Corrected Order - January 21, 2016

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 22, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16011 The People of the State of New York, Respondent, Ind. 1712/10

-against-

Peter Austin,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), rendered January 10, 2013, as amended May 30, 2013, convicting defendant, after a jury trial, of burglary in the third degree (two counts) and criminal mischief in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 7 to 14 years, affirmed.

At trial, the People's witnesses testified that scientific testing had shown that the DNA in blood evidence from the scene of the crime matched defendant's DNA. The blood evidence itself, however, was unavailable at trial because Hurricane Sandy (which

had occurred less than a month earlier) had caused the flooding of the warehouse in which the evidence was stored.[1] Contrary to defendant's argument, the trial court did not abuse its discretion in declining his request that the jury be given an adverse inference charge based on the unavailability of the blood evidence. The Court of Appeals has held that "a permissive adverse inference charge should be given where a defendant, using reasonable diligence, has requested evidence reasonably likely to be material, and where that evidence has been destroyed by agents of the State" (*People v Handy*, 20 NY3d 663, 669 [2013]). Here, assuming the materiality of the physical blood evidence and that defendant had requested it with reasonable diligence, the evidence in question was not lost or destroyed by agents of the State within the meaning of *Handy*. Rather, the evidence was destroyed or rendered inaccessible as the result of a meteorological event beyond human control. This is not a case where evidence was inadvertently lost through the negligence of government employees or destroyed pursuant to a government policy (*cf. Handy*, 20 NY3d at 666 [the defendant was entitled to an adverse inference charge where video images of a jailhouse

[1]Because it had been flooded by contaminated waters, the warehouse was closed as a health hazard by order of an agency of the federal government, and items stored there, even if not destroyed, could not be retrieved.

incident had been recorded over pursuant to the jail's policy]).

We further note that the materiality of the physical blood evidence itself (as opposed to the DNA analysis thereof) is questionable, at best. It was known from the outset of the prosecution that the People's case would be based on DNA analysis of the blood evidence found at the crime scenes. Nonetheless, beyond making standard discovery requests, defendant took no steps before the hurricane to enforce his right to production of the physical blood evidence. During voir dire, immediately after the hurricane had passed, his counsel announced in a conference call on November 1, 2012, that, having received "all the DNA files," the defense was "ready to go." It was only on the last day of voir dire, November 13, that defense counsel raised the issue of the People's failure to produce the physical blood evidence. Critically, however, defendant has never expressed, either in the proceedings before Supreme Court or on appeal, any intention to conduct his own DNA analysis of the blood evidence.[2] Defendant asserts on appeal that the physical evidence, by itself, might have supported an argument that "the DNA results

[2]Indeed, defendant's appellate brief states: "That [defendant] had not tested the DNA [evidence] months earlier, had no impact on the defense argument that the People's loss of the DNA evidence should be held against them at the time of trial, because the results of the tests were only a part of what the jury was asked to examine."

were not reliable because the DNA evidence was not carefully and properly collected and maintained." Defendant does not explain, however, how the manner of the collection and maintenance of the physical blood evidence at the time it was tested (in 2009) might have been inferred from the appearance of the physical evidence at trial more than three years later (in 2012).

We disagree with the dissent's characterization of the colloquy concerning discovery during voir dire as focusing on the physical blood evidence. In fact, these discussions focused on the expert reports and underlying data files on which the prosecution would be based and, contrary to the dissent, there were not "multiple court orders" specifically directing production of the physical evidence.[3] When voir dire began, the prosecution itself did not have all of the DNA documents (some of which apparently had not yet been completed), a circumstance of

[3]On the first day of voir dire (October 24, 2012), the court made a vague and ambiguous statement that the defense was entitled to receive "whatever it is that they used in making their examination and comparison of the DNA." This may have been a reference to the physical blood evidence found at the crime scene. The court's statement may also have been a reference to files containing the raw DNA data from the crime scene evidence and from defendant, which were compared to identify defendant as the perpetrator and provided the basis for the expert's report making the identification. In any event, it appears that the physical blood evidence did not again become the subject of on-the-record colloquy until the last day of voir dire, November 13, after the hurricane had passed.

which the court emphatically disapproved. However, the court also noted with displeasure that the defense had not taken any steps to enforce its right to production of these documents during the approximately 2½ years that had passed since defendant's indictment in April 2010. Ultimately, the court and counsel held an on-the-record conference call on November 1, 2012 (just after the hurricane had passed), at which defense counsel stated that he had "got[ten] all the DNA files from [the prosecutor]" by email and had "already gone through everything so we are ready to go." Again, only after the lapse of nearly two more weeks, on November 13, the last day of voir dire, did defense counsel make an issue of the physical blood evidence.

We also disagree with the dissent's view that the loss of the physical evidence as a result of flooding caused by a natural catastrophe constitutes "los[s] by inadvertence" for which the People may be penalized by the giving of an adverse inference charge under *Handy*. Even if the inadvertent loss of evidence through the negligence of State employees (as opposed to deliberate destruction, as occurred in *Handy*) would require the delivery of a *Handy* adverse inference charge, we cannot see any "inadvertence" with which the State can be charged here. The evidence was stored in a storage facility that was flooded as the result of a hurricane. In our view, the State cannot be deemed

at fault for the loss of this evidence, in the way it might be held responsible (under the principle of respondeat superior) for a State employee ruining the blood swabs by spilling a soft drink on them, based on the State's placement of the storage facility at a site that turned out to be vulnerable to flooding under extreme weather conditions that rarely occur. We do not believe that this kind of exercise of a discretionary governmental function was what the Court of Appeals had in mind when it indicated that a loss of evidence resulting from "a good faith error by the State" (20 NY3d at 669) could be the basis for an adverse inference charge. Indeed, the Court of Appeals has very recently highlighted that *Handy*'s rationale is "to deter the authorities from affirmatively destroying evidence that they knew, at the time of the destruction, was reasonably likely to be material" (*People v Durant*, __ NY3d __, 2015 NY Slip Op 08609, *6 [2015]; *see also id.* at *4 [the adverse inference charge required by *Handy* is "a *penalty* where the State . . . has destroyed existing material evidence" (emphasis added)]). In this case, the loss of the evidence in question did not result, either inadvertently or by design, from any conduct from which the State should be deterred by the penalty of an adverse inference instruction.

The dissent, while not going so far as to suggest that the

State should be penalized for its choice of location for the storage facility, takes the position that *Handy* and *Durant* mandate an adverse inference charge based on the People's having failed to comply with their obligation to produce the physical blood evidence before the hurricane happened to destroy it. However, the *Handy* adverse inference charge is a penalty for destruction of evidence, not for mere tardiness in producing it.[4] While we do not condone the People's slowness in fulfilling their disclosure obligations in this case, the evidence in question was not lost as a foreseeable result of the passage of time, but as a consequence of a natural catastrophe that happened to occur just before this case went to trial. Moreover, the delay in production of the evidence here appears to be as much the fault of the defense as of the People. Even though the defense always knew that the case would rely on DNA evidence, defense counsel, after making a pro forma request to which the physical blood

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[4]While the dissent points to a statement in *Durant* that "where the State violates its disclosure obligations, an adverse inference charge . . . [is] authorized" (2015 NY Slip 08609, *4-5), this dictum does not mean that any disclosure violation, bearing any causal connection to the loss of evidence, necessitates an adverse inference charge as a matter of law. Notably, the statement in *Durant* highlighted by the dissent is followed by a citation to *People v Martinez* (22 NY3d 551 [2014]), in which the Court of Appeals held that, under the circumstances of that case, the trial court did not abuse its discretion in declining to give an adverse inference instruction concerning the nonwillful, negligent loss or destruction of *Rosario* material.

evidence would have been responsive, never took any steps before the hurricane, over a period of approximately two years, to enforce defendant's right to production of that evidence. As previously noted, the physical evidence did not become a focus of the discussion among the court and counsel until after the hurricane had passed.[5]

We see no support in the record for the dissent's position that the physical blood evidence from the crime scene was somehow material to the defense. As previously discussed, while the dissent correctly notes that the match of defendant's DNA with the DNA in the crime scene evidence was "the lynchpin of the People's case against defendant," placing before the jury the physical blood evidence from the crime scene would not have told them anything about the accuracy of the DNA match. Indeed, this appears to have been the original conclusion of defense counsel, who, without ever having had an opportunity to examine the physical evidence, announced that he was "ready to go" to trial before he learned that such evidence was no longer available. Nothing but speculation supports the dissent's unlikely

[5]We also note that the dissent's position raises the question of what length of a delay in producing evidence before it happens to be destroyed by an unforeseeable natural disaster would warrant an adverse inference charge. The dissent offers no guidance for answering this question.

supposition that the appearance of the physical blood evidence at trial might have told the jury anything about "the manner of its collection, storage or handling" at the time the State analyzed its DNA, three years before trial. The condition of the physical evidence after the State conducted its analysis is irrelevant, since defendant has never expressed any interest in conducting an independent DNA analysis.

Finally, because the readily explained absence of the physical blood evidence at trial was not logically probative of the reliability of the DNA analysis on which the prosecution was based, the court's restriction of defense counsel's summation comments on the absence of such evidence did not constitute reversible error. In this regard, we note that defense counsel was permitted, in his summation, to attack the reliability of the chain of custody of the physical blood evidence on other grounds.

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

GISCHE, J. (dissenting)

At stake in this case is not whether the People proffered an acceptable explanation for the unavailability of crucial DNA evidence. The destruction of evidence as a result of post Hurricane Sandy flooding is a bona fide reason for its unavailability at trial. Rather, the issue before us is whether the jury, as opposed to the judge, gets to decide what weight, if any, to assign to the unavailability of important evidence in this case. I believe that the Court of Appeals decisions in *People v Handy* (20 NY3d 663 [2013]) and *People v Durant*, __ NY3d __, 2015 NY Slip Op 08609 [2015]) support a conclusion in this case that the decision regarding the weight afforded to the DNA evidence destroyed while in the People's custody and possession, including the reasons it is no longer available, belongs to the jury, not the judge. This is because the People were ordered to, but did not, produce this evidence before its destruction. The Judge, in refusing to give the requested permissive jury instruction that the jurors could, if they wanted, draw an unfavorable inference from the missing evidence, improperly usurped for herself the juror's role in evaluating the excuse given for the unavailablity of blood samples collected by law enforcement in this case. This error was compounded when the Judge sustained her own objection to defense counsel commenting

on the missing evidence during summation. I, therefore, respectfully dissent and would reverse the conviction and remand for a new trial.

