would have us recognize here - based on the defendant's conduct, and not the dog's, as the cause of the injury - is analogous to the one this Court accepted but the Court of Appeals rejected in *Doerr* (25 NY3d 1114).[5] Furthermore, it appears that, aside from

[5] Of course, it is not always clear why a dog acts in a given way, whether by its own choice or pursuant to its owner's direction and training. In *Doerr*, the opposing writings opined on the question of volition - whether the dog ran across the road because it was trained to come at the owner's behest or because it made its own choice to do so – but the parties had presented no scientific evidence on the subject. Similarly, the parties in the case at bar present no such evidence.

Nonetheless, while dogs may at times make their own choices, several studies suggest that modern domestic dogs have an inherent predisposition to follow human cues (e.g., pointing) and can be trained to obey their commands (e.g., instructing a dog to "come" or "sit") (*see e.g.* Udell & Wynne, *A Review of Domestic Dogs' (Canis Familiaris) Human-Like Behaviors*, 89 J Experimental Analysis of Behavior 247, 250-251 [2008]). Indeed, dogs have been living with humans for thousands of years, during which time they were selected for and developed those traits (*see* Soproni et al., *Comprehension of Human Communicative Signs in Pet Dogs (Canis Familiaris)*, 115 J Comparative Psych 122 [2001]). This suggests that when a dog responds to its owner's command, it is doing so as a result of instinct, training, and conditioning, not because it has made a conscious choice to do so.

Had the *Doerr* Court been presented with such evidence, perhaps it would have decided (as this Court did in the intermediate appeal) that the *Bard* rule was inapposite because the defendants had control over the dog such that the owner's command caused it to run into the plaintiff's path. However, the *Doerr* majority impliedly rejected that line of reasoning by

the *Hastings* exception, *Bard* continues to be an absolute bar to negligence claims where domestic animals cause injury (*see Doerr*, 25 NY3d at 1150-1151 [Fahey, J., dissenting], quoting *Bard*, 6 NY3d at 601 [R.S. Smith, J., dissenting] ["(T)here is no such thing as negligence liability where harm done by domestic animals is concerned"]; *see also Petrone*, 12 NY3d at 550 [same]). Accordingly, we conclude that we are constrained by Court of Appeals precedent to reject plaintiffs' negligence claim.

Were we not so constrained, however, we would, like the dissenting judges in *Bard* and *Doerr*, permit plaintiffs to pursue their negligence cause of action. To avoid the harshness of the *Bard* rule, the recognition of the following exception would be appropriate: A dog owner who attaches his or her dog to an unsecured, dangerous object, allowing the dog to drag the object through the streets and cause injury to others, may be held liable in negligence. In these circumstances, negligence liability would be in keeping with the principles of fundamental

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reversing this Court (*see also* 25 NY3d at 1130-1132 [Abdus-Salaam, J., concurring]).

Therefore, we do not think the Court of Appeals would accept that defendant's actions solely or most proximately caused the injury, even though defendant arguably exerted complete control over the dog (overriding any volition it might have had, when he attached to the dog's leash an unsecured metal bicycle rack that was far lighter in weight than the dog, all but guaranteeing that the dog would wreak havoc wherever it chose to wander).

fairness, responsibility for one's actions, and societal expectations (*see Doerr*, 25 NY3d at 1148 [Fahey, J., dissenting]) – assuming a jury would deem unreasonable defendant's failure to ensure that the rack was secured before he tied his dog to it. It is not unreasonable to expect dog owners to restrain their dogs in public unless unleashing them is safe or specifically permitted at certain times and locations, as evidenced by local leash laws (*see e.g.* 24 RCNY 161.05). However, the Court of Appeals has decided that local leash laws have no bearing on whether liability in negligence ought to attach (*Petrone*, 12 NY3d 546), undermining the declared public policy of those localities that have enacted such laws (*cf. Young v Wyman*, 76 NY2d 1009, 1011 [1990], Kaye, J., dissenting] ["current statement of public policy on the question (whether local law prohibiting owners from letting dogs run 'at large' creates a presumption of negligence) is surely entitled to some recognition by the courts, yet none is given"] [citations omitted]). And although the *Doerr* concurrence reasoned that New Yorkers may expect to find unrestrained dogs in public parks (*see* 25 NY3d at 1129; *but see* 25 NY3d at 1157 [Fahey, J., dissenting]), New Yorkers certainly do not expect to find those dogs running on public roads towing large metal objects behind them. A dog owner who, without observing a reasonable standard of care, attaches his or her dog to an object

that could foreseeably become weaponized if the dog is able to drag the object through public areas should not be immune from liability when that conduct causes injury.

Moreover, as a matter of public policy, we agree with Judge Fahey's dissent in *Doerr* that New York should join the overwhelming majority of states that follow the Restatement (Second) of Torts § 518 (25 NY3d at 1149, 1157). Under the current rule articulated by the Court of Appeals, it appears that pet owners would be permitted to act in any number of objectively unreasonable ways when supervising their nonvicious pets, because New York law does not place upon them a duty to observe any standard of care (*see Doerr*, 25 NY3d at 1132 [Abdus-Salaam, J., concurring]). The potential for unjust outcomes is manifest. Although "the Restatement rule . . . does not treat a domestic pet's untrammeled wanderings as actionable negligence" in all cases (*Doerr*, 25 NY3d at 1137 [Abdus-Salaam, J., concurring], citing Restatement [Second] of Torts § 518, Comment *j*), the Restatement does recognize that "[t]here may . . . be circumstances under which it w[ould] be negligent to permit an animal to run at large, even though it is of a kind that customarily is allowed to do so [e.g., a dog] and under other circumstances there would be no negligence" (Restatement [Second] of Torts § 518, Comment *k*). It seems, however, that under the

law of New York at present, permitting a domestic pet that has not displayed vicious propensities to run at large under *any* circumstances - even when doing so would be clearly dangerous - would never give rise to a claim sounding in negligence. We find this to be most unsatisfactory as a matter of public policy and would recognize a cause of action for negligence in appropriate circumstances.

Conclusion

Accordingly, the order of Supreme Court, New York County (Carol R. Edmead, J.), entered April 28, 2016, which granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiffs' cross motion for summary judgment on the issue of liability, should be affirmed, without costs.

All concur.

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

ENTERED: MARCH 16, 2017

CLERK