Defendant was convicted of two counts of burglary in the third degree and one count of criminal mischief in the fourth degree, stemming from a robbery of a vacant store and a dry cleaners, both of which were located in the same commercial building on East Gun Hill Road in the Bronx. The break ins were discovered by the owner of the dry cleaners, when he came to work at 8:00 a.m. the morning of June 30, 2009. He found his store "messed up," and that money (approximately $6,000) and a pair of sneakers were missing. In addition, he observed that the basement door had been dented and opened. The landlord was contacted and arrived at the building shortly thereafter. She discovered that not only had the dry cleaning store been burglarized, but a connected vacant office had also been broken into. She observed blood streaks on a rear door on which a glass panel had been broken.

During the ensuing police investigation, swabs were taken of the blood observed on the door. No usable fingerprints were found at the crime scene. Almost a year after the incident, DNA testing of the blood sample turned up a match to defendant's DNA contained in a statewide data bank. In July 2012, the People had

defendant re-swabbed, obtaining the results of that testing only two days before voir dire of the jury began. Since 2009, the People retained custody of the physical blood evidence from the crime scene, along with the original copies of the reports and other supporting evidence. There is some ambiguity in the People's representations about the physical location of the DNA evidence, but by the time the trial began, the evidence was being held at the NYPD Kingsland Avenue Storage Facility.

There were ongoing discovery disputes, mostly centered on the People's failure to turn over any part of the DNA evidence. During a June 9, 2011 conference, the court set a deadline of June 24, 2011 for completion of all discovery. Notwithstanding the court's order, on October 24, 2012, when jury selection was about to begin, the People had still not provided any of the original DNA evidence to defense counsel, who again requested it. The Judge commented on the importance of the information for cross-examination purposes. Defense counsel expressly stated that he was "entitled to more than just the reports" and the Judge agreed, stating that the defense was "going to get whatever it is that [the ADA's] got" including whatever was used in examining and comparing the DNA. While the overall colloquy generally concerned the People's failure to have provided any part of the original DNA file, it clearly and necessarily

included the failure to provide the physical blood evidence from which the DNA was obtained.

At some point the People represented that the evidence had been stored **at the Erie facility**. At another point the People claimed that because the lab had only completed its report on the re-swabbed DNA two days earlier, it could not provide any part of the original file until it was released from the lab. The ADA represented that she had been working on obtaining the DNA evidence for defense counsel for the last month. By the completion of voir dire and with opening statements scheduled to start the next day, although defense counsel had copies of some reports, the defense still had not received the DNA file with the original evidence. The People represented at that time that they expected to have the material from the lab no later than the next morning. The court directed that the trial proceed and that the DNA evidence be produced. The People were never relieved of that obligation.

The People had still not produced the DNA file before October 29, 2012, when Hurricane Sandy made landfall in the New York City metropolitan area. Due to the State of Emergency that followed, the trial of this matter was interrupted. When the trial resumed, the People reported that the DNA evidence it had intended to produce was either lost or destroyed while in a

storage facility that had flooded in the hurricane and that the storage facility had been closed by OSHA.

At trial, the People called a DNA expert to testify about the DNA testing results. Other than the DNA profile of the swabbed blood matching defendant's DNA, there was no other evidence linking defendant to the crime scene or otherwise identifying him as the perpetrator of the crime. There were no eyewitnesses. Although there was a surveillance video from a security camera at the scene, the nature and quality of the image was not sufficient to identify defendant. No usable fingerprints were found at the scene. There was no confession, or indeed, any incriminating statements made by defendant that the People were relying upon in proving its case.[1] The claimed missing items were never recovered.

The defense requested that the jury be given a permissive adverse inference charge in connection with the missing DNA evidence. The court denied the request, based on its own assessment that Hurricane Sandy provided a good reason for non-production of evidence. During summation defense counsel argued to the jury: "There is no DNA at all in evidence in this case. Not one thing... Of course you are probably going to hear an

[1]Defendant's only statements were apparently exclupating.

argument that says; well, it was destroyed by Sandy the hurricane that it and it is unfortunate... The problem with that is that you don't really know, and I don't know, and they don't know, which is even scarier, where this stuff really is or who touched it." Without objection by the prosecutor, the court sustained its own objection to defense counsel's argument about the missing DNA evidence. The prosecution was then permitted to state in its closing: "You also know the exact circumstances why [the DNA is] not here. Because, unfortunately, our city suffered–forget about our city, our state and the whole eastern seaboard got to meet Hurricane Sandy, and Hurricane Sandy, as you heard from Sergeant Apuzzi who is the head of the Kingsland Facility... also flooded the current facility that is holding these items and we cannot bring them here for you because a federal agency closed it as toxic."

In the first instance, I disagree with the majority to the extent it questions the materiality of the physical blood evidence. The only evidence connecting defendant to the crimes of which he was convicted was the blood evidence found at the scene. The accuracy of the DNA match analysis was not just material, it was crucial and the lynchpin of the People's case against defendant. Defense counsel was entitled to physically examine that evidence and decide whether based upon the manner of

its collection, storage or handling, there was any basis to make arguments to the jury discrediting the conclusions reached by the lab that analyzed it. The fact that defense counsel never sought independent testing of the blood did not lessen its materiality or importance for production at trial. Since the evidence was never produced, and its qualitative condition is unknown, we cannot know what impact the condition of the physical evidence may have had on the jury's decision to credit the conclusions reached by the People's expert.

The jury instruction requested by defense counsel would have allowed the jury to consider the unavailability of the blood samples and make its own evaluation of the weight to be afforded to the People's DNA expert. The jury would have further been instructed that the law permits them, but does not require them, to infer, if they believe it was proper to do so, that had the evidence been preserved its contents would not support or would be inconsistent with the witness' testimony on this issue.

In *People v Handy* (20 NY3d 663 [2013], *supra*), the Court of Appeals held that, under New York law of evidence, a permissive adverse inference charge must be given where a defendant, using reasonable diligence, has requested evidence reasonably likely to be material, and where the evidence has been destroyed by agents of the State. In *Handy*, a permissive adverse inference charge

was required where the State had destroyed material evidence in its possession, consisting of a video recording that defense counsel had requested (20 NY3d at 667-669). The Court held that even if the destruction was inadvertent, the instruction was still required. In the very recent case of *People v Durant* (__ NY3d __, 2015 NY Slip Op 08609 [2015], *supra*) the Court of Appeals once again examined the issue of when a permissive adverse inference instruction is required. Recognizing that the instruction typically serves as either "(1) a penalty for the government's violation of its statutory and constitutional duties or its destruction of material evidence; or (2) an explanation of logical inferences that may be drawn regarding the government's motives for failing to present certain evidence at trial," the court declined to hold that such an instruction was required where the police could have, but failed to, electronically record a custodial interrogation of the defendant (*Durant*, 2015 NY Slip Op 08609 at *4). In part, the Court's holding was based upon the fact that the government had no legal duty to make an electronic recording of an interrogation. The Court recognized, however, that the instruction should be given where the government has destroyed existing material evidence in its possession, or "where the State violates its disclosure obligations . . ." (*Durant*, __ NY3d at __, 2015 NY Slip Op 08609 at *4-5).

Here, the DNA evidence was indisputably within the People's custody and control since the inception of the investigation of the crime scene. There is no dispute that the People had a legal duty to preserve and also to disclose such evidence (*People v Kelly*, 62 NY2d 516, 519-520 [1984]). While the People did not physically destroy the evidence, they did violate their duty to disclose the evidence before it was destroyed. We know that the DNA file was not produced before trial, despite multiple court orders requiring its production before it was destroyed. By at least the beginning of voir dire, the court's direction that defense counsel was entitled to everything the People had in its possession to reach the conclusion of the DNA match, required that the blood samples needed to be turned over. Had the People produced the blood samples when ordered to do so, or even when they represented they would do so, there would be no issues related to their destruction.

I acknowledge that defense counsel could have been more diligent in pursuing the production of this evidence, especially given the court's order requiring discovery to be complete in June 2011. In fact, the trial Judge admonished counsel for not acting sooner. But the standard under *Handy* is not whether defense counsel could have been more diligent in seeking the discovery, but rather whether counsel was reasonably diligent.

Defense counsel in this case made a discovery demand before trial for the DNA file, at a time when the People could and should have easily produced it. I believe this aspect of *Handy* has been satisfied. The evidence was indisputably destroyed while in the People's custody and control. The People were directed to produce it, but failed to do so when they could, i.e., before it was destroyed. The majority claims that because the evidence was destroyed by Hurricane Sandy, an act of God, it was not destroyed by agents of the State, and, therefore, *Handy* does not apply. I believe that the majority is reading the phrase "agent of the State" as referenced in *Handy* far too narrowly. In deciding *Handy*, the Court of Appeals makes it abundantly clear that the instruction should be given even where destruction of evidence is not deliberate or done in bad faith (*Handy* at 669). The Court stated:

> "Our rule is unlikely ... to increase greatly the risk that a good faith error by the State will lead to a guilty defendant's acquittal. We hold only that the jury should be told it *may* draw an inference in defendant's favor. This instruction ... could be labeled a 'missing evidence' instruction-not unlike the 'missing witness' instruction given when a party fails to call a witness who is under that party's control and might be expected to give favorable testimony. The instruction 'neither establishes a legal presumption nor furnishes substantive proof'" (*id.* at 669-670 [internal citations omitted]).

Evidence lost through inadvertence does not excuse a loss. Additionally, under *Durant*, where evidence that should have been, but was not, produced during discovery is now unavailable, the instruction is necessary to eliminate the prejudice to the defendant (*see People v Martinez*, 71 NY2d 937, 940 [1988]; *People v Haupt*, 71 NY2d 929 [1988]). Because the instruction is a permissive one, the jury would have been free to draw its own conclusions about the effect Hurricane Sandy had on the unavailability of the DNA evidence.

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

ENTERED: DECEMBER 22, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16376 David Johnson, Index 302010/10
Plaintiff-Appellant,

-against-

Wythe Place, LLC,
Defendant-Respondent,

Ragoo Oudhoram,
Defendant.

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Decolator, Cohen & DiPrisco, LLP, Garden City (Joseph L. Decolator of counsel), for appellant.

Torino & Bernstein, P.C., New York (Carol R. Finocchio of counsel), for respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered July 31, 2014, which granted defendant Wythe Place, LLC's (Wythe) motion to reargue its motion for summary judgment dismissing the complaint, and upon reargument, granted the motion for summary judgment, unanimously affirmed, without costs.

Plaintiff's General Municipal Law § 205-e claim was not barred by the companion statute to the "firefighter's rule," which imposes absolute liability where a police officer is injured in the line of duty as a result of statutory or regulatory violations (*see Guiffrida v Citibank Corp.*, 100 NY2d 72, 77-78 [2003]), since Wythe was neither plaintiff's employer nor co-employee (*see* General Obligations Law § 11-106; *Wadler v*

City of New York, 14 NY3d 192, 194 [2010]).

Wythe's evidence established that it lacked actual or constructive notice of the alleged defective condition of the step on which plaintiff fell. The superintendent's deposition testimony and affidavit, and the affidavit of a member of the building management company established that there were no prior repairs, complaints, or reports of prior incidents involving the same step (*see Clark v New York City Hous. Auth.*, 7 AD3d 440 1st Dept 2004]). Nor was there any evidence of any violations or citations issued regarding the staircase.

As to constructive notice, Wythe's superintendent of the building testified that he had cleaned the steps at 7:00 a.m. on the morning of plaintiff's accident, and did not observe any crack or caving in of the step (*see Rodriguez v New York City Hous. Auth.*, 102 AD3d 407, 407-408 [1st Dept 2013]; *Sabalza v Salgado*, 85 AD3d 436, 437-438 [1st Dept 2011]. Plaintiff's own testimony, that he did not see the crack as he walked up the stairs just minutes before the accident, indicates that the alleged defective condition was not "visible and apparent" so as to give rise to constructive notice (*see Lance v Den-Lyn Realty Corp.*, 84 AD3d 470 [1st Dept 2011]). Further, the photographs in the record do not raise an issue of fact, as they do not show how deep the crack was. From the photograph, it is difficult to

discern anything more than a superficial marking or surface scratch.

Although Wythe "conceded constructive notice that the tread of the fifth step was worn," the record does not establish that the worn marble tread here is an actionable defective condition (*see Dipini v 381 E. 160 Equities LLC*, 121 AD3d 465 [1st Dept 2014]; *see generally Carrion v Faulkner*, 129 AD3d 456 [1st Dept 2015]). The photographs of the step show at most, ordinary wear and tear (*see Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 110-111 [1st Dept 2006]).

Supreme Court properly dismissed plaintiff's General Municipal Law § 205-e claim predicated upon Administrative Code of City of NY § 27-375(e)(2), since plaintiff never attributed his accident to conditions involving the step riser heights and tread width (*see Raghu v New York City Hous. Auth.*, 72 AD3d 480, 482 [1st Dept 2010]). The claims predicated upon Administrative Code §§ 27-375(h) and 28-301.1 were also properly dismissed, even though Wythe did not satisfy its burden of showing that the building was not substantially altered within the meaning of Administrative Code § 27-115, since a section 205-e claim cannot be maintained in the absence of notice (*see Fernandez v City of New York*, 84 AD3d 595, 596 [1st Dept 2011]). For this same reason, dismissal of plaintiff's section 205-e claim predicated

upon sections 78(1) and 52(1) of the Multiple Dwelling Law was warranted (*see Robinson v New York City Hous. Auth.*, 89 AD3d 497 [1st Dept 2011]).

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: DECEMBER 22, 2015

CLERK

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16448 The People of the State of New York, Ind. 3907/12
Respondent,

-against-

Curtis Forteau,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Andrew J. Dalack of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel Conviser, J.), rendered on or about July 15, 2014,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: DECEMBER 22, 2015

CLERK

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

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16449 Pablo Santiago, Index 102710/11
Plaintiff-Respondent,

-against-

Weisheng Enterprises LLC, et al.,
Defendants-Appellants.

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Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for appellants.

Dansker & Aspromonte Associates, New York (Raymond Maceira of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 17, 2015, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants property owner and lessee-restaurant failed to establish their entitlement to judgment as a matter of law, in this action where plaintiff alleges that he was injured when he slipped and fell on a dark patch of ice on the sidewalk abutting defendants' building. Deposition testimony offered by defendant property owner, the owner of the restaurant, and a manager of the restaurant as to the general snow clearing procedures followed by defendants, failed to reflect their personal knowledge as to the adequacy of the snow removal efforts, if any, actually undertaken prior to plaintiff's fall, their knowledge of the condition of

the sidewalk, or when the sidewalk had last been inspected (*see* *Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d 412 [1st Dept 2013]; *De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566 [1st Dept 2010]).

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

ENTERED: DECEMBER 22, 2015

CLERK

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16450-
16451 In re Shamiyah P., and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

Anna P.,
Respondent-Appellant,

Commissioner of Social Services of
the City of New York, et al.,
Petitioners-Respondents.

_____

Douglas H. Reiniger, New York, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondents.

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

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Orders, Family Court, New York County (Jane Pearl, J.), entered on or about August 4, 2014, which, to the extent appealed from as limited by the briefs, upon a fact-finding determination that respondent mother is unable, by reason of mental retardation, to provide proper and adequate care for the subject children, terminated her parental rights to the children, and transferred their custody and guardianship to petitioners for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence, including expert testimony from the psychologist who examined the mother and reviewed all of

her available medical and agency records, supports the determination that she is presently and for the foreseeable future unable to provide proper and adequate care to the children because of her mental retardation (*see* Social Services Law § 384-b[4][c], [6][b]). The evidence shows that even though the mother cooperated with the required services, her adaptive skills and ability to care for her two special needs children were not sufficient to insure their safety while in her care (*see Matter of Jessica Latasha B.*, 234 AD2d 48, 48 [1st Dept 1996]). A dispositional hearing was not required (*Matter of Joyce T.*, 65 NY2d 39, 49 [1985]; *Jessica Latasha B.*, 234 AD2d at 48).

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

ENTERED: DECEMBER 22, 2015

CLERK

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16452 Robert M. Rubin, Index 350378/99
Plaintiff-Respondent,

—against—

Robin K. W. Rubin,
Defendant-Appellant.

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Fox Horan & Camerini LLP, New York (John R. Horan of counsel), for appellant.

Warshaw Burstein, LLP, New York (Eric I. Wrubel of counsel), for respondent.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered January 30, 2014, which granted plaintiff father's motion to terminate his monthly child support obligation of $4,250, unanimously affirmed, without costs.

Supreme Court properly granted the father's motion for a termination of his child support obligation, based upon his showing of a substantial change in circumstances as a result of a change in the child's residence from defendant mother to him (*see e.g. Atlas v Smily*, 117 AD3d 471 [1st Dept 2014]; Domestic Relations Law § 236[B][9][b]). Contrary to the mother's contention, the court was not required to conduct a hearing, since no triable issues of fact were raised (*see Matter of Stern v Stern*, 40 AD3d 1108 [2d Dept 2007], *lv denied* 9 NY3d 813 [2007]). Indeed, the mother acknowledged in her opposing

affidavit that the child had resided with the father since September 2013, and the 19-year-old child also averred the same in her affidavit. The mother's allegations of the father's undue influence on the child and other allegations pertaining to the child's execution of her affidavit are conclusory and insufficient to warrant a hearing (*see David W. v Julia W.*, 158 AD2d 1, 7-8 [1st Dept 1990]).

The child's affidavit, based on her personal knowledge of her intent not to return to the mother's home, did not constitute inadmissible hearsay (*see e.g. Pintor v 122 Water Realty, LLC*, 90 AD3d 449, 451 [1st Dept 2011]). In contrast, the mother's statements in her affidavit, based on what the child purportedly told her, were properly rejected as inadmissible hearsay and double hearsay (*see McGinley v Mystic W. Realty, Corp.*, 117 AD3d 504, 505 [1st Dept 2014]; *MG W. 100 LLC v St. Michaels Prot. Episcopal Church*, 127 AD3d 624, 625 [1st Dept 2015]).

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

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

ENTERED: DECEMBER 22, 2015

CLERK

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16454 Lydia Mantilla, Index 307162/09
Plaintiff,

-against-

Riverdale Equities, Ltd., et al.,
Defendants-Respondents,

TruGreen Landcare, L.L.C.,
Defendant-Appellant.

- - - - -

Washington Mutual, Inc.,
also known as JP Morgan Chase & Co.,
Third-Party Plaintiff-Respondent,

-against-

TruGreen Landcare, L.L.C.,
Third-Party Defendant-Appellant.

- - - - -

[And Another Third-Party Action]

_____

Hinshaw & Culbertson, LLP, New York (William M. Lopez of counsel), for appellant.

Russo & Toner, LLP, New York (Marcin J. Kurzatkowski of counsel), for respondents.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered August 20, 2014, which, to the extent appealed from as limited by the briefs, denied third-party defendant TruGreen Landcare, L.L.C.'s motion for summary judgment dismissing third-party plaintiff Washington Mutual Inc.'s claim for contractual indemnification, unanimously affirmed, with costs.

In this slip and fall action, plaintiff seeks to recover damages for injuries she sustained when she fell on snow and ice on the public sidewalk in front of a bank branch leased by defendant/third-party plaintiff Washington Mutual. Washington Mutual had entered into an agreement with third-party defendant TruGreen, requiring TruGreen to clear snow and ice from the sidewalk and to indemnify Washington Mutual, to the fullest extent permitted by law, against claims, inter alia, arising from its performance of its work or from its breach of the agreement. The agreement provides that, in the event of joint or concurrent negligence, TruGreen's obligation is limited to the extent of its own negligence, and that TruGreen has no obligation to indemnify Washington Mutual against its "sole negligence." The record indicates that TruGreen subcontracted its work to another company, which never cleared the sidewalk because TruGreen gave it the wrong address.

The motion court granted the portion of TruGreen's motion seeking dismissal of plaintiff's negligence cause of action against it because, as a contractor, it does not owe a duty of care to plaintiff (*see Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]), and that holding is not at issue on appeal. Contrary to TruGreen's argument, the dismissal of plaintiff's direct negligence claim against it does not preclude a finding

that TruGreen is obligated to indemnify Washington Mutual under the terms of their contract for failure to perform the snow removal services which it was retained to perform (*see Garcia v Mack-Cali Realty Corp.*, 52 AD3d 420, 420-22 [1st Dept 2008]; *Abramowitz v Home Depot USA, Inc.*, 79 AD3d 675, 677 [2d Dept 2010]; *Baratta v Home Depot USA, Inc.*, 303 AD2d 434, 435 [2d Dept 2003]). TruGreen's argument that the indemnification provision violates General Obligation Law § 5-322.1, or the equivalent Washington State law, is also without merit, since the agreement expressly limits TruGreen's indemnification obligation in a manner consistent with that law (*see Tamhane v Citibank, N.A.*, 61 AD3d 571, 573 [1st Dept 2009]).

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

ENTERED: DECEMBER 22, 2015

CLERK

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16455 The People of the State of New York, Respondent, Ind. 6074/10

-against-

Nicholas Brooks, Defendant-Appellant.

_____

Blank Rome LLP, New York (Jeffrey C. Hoffman of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered September 23, 2013, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly granted the People's motion for a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]) on the issue of the scientific underpinnings of the defense expert's theory. Defendant's forensic pathologist was not an expert in toxicology and could provide no authority to support his theory that five prescription drugs found in the victim's system interacted with one another so as to heighten their sedative effect and cause the victim to die accidentally, either directly from overdose or secondarily through accidental drowning in a bathtub as a result of unintended drug-induced incapacitation.

Defendant's claim that he was prejudiced by the mere fact that a hearing was held is unsubstantiated.

The court properly exercised its discretion in issuing various preclusive rulings. Among other rulings, the court properly precluded defendant's pathologist from affirmatively opining that the victim was not forcibly drowned. The expert was permitted to testify, among other things, that a victim of forcible drowning would be expected to have a substantial amount of fluid in the sphenoidal sinus, rather than the "minimal amount" of fluid found in the victim here. In this regard, defendant's contention that, in the absence of published authority directly on point, his pathologist was entitled to rely on his experience, is unavailing (*compare People v Oddone*, 22 NY3d 369 [2013] [expert may, in appropriate circumstances, rely on own experience]). Although the pathologist had performed hundreds of autopsies, he could recall only one involving a forcible drowning. Even in that one case, the pathologist could not recall whether the victim had fluid in the sphenoid sinus. Hence, the pathologist's experience simply provided no basis for him to opine that fluid in the sphenoid sinus is a sine qua non marker of *forcible* drowning (*see Cleghorne v City of New York*, 99 AD3d 443, 447 [1st Dept 2012]).

The court properly limited testimony about drug-related

issues, including drug screening protocols employed by the Office of the Chief Medical Examiner and the independent laboratory it employs, and what drugs, other than the five found in postmortem testing, that the victim had been prescribed in the past. Questions about what drugs might have been found through further screening would have been unduly speculative (*see People v Blount*, 286 AD2d 649 [1st Dept 2001], *lv denied* 97 NY2d 901 [2002]). Moreover, such speculation was not necessary to establish defendant's defense, since the fact that the victim was found to have five drugs in her system, most of which had sedative effects and one of which was in a supertherapeutic concentration, gave the defense ample room to argue that additive and synergistic effects might have incapacitated the victim and caused her to slip under the bath water. Questions about what other drugs the victim had been prescribed in the past likewise would have been speculative and collateral.

Similarly, given the absence of any evidentiary basis to believe that defendant and the victim had ever engaged in erotic choking, the trial court properly precluded defendant's pathologist from testifying that rough sex or erotic choking might have caused bruising found on the victim's body.

Defendant's argument that the court compounded the alleged error in its preclusive rulings by precluding the defense from

making similar arguments during summation is similarly without merit. Nor did the court act improperly in threatening defense counsel with contempt for repeatedly flouting the court's preclusive rulings (*see People v Gonzalez*, 38 NY2d 208, 210 [1975]).

The court provided meaningful responses to jury questions during deliberations (*see People v Almodovar*, 62 NY2d 126, 131 [1984]; *People v Malloy*, 55 NY2d 296, 301-302 [1982], *cert denied* 459 US 847 [1982]).

The court properly admitted testimony from friends of the victim reflecting the victim's unfavorable perception of defendant's character, in order to show the victim's beliefs as part of a showing that the couple had been arguing and that the victim had been attempting to break up with defendant. Proof of the "murder victim's espoused intention to terminate her relationship with, and stay away from, defendant" was admissible to show the "victim's state of mind" and was "relevant to the issue of the motive of defendant, who was aware of the victim's attitude, to kill the victim" (*People v Martinez*, 257 AD2d 410, 411 [1st Dept 1999], *lv denied* 93 NY2d 876 [1999]). Hence, the background information about the couple's "strife and unhappiness" was admissible as "highly probative of the defendant's motive and [was] either directly related to or

inextricably interwoven with the issue of his identity as the killer" (*People v Bierenbaum*, 301 AD2d 119, 146 [1st Dept 2002] [citation and internal quotation marks omitted], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]; *see also People v Sorrentino*, 93 AD3d 450, 451 [1st Dept 2012], *lv denied* 19 NY3d 977 [2012]). The friends' testimony about disputes between defendant and the victim was similarly admissible (*see People v Gamble*, 18 NY3d 386, 398 [2012]).

The court properly denied defendant's CPL 330.30(2) motion to set aside the verdict on the ground of alleged juror misconduct (42 Misc 3d 1209[A], 2013 NY Slip Op 52261[U]). There was no evidence that the juror at issue had engaged in misconduct or that defendant had suffered prejudice to any substantial right (*see People v Hernandez*, 107 AD3d 504 [1st Dept 2013], *lv denied* 22 NY3d 1199 [2014]). Nor was defendant "entitled to a hearing based on expressions of hope that a hearing might reveal the essential facts," given the absence of any evidence of misconduct

or actual impact on the deliberative process (*People v Johnson*, 54 AD3d 636, 636 [1st Dept 2008], *lv denied* 11 NY3d 898 [2008]).

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

ENTERED: DECEMBER 22, 2015

CLERK

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16456 In re Enrique S., and Others,

Children Under the Age of
Eighteen Years, etc.,
- - - - -
Kelba C. S.,
Respondent-Appellant,

The Administration for
Children's Services,
Petitioner-Respondent,

Nicole H.,
Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondent.

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

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Order of fact-finding and disposition (one paper) of the Family Court, New York County (Stewart H. Weinstein, J.), entered on or about December 1, 2014, which, to the extent appealed from as limited by the briefs, determined that respondent father had neglected the subject children, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). The record evidences the father's untreated mental illness,

aggressive and violent behavior towards the mother, and his admission that he had been diagnosed with bipolar disorder, which raised the substantial probability of neglect that would place the children at imminent risk of impairment if released to his care (*see Matter of Liarah H. [Dora S.]*, 111 AD3d 514, 515 [1st Dept 2013]; *Matter of Cerenithy Ecksthine B. [Christian B.]*, 92 AD3d 417 [1st Dept 2012]).

Furthermore, the court properly granted petitioner agency's motion to amend the petition to conform to the evidence (F.C.A. § 1051[b]). The record demonstrates that the father had ample notice of the new allegations and an opportunity to respond (*see Matter of Aaron C.*, 105 AD3d 548 [1st Dept 2013]; *Matter of Madison H. [Demezz H.-Tabitha A.]*, 99 AD3d 475, 476 [1st Dept 2012]). In addition to meeting its burden of showing that the father neglected the subject children by reason of his mental illness, the record supports the alternative theory of neglect advanced by the agency based on the failure of the father to protect the children from the mother's neglect, which he knew, or

should have known, created a risk of harm to them (*see Matter of Erica D. (Maria D.)*, 77 AD3d 505 [1st Dept 2010]; *Matter of Christy C.*, 77 AD3d 563 [1st Dept 2010]).

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

ENTERED: DECEMBER 22, 2015

CLERK

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16462 The People of the State of New York, Ind. 5113N/10
Respondent,

-against-

Vanderpool Rodriguez, etc.,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Sonberg, J.), rendered on or about November 29, 2011,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: DECEMBER 22, 2015

CLERK

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

Corrected Order - October 21, 2016

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16457- Index 652491/13
16458- 652492/13
16459-
16460-
16461 & M-5670

Allenby, LLC, et al.,
Plaintiffs-Appellants,

-against-

Credit Suisse, AG, et al.,
Defendants-Respondents.

- - - - -

Allenby, LLC, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Credit Suisse AG, Cayman Islands Branch, et al.,
Defendants-Appellants-Respondents.

- - - - -

Credit Suisse Loan Funding LLC, et al.,
Plaintiffs-Respondents,

-against-

Highland Crusader Offshore Partners, L.P., et al.,
Defendants-Appellants.

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Reid Collins & Tsai LLP, New York (William T. Reid, IV of counsel), for Allenby, LLC and Haywood, LLC, appellants/respondents-appellants.

Reid Collins & Tsai, Austin, TX (Lisa S. Tsai of the bar of the State of California and the bar of the State of Texas, admitted pro hac vice, of counsel), for Highland Crusader Offshore Partners, L.P., Highland CDO Opportunity Master Fund, L.P., Highland Credit Strategies Master Fund, L.P., and Highland Credit Opportunities CDO, L.P., appellants.

Weil, Gotshal & Manges LLP, New York (Gregory Silbert and David Lender of counsel), for appellants-respondents and respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 10, 2014, which granted defendants Credit Suisse, AG, Cayman Islands Branch, Credit Suisse Securities (USA) LLC, and Credit Suisse Loan Funding LLC's motion to dismiss to the extent of dismissing the unjust enrichment and breach of the implied covenant of good faith and fair dealing causes of action with prejudice and the fraud, aiding and abetting fraud, and conspiracy causes of action without prejudice, unanimously modified, on the law, to deny the motion as to the claims for fraud and aiding and abetting fraud, and otherwise affirmed, without costs. Order, same court and Justice, entered March 3, 2015, which granted so much of defendant Credit Suisse AG, Cayman Islands Branch's (CS-CIB) motion as sought summary dismissal of part of plaintiffs' contract claim as time-barred, and denied so much of the motion as sought summary dismissal of the rest of the contract claim, and denied plaintiffs' cross motion to strike the defense of the statute of limitations, unanimously affirmed, with costs. Judgment, same court (Melvin L. Schweitzer, J.), entered September 11, 2014, against defendants in plaintiffs Credit Suisse Loan Funding LLC and Credit Suisse AG, Cayman Islands Branch's favor, unanimously affirmed, with costs. Appeals from

order, same court and Justice, entered July 10, 2014, to the extent it denied defendants' motion to compel discovery regarding plaintiffs' alleged manipulation of the London Interbank Offered Rate (LIBOR), and order, same court and Justice, entered September 10, 2014, which granted plaintiffs' motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In the summary judgment decision in index no. 652491/13, the court correctly found that the tolling agreement was governed by New York rather than Texas law, that part of plaintiff's contract claim was time-barred (*see Bayridge Air Rights v Blitman Constr. Corp.*, 80 NY2d 777 [1992]), and that equitable estoppel did not apply as a matter of law (*see Dailey v Mazel Stores*, 309 AD2d 661 [1st Dept 2003]).

With respect to the non-time-barred portion of the contract claim, the court correctly found an issue of fact as to whether CS-CIB had a contractual obligation to review and approve the quarterly updates of the appraisals in its reasonable judgment, based on the definition of "Qualified Appraisal Update" in the contracts at issue.

We reject defendants' causation argument regarding the contract claim.

Plaintiffs contend that, with respect to defendants Credit

Suisse Securities (USA) LLC and Credit Suisse Loan Funding LLC, the court erred by dismissing the claim for breach of the implied covenant of good faith and fair dealing as *duplicative* of the contract claim, because the latter claim was asserted only against CS-CIB. We uphold the dismissal on other grounds.

Plaintiffs do not allege that Credit Suisse Loan Funding was a party to the credit agreements at issue in index no. 652491/13. If there is no contract with Loan Funding, there can be no implied covenant claim against it (*see Smile Train, Inc. v Ferris Consulting Corp.*, 117 AD3d 629, 630 [1st Dept 2014]).

Plaintiffs do allege that Credit Suisse Securities was a party to the Ginn agreement and the Park Highlands agreement. In their implied covenant claim, they allege that "defendants" had the obligation under the credit agreements to review and approve the form and substance of the appraisals. However, plaintiffs' allegations notwithstanding, the contracts show that it was the Administrative Agent – i.e., CS-CIB, not Credit Suisse Securities – that had the obligation to review and approve Qualified Appraisal Updates (*see Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

The court correctly found, with respect to CS-CIB, that the implied covenant claim was duplicative of the contract claim (*see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70

AD3d 423 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]). *Wilmoth v Sandor* (259 AD2d 252 [1st Dept 1999]), on which plaintiffs rely, does not address the implied covenant of good faith and fair dealing.

The unjust enrichment claim was correctly dismissed because there are express contracts governing the subject of that claim (*see e.g. Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). It is of no moment that the contracts are between defendants and the nonparty borrowers/real estate developers, not between defendants and plaintiffs (*see e.g. Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 283 [1st Dept 1989], *lv dismissed in part, denied in part* 74 NY2d 874 [1989]; *see also Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]).

The court dismissed the fraud claim on the grounds that it had not been pleaded with sufficient particularity (*see* CPLR 3016[b]) and that too much of it was pleaded on information and belief. However, the complaint informs defendants that plaintiffs are complaining about the appraisals for five specific transactions (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]). At this early, pre-discovery stage of the litigation, plaintiffs were not required to allege that a particular named individual inflated an appraisal (*see id.* ["section 3016(b) should not be so strictly interpreted as to

prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (internal quotation marks omitted)]; *see also e.g. P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 377 [1st Dept 2003]; *Loreley Fin. [Jersey] No. 3 Ltd. v Citigroup Global Mkts. Inc.*, 119 AD3d 136, 142-143 [1st Dept 2014]).

Although the allegations of fraud are based on information and belief, plaintiffs "set forth sufficient information to apprise defendants of the alleged wrongs" (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010]). In addition to pleading only on information and belief that defendants caused the appraisers to inflate the appraisals at issue, plaintiffs allege that the transactions in the instant action were like the Lake Las Vegas transaction, for which they allege specific dates and names.

Defendants also contend that the fraud claim should be dismissed for lack of reasonable reliance and because it is duplicative of plaintiffs' contract claim against CS-CIB. These arguments are unavailing.

Defendants point out that plaintiffs disclaimed reliance. However, while "[u]sually, comprehensive disclaimers contained in carefully drafted documents executed by sophisticated commercial

parties are sufficient to insulate sellers from tort liability[,] there is a limit to the efficacy of these disclaimers" (*Loreley*, 119 AD3d at 138 [citation omitted]). Plaintiffs allege that the misrepresentations concerned facts peculiarly within defendants' knowledge (*see id.* at 147; *Bank Brussels Lambert v Chase Manhattan Bank, N.A.*, 1996 WL 609439, *5, 1996 US Dist LEXIS 15631, *14 [SD NY, Oct. 23, 1996]; *see also China Dev. Indus. Bank v Morgan Stanley & Co., Inc.*, 86 AD3d 435 [1st Dept 2011]).

Contrary to defendants' claim, plaintiffs do not concede that all of the assumptions underlying the appraisals were disclosed.

Defendants contend that plaintiffs failed to conduct any investigation. However, the contracts at issue implied that the appraisers (both of which were well known firms) would be independent, and said that the appraisals would be conducted in accordance with the Uniform Standards of Professional Appraisal Practice. "Where ... a plaintiff has taken reasonable steps to protect itself against deception, it should not be denied recovery merely because hindsight suggests that it might have been possible to detect the fraud when it occurred" (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]). Moreover, whether defendants' information was available to plaintiffs with the exercise of reasonable diligence is not appropriately

determined as a matter of law on the pleadings (*P.T. Bank*, 301 AD2d at 378).

Since the fraud claim is asserted against all three defendants but a contract claim is asserted against only CS-CIB, the fraud claim cannot be *duplicative* as to Credit Suisse Securities and Credit Suisse Loan Funding (*see Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 305 [1st Dept 2003]). We find that the fraud claim against CS-CIB is not duplicative of the contract claim (*see e.g. Wyle Inc. v ITT Corp.*, 130 AD3d 438, 440 [1st Dept 2015]).

The court dismissed the claim for aiding and abetting the appraisers' fraud because it had dismissed the fraud claim. However, we have reinstated the fraud claim.

Defendants contend that the aiding and abetting claim is duplicative of their fraud claim. However, plaintiffs may plead alternate causes of action (*see Weinberg v Mendelow*, 113 AD3d 485, 487 [1st Dept 2014]).

Relying on *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.* (64 AD3d 472 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]), defendants contend that the aiding and abetting claim is precluded by disclaimers in the contracts at issue. However, "the crux" of the claim is not mere "silence or inaction" (*id.* at 476); plaintiffs allege that defendants were

actively involved in the whole scheme to inflate appraisals.

The court correctly dismissed the claim for civil conspiracy (*see e.g. Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968 [1986]).

In index no. 652492/13, defendants contend that the court erred by awarding prejudgment interest at 9% (the rate prescribed by CPLR 5004) instead of LIBOR, the contract rate of interest (*see NML Capital v Republic of Argentina*, 17 NY3d 250, 258 [2011]). However, Section 6 of the Standard Terms and Conditions does not apply to a breach of contract; it governs the separate subject of delayed settlement.

We find no issue of fact as to whether defendants breached the trade confirmations.

Having properly awarded interest at 9%, the court providently exercised its discretion in denying discovery about LIBOR since such discovery would be irrelevant.

M-5670 - ***Allenby, LLC v Credit Suisse, AG***

Motion to strike portions of reply brief granted to the extent of taking judicial notice of a document filed in a Texas State court, and otherwise denied.

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

ENTERED: DECEMBER 22, 2015

CLERK

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16465-
16465A-
16466 In re Arianna-Samantha Lady
Melissa S., and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

Carissa S.,
Respondent-Appellant,

Community Counseling & Mediation,
Petitioner-Respondent.

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Bruce A. Young, New York, for appellant.

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

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the children.

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Orders of fact-finding and disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about January 6, 2015, which, to the extent appealable, found that respondent mother permanently neglected the subject children, unanimously affirmed, without costs. Order, same court and Judge, entered on or about February 9, 2014, which denied the mother's motion to vacate the orders of disposition terminating her parental rights upon inquest following her default in appearance, unanimously affirmed, without costs.

As to the fact-finding portions of the orders, the agency

demonstrated by clear and convincing evidence that it made the requisite diligent efforts (*see* Social Services Law § 384-b[7][a], and the mother failed to show that she had complied with required mental health treatment and services (*see Matter of Juliana Victoria S. [Benny William W.]*, 89 AD3d 490 [1st Dept 2005], *lv denied* 18 NY3d 805 [2012]), visited the children consistently (*see Matter of Calvario Chase Norall W. [Denise W.]*, 85 AD3d 582 [1st Dept 2011]), obtained safe and secure housing, or otherwise addressed the issues which led to the children's placement in the first instance (*see Matter of Jaileen X.M. [Annette M.]*, 111 AD3d 502, 503 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]).

No appeal lies from the dispositional portions of the orders of fact-finding and disposition, since the mother defaulted at the dispositional hearing (*see Matter of Jaquan Tieran B. [Latoya B.]*, 105 AD3d 498, 499 [1st Dept 2013]).

The court properly exercised its discretion in denying the mother's motion to vacate the dispositional orders entered on her default, since she failed to demonstrate a reasonable excuse for her failure to appear at the hearing and a potentially meritorious defense (*see* CPLR 5015[a][1]; *see e.g., Matter of Yadori Marie F. [Osvaldo F.]*, 111 AD3d 418, 419 [1st Dept 2013]). In particular, her contention that she experienced unexpected

subway delays and long security lines at the courthouse, and was unable to contact her attorney during the trip, did not constitute a reasonable excuse, especially in light of her repeated tardiness and absences during the proceedings, as well as a lack of evidence in support of her purported excuse (*see Matter of Nasir Levon L. [Ashley Bernadette B.]*, 110 AD3d 565 [1st Dept 2013], *lv dismissed* 22 NY3d 1099 [2014]; *Matter of Male H.*, 179 AD2d 384, 385 [1st Dept 1992], *lv dismissed* 79 NY2d 1026 [1992]; *Matter of Laura Mariela R.*, 302 AD2d 300 [1st Dept 2003]; *Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428 [1st Dept 2010], *lv dismissed* 15 NY3d 766 [2010]). In any event, the mother failed to provide evidence in support of a meritorious defense other than her conclusory statement that, were the hearing to be reopened, she would testify that she was ready, willing and able to care for the children (*see Matter of Lenea'jah F. [Makeba T.S.]*, 105 AD3d 514 [1st Dept 2013]). Indeed, the record evidence is to the contrary.

Moreover, the court properly credited the caseworker's testimony which demonstrated that it was in the children's best interests for the mother's rights to be terminated to enable the children to be adopted by their long-term foster mother, who has provided a loving and stable home, for both children, for nearly

their entire lives, and with whom they are thriving (*Matter of Ciara Lee C. [Lourdes R.]*, 67 AD3d 437 [1st Dept 2009], *lv dismissed* 14 NY3d 756 [2010]).

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

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

ENTERED: DECEMBER 22, 2015

CLERK

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16467 The People of the State of New York SCI 2865/10
Respondent,

-against-

Scott M. Austin,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lynn R. Kotler, J. at plea; Patricia M. Nunez, J. at sentencing), rendered September 6, 2012, as amended November 19, 2012, convicting defendant of grand larceny in the third degree, and sentencing him to a term of one year, unanimously affirmed.

Defendant's claim that his plea allocution was deficient because the court omitted the word "jury" from its reference to giving up the right to a trial is a claim requiring preservation (*see People v Jackson*, 123 AD3d 634 [1st Dept 2014], *lv denied* 25 NY3d 1201 [2015]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find that the record establishes the voluntariness of the plea

(*see People v Tyrell*, 22 NY3d 359, 365 [2013]; *People v Harris*,61 NY2d 9, 16-19 [1983]).

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

ENTERED: DECEMBER 22, 2015

CLERK

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16468-
16469 The People of the State of New York
Respondent,

-against-

Laquan Carroll,
Defendant-Appellant.

Ind. 5680/01

Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

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

Appeals having been taken to this Court by the above-named appellant from the judgments of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about December 10, 2002,

Said appeals having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgments so appealed from be and the same are hereby affirmed.

ENTERED: DECEMBER 22, 2015

CLERK

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

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16470 J-Line Inc., Index 20295/14E
Plaintiff-Appellant,

-against-

Leggett Ave. & So. Blvd. Realty Corp.,
Defendant-Respondent.

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Vishnick McGovern Milizio, LLP, Lake Success (Dennis Lyons of counsel), for appellant.

Law Office of Donald R. Dunn, Jr., Bronx (Donald R. Dunn, Jr. of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered September 17, 2014, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the first and second causes of action of the complaint, unanimously affirmed, without costs.

The first cause of action, for breach of the parties' lease, and the second cause of action, for negligence, are based on defendant landlord's alleged failure to maintain its building. In particular, plaintiff tenant asserts that a vacate order issued by the New York City Department of Buildings forced it to vacate the building due to defendant's failure to maintain the "masonry bearing walls" and the "main roof bow truss framing." The lease, however, shows that plaintiff took possession of the premises "as is" and had agreed to keep the load-bearing elements

of the building, including the interior and exterior walls, in good order and repair. Accordingly, defendant made a prima facie showing that plaintiff was responsible for the defects that led to the vacate order (*see Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [1st Dept 2010]). In addition, Administrative Code of the City of New York § 28-301.1 may not serve as a predicate to impose tort liability upon defendant (*Yuying Qiu v J&J Grocery & Deli Corp.*, 115 AD3d 627, 627-628 [1st Dept 2014]).

In opposition, plaintiff failed to raise a triable issue of fact. Although the lease required defendant to maintain the roof and exterior pointing of the building, plaintiff did not show that the vacate order was premised upon any failure by defendant to maintain those aspects of the building. Plaintiff's expert's affidavit is insufficient to raise a triable issue of fact, as his opinion is not based on his personal inspection of the building (*see Garcia-Rosales v 370 Seventh Ave. Assoc., LLC*, 88 AD3d 464, 465 [1st Dept 2011]. While plaintiff asserts that further investigation was required to ascertain which aspects of the premises were damaged and who was responsible for them, there is nothing in the record that indicates that plaintiff made any attempt to have its expert inspect the premises and was denied

entry, or that plaintiff made any discovery demands for the information it claims it needed. Moreover, the alleged discrepancies between defendant's expert affidavit and the vacate order do not show that defendant was responsible for the defects mentioned in the order.

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

ENTERED: DECEMBER 22, 2015

CLERK

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16471 The People of the State of New York, Respondent,

Ind. 1378/10

-against-

Franklin Kirkland,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Abigail Everett of counsel), for appellant.

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

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Order, Supreme Court, New York County (Richard D. Carruthers, J.), entered on or about July 14, 2014, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant a downward departure, since the alleged mitigating factors were adequately taken into account by the risk assessment instrument and were outweighed by, among other things, the seriousness of the underlying offense and defendant's extensive

criminal record (*see generally People v Gillotti*, 23 NY3d 841 [2014]).

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

ENTERED: DECEMBER 22, 2015

CLERK

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16472 The People of the State of New York, Ind. 185/12
Respondent,

-against-

Omayra Figueroa,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about January 15, 2014,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: DECEMBER 22, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, Andrias, Saxe, Richter, JJ.

15426 Lend Lease (US) Construction LMB Inc., et al., Plaintiffs-Appellants-Respondents, Index 158438/13

-against-

Zurich American Insurance Company, et al., Defendants-Respondents-Appellants.

_____

Carroll McNulty & Kull LLC, Basking Ridge, New Jersey (Matthew J. Lodge of the bar of the State of New Jersey, admitted pro hac vice, of counsel), for Lend Lease (US) Construction LMB Inc., appellant-respondent.

Greenberg, Trager & Herbst, LLP, New York (Richard J. Lambert of counsel), for Extell West 57th Street LLC, appellant-respondent.

Mound Cotton Wollan & Greengrass LLP, New York (Philip C. Silverberg and Mark S. Katz of counsel) for respondents-appellants.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about January 20, 2015, modified, on the law, to grant defendants' cross motions for summary judgment and declare that defendants have no obligation to provide coverage under the builder's risk policy, and otherwise affirmed, without costs.

Opinion by Andrias, J. All concur except Mazzarelli, J.P. and Richter, J. who dissent in an Opinion by Mazzarelli, J.P.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
John W. Sweeny, Jr.
Richard T. Andrias
David B. Saxe
Rosalyn H. Richter, JJ.

15426
Index 158438/13

_____x

Lend Lease (US) Construction
LMB Inc., et al.,
Plaintiffs-Appellants-Respondents,

-against-

Zurich American Insurance Company,
et al.,
Defendants-Respondents-Appellants.

_____x

Cross appeals from the order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about January 20, 2015, which denied plaintiffs' respective motions and defendants' cross motions for summary judgment.

Carroll McNulty & Kull LLC, New York (Christopher R. Carroll, Jillian G. Ackermann, and Matthew J. Lodge of the bar of the State of New Jersey, admitted pro hac vice, of counsel), for Lend Lease (US) Construction LMB Inc., appellant-respondent.

Greenberg, Trager & Herbst, LLP, New York (Richard J. Lambert of counsel), for Extell West 57th Street LLC, appellant-respondent.

Mound Cotton Wollan & Greengrass LLP, New York (Philip C. Silverberg, Mark S. Katz and Sanjit Shah of counsel) for respondents-appellants.

ANDRIAS, J.

Plaintiffs Extell West 57th Street LLC (Extell) and Lend Lease (US) Construction LMB INC. (Lend Lease) are the owner and construction manager of a project to erect a 74-story mixed-use hotel and residential building in Manhattan. In this breach of contract and declaratory judgment action, plaintiffs seek coverage under a $700,000,000 builder's risk policy, consisting of five separate policies issued by defendants with identical terms, for damage caused by Superstorm Sandy's dislodgement and partial destruction of a tower crane that was affixed to the building for use in the performance of the construction work.

The insuring agreement provides that the "[p]olicy, subject to [its] terms, exclusions, limitations and conditions . . . insures against all risks of direct physical loss of or damage to Covered Property while at the location of the INSURED PROJECT* and occurring during the Policy Term." Covered Property includes "Property Under Construction" and "Temporary Works."

The policy defines "Temporary Works," as

> "[a]ll scaffolding (including scaffolding erection costs), formwork, falsework, shoring, fences and temporary buildings or structures, including office and job site trailers, all incidental to the project, the value of which has been included in the estimated TOTAL PROJECT VALUE* of the INSURED PROJECT* declared by the NAMED INSURED."

The policy excludes coverage for

> "[c]ontractor's tools, machinery, plant and equipment including spare parts and accessories, whether owned, loaned, borrowed, hired or leased, and property of a similar nature not destined to become a permanent part of the INSURED PROJECT*, unless specifically endorsed to the Policy."

The tower crane was integral, not "incidental to the project," and therefore does not fall within the definition of Temporary Works. Even if the tower crane fell within the definition of Temporary Works, the contractor's tools, machinery, plant and equipment exclusion would be applicable and, contrary to the opinion of the dissent, enforceable. Accordingly, the order on appeal should be modified to grant defendants' motion for summary judgment and to declare that defendants have no obligation to provide coverage.

Lend Lease contracted with nonparty Pinnacle Industries II, LLC (Pinnacle) to furnish and install all superstructure concrete work for the project, which was included as a line item in Extell's budget with a value of $89,000,000. The contract provided, inter alia, that Pinnacle would supply "[d]iesel fuel tower cranes, all cherry pickers, any assist cranes, concrete pumps, and other heavy equipment required for the erection of the building." This included two cranes, whose "locations, lay outs and structural supports required [we]re to be designed by a

licensed New York State professional engineer (NYS PE) to meet all NYC, DOB, NYC DOT, OSHA and Construction Manager criteria." The contract further provided that Crane 2, the tower crane at issue in this appeal, "[wa]s to be supported by a reinforced slab on the 20th floor, included in this Contract, and associated supporting elements as required."

Pinnacle rented the tower crane from Pinnacle Industries III, LLC (Pinnacle Industries III), a related company, at a cost of $77,000 per month. Under its contract with Lend Lease, Pinnacle was obligated to "secure, pay for, and maintain Property Insurance necessary for protection against loss" of the crane. Pinnacle Industries III also subleased the tower crane to a steel contractor working at the project, Post Road Iron Works, Inc., for $77,000 per month. Pursuant to that sublease, Post Road was obligated to maintain liability and property damage insurance, including "coverage for the contractual liability created by this sublease agreement."

The 750-foot tall tower crane is a massive and sophisticated piece of equipment. Its components include (i) a turntable, which provided it with the ability to rotate as necessary; (ii) a working arm or boom, which was used to physically lift and move various items necessary to the construction of the building; (iii) various counterweights; (iv) a diesel-driven winch pack;

and (v) a cab from where its necessary movements were controlled.

To support the tower crane and the loads it carried, Pinnacle built a base on the 20th floor of the building, which was bolted to a large pad of reinforced concrete that was strengthened and stabilized by beams encased into the floor slab. Plates were also cast into the shear walls connected by threaded rods. To provide increased stability, the mast of the tower crane, consisting of over 50 individual sections, was fastened or tied to the structural floor slabs at regular intervals, which required additional steel reinforcement of the slabs. Although the tower crane itself was to be completely removed from the project once its work was done, both the additional beams cast into the slab on the 20th floor, and the reinforcement of the floor slabs at the tie locations, were to permanently remain part of the building following the completion of construction.

On October 29, 2012, high winds from the Superstorm caused the tower crane to partially collapse. The boom flipped over and some parts of the crane broke away, falling to the street below. Extell submitted a claim in the amount of $6,494,723.01 for damage to the tower crane and building, which defendants disclaimed on the grounds that the tower crane did not constitute covered property and/or was excluded property under the policy. This litigation ensued.

An insured bears the burden of establishing the existence of coverage (*see Platek v Town of Hamburg*, 24 NY3d 688, 694 [2015]). Unlike scaffolding, formwork, falsework, shoring and fences, the tower crane is not specifically identified in the definition of Temporary Works. Thus, to obtain coverage, plaintiffs must demonstrate, inter alia, that the tower crane is a "temporary structure" within the meaning of the clause.

In construing policy provisions defining the scope of coverage, courts "first look to the language of the policy" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221 [2002]), which is "interpreted according to common speech and consistent with the reasonable expectation of the average insured" (*Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]). Thus, "[u]nless otherwise defined by the policy, words and phrases are to be understood in their plain, ordinary, and popularly understood sense, rather than in a forced or technical sense" (*Hartford Ins. Co. of Midwest v Halt*, 223 AD2d 204, 212 [4th Dept 1996], *lv denied* 89 NY2d 813 [1997]).

Although ambiguous provisions "must be construed in favor of the insured and against the insurer," unambiguous provisions "must be given their plain and ordinary meaning" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]). Thus, courts will "not disregard clear provisions which the insurers inserted in

the policies and the insured accepted, and equitable considerations will not allow an extension of coverage beyond its fair intent and meaning in order to obviate objections which might have been foreseen and guarded against" (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005] [internal quotation marks omitted]).

The test for ambiguity is whether the language of the insurance contract is "susceptible of two reasonable interpretations" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]). "That one party to the agreement may attach a particular, subjective meaning to a term that differs from the term's plain meaning does not render the term ambiguous" (*see Slattery Skanska Inc. v American Home Assur. Co.* 67 AD3d 1, 14 [1st Dept 2009]). Nor does the lack of a definition, in and of itself, render a word ambiguous (*id.*).

The policy defines a temporary structure as something that is "incidental to the project." Although the term incidental is not defined, "it is common practice for the courts of this State to refer to the dictionary to determine the plain and ordinary meaning of words to a contract" (*2619 Realty v Fidelity & Guar. Ins. Co.*, 303 AD2d 299, 301 [1st Dept 2003] [internal quotation marks omitted], *lv denied* 100 NY2d 508 [2003]; *see also R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 33 [2002]; *Chelsea*

Piers L.P. v Hudson Riv. Park Trust, 106 AD3d 410, 411 [1st Dept 2013]).

Black's Law Dictionary defines the term "incidental" as "[s]ubordinate to something of greater importance; having a minor role" (10th ed 2014]). The American Heritage Dictionary, defines incidental as "[o]f a minor, casual, or subordinate nature" (5th ed 2011]). The Merriam-Webster Online Dictionary defines the term "incidental" as "being likely to ensue as a chance or minor consequence" (11th ed 2003).

Applying these definitions, the 750-foot tower crane is not a structure that is "incidental" to the project. Indeed, rather than ensuing by chance or minor consequence, as Extell's Senior Vice President for Construction Management acknowledged, the "[b]uilding was specifically designed to incorporate the Tower Crane during construction" and the crane's design and erection involved an "in-depth process" that had to be approved by a structural engineer. Moreover, once it was integrated into the structure of the building, the custom designed tower crane, rather than serving a minor or subordinate role, was used to lift items such as concrete slabs, structural steel and equipment, was integral and indispensable, not incidental, to the construction of the 74-story high-rise, which could not have been built without it. Accordingly, the tower crane does not fall within

the policy's definition of Temporary Works.

The application of the rule of ejusdem generis would lead to the same conclusion. Under the rule of ejusdem generis, the meaning of a word in a series of words is determined "by the company it keeps" (*People v Illardo*, 48 NY2d 408, 416 [1979]). "[A] series of specific words describing things or concepts of a particular sort are used to explain the meaning of a general one in the same series" (*Matter of Riefberg*, 58 NY2d 134, 141 [1983]; *see also 242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 103-104 [1st Dept 2006]).

The general term "temporary buildings and structures," is described by the specific term "including office and job site trailers." The 750-foot tower crane differs from office and job site trailers in many important ways. Unlike office and job site trailers, the tower crane (i) was furnished pursuant to a contract that included detailed instructions for its placement, design, erection, support and approval; (ii) is a sophisticated mechanized device, whose mast consisted of over 50 individual sections, that could only be operated by a licensed operator; and (iii) intended to physically lift and move various items necessary to the construction of the tower. Indeed, even if the meaning of the word "structure" is to be determined in conjunction not only with office and job site trailers but also

with formwork, falsework, shoring and fences, this active participation in the construction work distinguishes the tower crane from those items, which provide access, support, and protection for the facility under construction that is incidental to the project.

The dissent believes that the tower crane is a "temporary structure" that was "incidental to the project." The dissent equates the tower crane to office and job site trailers on the ground that it too is a substantial and critical mechanism employed to construct the tower, which remained on the site for a significant portion of the project, which was dismantled at the project's end. However, this overstates the role office and job site trailers play in the actual construction work and turns the plain meaning of incidental, as something having a minor or subordinate role, on its head. While the tower crane is a mechanism that is integrated into the building and is crucial to the construction of the tower, office and job site trailers do not directly participate in the construction work and may be placed anywhere on or near the construction site.

The dissent disagrees, stating that the only sensible way to avoid reading the phrase "all incidental to the project" as superfluous is to interpret it as a catchall phrase capturing any "temporary structures" not specifically enumerated in the

definition. However, a court "may not make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]) and may not "disregard the provisions of an insurance contract which are clear and unequivocal or accord a policy a strained construction merely because that interpretation is possible" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 131 [1st Dept 2006]). If the definition of Temporary Works was intended to include all temporary buildings and structures of every ilk, there would have been no need to add the language "including office and job site trailers, all incidental to the project." Thus, the dissent's interpretation, which in essence views every item assembled at the project that will not remain a permanent part of the building as a temporary structure incidental to the project, rewrites the plain language of the policy to include coverage that was never intended. In this regard, it bears repeating that because the Temporary Works clause is not ambiguous, we are not "constrained" to give the benefit of the doubt to plaintiffs, as the dissent asserts.

In any event, even if the tower crane could be considered Temporary Works under the policy, damage to it from Superstorm Sandy would not be covered by reason of the contractor's tools, machinery, plant and equipment exclusion.

An insurer bears the burden of proving the applicability of an exclusion of coverage (*Platek*, 24 NY3d at 694). To rely on an exclusion to deny coverage, an insurer must demonstrate "that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" *(J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 126 AD3d 76, 83 [1st Dept 2015][internal quotation marks omitted]). Defendants have satisfied this burden.

The record establishes that the tower crane is equipment that was used in the building's construction and is not a permanent part of the building. Notably, the tower crane was provided by Pinnacle pursuant to a contract that characterizes it as "heavy equipment." The tower crane is assembled when the project starts, disassembled and completely removed when the project is complete, and then moved to the next job. Thus, adhering to the basic tenets of contract interpretation by reading this exclusion in its entirety and ascribing to it its plain and ordinary meaning, the tower crane, is without question, contractor's machinery or equipment that is excluded from coverage.

In this regard, I agree with the dissent insofar as it rejects plaintiffs' argument that the tower crane does not constitute a tool or piece of equipment because of its size and

sophistication. Moreover, contrary to the motion court's determination that there is an issue of fact concerning whether the tower crane was to become a permanent part of the project, merely having a portion of the tower crane's base left in the building is insufficient to remove the crane from the exclusion.

I do not agree with the dissent's conclusion that to enforce the exclusion would render the coverage for Temporary Works illusory because the exclusion is so broad that a plausible argument could be made that any of the items listed in the definition of Temporary Works would also constitute a "contractor's tool, machinery, plant [or] equipment."

Construction of a clause so broad that it would appear to exclude what, as a practical matter, would be some of the largest foreseeable elements of damages may render coverage "nearly illusory" (*Thomas J. Lipton, Inc. v Liberty Mut. Ins. Co.*, 34 NY2d 356, 361 [1974]). Accordingly, exclusionary policy language should not be enforced when it defeats the main object of the purchased coverage, or virtually nullifies the coverage sought for anticipated risk. However, exclusions by their nature modify the scope of coverage provided in an insurance policy and "[a]n insurance policy is not illusory if it provides coverage for some acts; it is not illusory simply because of a potentially wide exclusion" (*Associated Community Bancorp, Inc. v St. Paul Mercury*

Ins. Co., 118 AD3d 608 [1st Dept 2014] [internal quotation marks omitted] [alteration in original]).

Here, the contractor's tools, machinery, plant and equipment exclusion did not render the policy illusory, because the policy provided some benefit to the insured and the exclusion does not negate all possible coverage for Temporary Works. Furthermore, putting aside the dissent's overly broad interpretation of Temporary Works as encompassing virtually anything that pertains to the project, pursuant to the express terms of the exclusion, machinery and equipment is excluded "unless specifically endorsed to the Policy." Thus, under the terms of the contractor's tools, machinery, plant and equipment exclusion, coverage for the tower crane, or any item qualifying as Temporary Works, could have been endorsed onto the policy and the clause does not in and of itself deprive an insured from coverage for the damages he reasonably thought himself insured (*see Thomas J. Lipton, Inc.*, 34 NY2d at 361).

Insofar as the dissent believes that the exclusion does not apply to the tower crane because it is a general provision that conflicts with the specific Temporary Works provision, I note that the tower crane is not specifically included in the Temporary Works provision and that plaintiffs rely on the principle of ejusdem generis to argue that the tower crane is a

"temporary structure" within the meaning of that provision. Moreover, "[a]n exclusion . . . serves the purpose of taking out persons or events otherwise included within the defined scope of coverage" (*Matter of Edwards v Motor Veh. Acc. Indem. Corp.*, 25 AD2d 420, 420 [1st Dept 1966]).

Thus, the clearly worded contractor's tools, machinery, plant and equipment exclusion must be enforced as written to bar coverage under the particular facts of this case.

Accordingly, the order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about January 20, 2015, which denied plaintiffs' respective motions and defendants' cross motions for summary judgment, should be modified, on the law, to grant defendants' cross motions for summary judgment and declare that defendants have no obligation to provide coverage under the builder's risk policy, and otherwise affirmed, without costs.

All concur except Mazzarelli, J.P. and Richter, J. who dissent in an Opinion by Mazzarelli, J.P.

MAZZARELLI, J.P. (dissenting)

Plaintiff Extell West 57th Street (Extell) is the owner of real property located at 157 West 57th Street in Manhattan. Extell undertook the construction of a 74-floor mixed-use hotel and residential building, known as the One57 building. Plaintiff Lend Lease (US) Construction LMB Inc. (Lend Lease) served as Extell's construction manager for the project. Lend Lease subcontracted with nonparty Pinnacle Industries II, LLC (Pinnacle) for superstructure concrete work. Pinnacle's work, as provided for in the contract, included the design, furnishing, erection and eventual disassembly of two tower cranes, and was included in a line item on Extell's budget as "Superstructure Concrete" with a value of $89,000,000.

The second crane, which is at issue in this action (the crane), was 750 feet tall and custom-designed. To support the crane, Pinnacle built numerous support mechanisms into the concrete superstructure of the building. The supports included a base that was located on the 20th floor and bolted to a large pad or foundation (pedestal) of reinforced concrete. The pedestal was designed to support the massive size and weight of the crane, as well as the load the crane would be picking up and carrying to construct the building. The pedestal was strengthened and stabilized by adding beams that were permanently encased into the

concrete floor slab on the 20th floor. In addition, plates were cast into the walls and connected by threaded rods. To provide increased stability for the crane itself, the mast of the crane, which was made up of more than 50 individual sections, was fastened or tied to the concrete floor slabs at every seventh floor. The ties required additional steel reinforcement of the floor slabs in the locations where the ties were affixed to the slabs.

The construction project was insured by a $700,000,000 builder's risk policy that Extell obtained from defendants. The policy consists of five separate policies issued by defendants, each covering a certain percentage of the policy limits. Zurich covered 50% ($350,000,000); Travelers Excess and Surplus covered 17.14% ($120,000,000); Axis Surplus covered 14.29% ($100,000,000); XL Insurance America covered 14.29% ($100,000,000); and Ace American Insurance covered 4.2857% ($30,000,000). Each policy contained identical provisions.

The policy was an occurrence-based policy and included named storms in the definition of the perils covered. As relevant here, the policy covered "temporary works," defined by the policy as follows:

> "All scaffolding (including scaffolding erection costs), formwork, falsework, shoring, fences, and temporary buildings or

> structures, including office and job site trailers, all incidental to the project, the value of which has been included in the estimated total project value of the insured project declared by the named insured" (all caps and asterisks omitted).

"Total project value" was defined as follows:

> "The total value of property under construction, temporary works, existing structures (when endorsed to the policy) and landscaping materials; plus labor costs that will be expended in the insured project; plus site general conditions, construction management fees, and contractor's profit and overhead, all as stated in the Declarations" (all caps and asterisks omitted).

The policy also contained several exclusions. The exclusion at issue here states that the policy does not insure against loss or damage to:

> "[c]ontractor's tools, machinery, plant and equipment, including spare parts and accessories, whether owned, loaned, borrowed, hired or leased, and property of a similar nature not destined to become a permanent part of the insured project, unless specifically endorsed to the Policy" (all caps and asterisks omitted).

On October 29, 2012, "superstorm" Sandy made landfall in the New York City metropolitan area. The high winds from the storm caused the crane to partially collapse. The boom flipped over, causing damage to the crane itself and the building. Some parts of the crane broke away, falling to the street below. Once the storm passed, plaintiffs determined that the crane itself and the

glass facade of the building had been damaged. The next day, Lend Lease provided notice to defendants of their claim under the policy. Defendants disclaimed coverage.

Extell commenced the instant action for breach of contract and a declaratory judgment, seeking coverage under the policy. Shortly thereafter, before any discovery had been taken, Extell moved for partial summary judgment. Extell sought a declaration that the crane was covered under the policy; judgment as to liability on its claim that defendants breached the insurance contract by wrongfully disclaiming coverage; and limited discovery on the issue of damages. Lend Lease subsequently filed a motion seeking the same relief. Defendants jointly cross-moved for, among other things, a declaratory judgment that the loss is not covered under the policy, contending that the crane was not a "temporary work" as defined by the policy and that, in any event, it fell under the exclusion for "contractor's tools." Defendants argued alternatively that the motion for summary judgment should be denied pursuant to CPLR 3212(f) to permit discovery on the issue of whether the crane was included in the total project value.

The court denied all of the motions, finding that "[a]mong other issues of fact," there was a question whether the crane was intended to become a permanent part of the project.

On appeal, plaintiffs both argue that coverage applies under the provision for "temporary works" since the crane was a "temporary . . . structure[]" within the meaning of that provision. They state that because the crane was always intended to be dismantled at the end of the project, it was inherently "temporary." In addition, they rely on the affidavit of an Extell executive who was involved in the procurement of the policy, to establish that in declaring the total project value to defendants, Extell included a line item for "superstructure concrete," and that, pursuant to the contract documents, the crane was incorporated within that item. Regarding the exclusion for "contractor's tools," plaintiffs contend that the crane did not fall within the scope of the exclusion. In any event, they argue, the exclusion is subordinate to the provision covering temporary works, and, to the extent the two provisions conflict, it must give way to the clause affording coverage.

Defendants assert that the plain language of the provision affording coverage for temporary works does not apply to the crane because the crane was too substantial and integral to the construction to be considered "incidental." They further argue that the crane does not fit within the class of "structures" discussed in the provision. Defendants additionally contend that, regardless of whether the crane was a "temporary

structure," it is unclear from the budget that was prepared for the project whether its actual value was included in the total project value, as plainly required by the definition of "temporary works." Finally, defendants claim that the exclusion for "contractor's tools" and the like is applicable, because the crane was not "destined to become a permanent part of the" project, and that it does not conflict with the provision affording coverage. This, they state, is because exclusions are specifically designed to take away what is otherwise covered.

The first issue to address is whether the crane is a "temporary structure" within the meaning of the "temporary works" provision. In reviewing this portion of the policy, it is necessary to determine whether, "afford[ing] a fair meaning to all of the language employed by the parties in the contract and leav[ing] no provision without force and effect, there is a reasonable basis for a difference of opinion as to [its] meaning" (*Federal Ins. Co. v International Bus. Mach. Corp.*, 18 NY3d 642, 646 [2012] [internal citations and quotation marks omitted] [alterations in original]). If there is no such reasonable basis, the interpretation of the language used in the definition of "temporary works," based on common speech and the reasonable expectations of the average insured, will determine whether, as a matter of law, plaintiffs are entitled to coverage or whether

defendants were justified in disclaiming (*see Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]). If, however, the provision is ambiguous because there is more than one reasonable way to interpret the policy, the construction that favors the insured must prevail (*id.*).

Plaintiffs allow that "temporary . . . structure[]" is the only item in the "temporary works" definition that the crane can conceivably be considered. In asserting that the crane was a structure, they rely on cases which have held that a crane was a structure because it was a "production or piece of work artificially built up or composed of parts joined together in some definite manner" (citing *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 801 [2d Dept 2005] [internal quotation marks omitted]; *Cornacchione v Clark Concrete Co.*, 278 AD2d 800, 801 [4th Dept 2000]). In stressing the temporary nature of the crane, they analogize to two Federal Court of Appeals cases. The first is *Landry v G.C. Constructors* (514 Fed Appx 432 [5th Cir 2013], *cert denied* 134 S Ct 212 [2013]), in which, for purposes of determining whether a barge owner had third-party liability towards a worker who was injured when a crane affixed to the barge leaked oil, the court held that the crane was only a temporary part of the barge (*id.* at 438), since it "was brought onto the Barge for construction-related purposes for the duration

of the bridge-building project" (*id.* at 439). The second Court of Appeals case on which plaintiffs rely is *Glacier Constr. Co. v Travelers Prop. Cas. Co. of America* (569 Fed Appx 582 [10th Cir 2014]). There the court held that submersible wells and pipes needed to remove excess groundwater from a site before it could be developed, which were intended to be removed once the water removal was complete, were covered property under a builder's risk policy, since the policy covered "[b]uildings or structures including temporary structures while being constructed, erected, or fabricated at the 'job site,' [and] [p]roperty that will become part of a permanent part of the buildings or structures at the 'job site'". (*id.* at 584). Plaintiffs further argue that the canon of construction known as ejusdem generis applies, and dictates that the general term "temporary . . . structures" should be considered in the context of more specific terms such as scaffolding, formwork, falsework, etc. They posit that the crane is akin to those things, so it follows that the provision embraces it.

Defendants contend that the crane does not fall within the enumerated items in the definition of temporary works. They also claim that ejusdem generis supports their interpretation, because the general term "temporary . . . structures" must be read in the context of the more specific terms following it, which are

"office and job site trailers," neither of which is related to a crane. Even if the term "temporary . . . structures" were not so limited, they state, a crane still does not constitute a temporary structure. They dismiss the Labor Law holdings cited by plaintiffs as inapplicable because those courts were determining whether a crane was a structure for purposes of liability under Labor Law section 240(1), which courts are required to construe liberally. They dismiss *Landry (*514 Fed Appx 432*)* as irrelevant to this dispute, since it did not deal with the definition of "temporary structure" in an insurance policy. As for *Glacier Constr. Co.* (569 Fed Appx 582), they argue that it is distinguishable because it did not involve a tower crane, and because it involved a much broader definition of the term "temporary structures," namely, "[b]uildings or structures including temporary structures while being constructed, erected, or fabricated at the 'job site'" (*id.* at 584). They further note that the policy at issue in *Glacier Constr. Co.* expressly covered things, such as pumps, which were necessary for "site preparation" (*id.* at 587).

Defendants also contend that the crane cannot be a "temporary work," since it was not "incidental to the project." Relying on the Merriam-Webster Online Dictionary, they state that "incidental" means "likely to ensue as a chance or minor

consequence" (11th ed 2003). Defendants emphasize the complex nature of the construct supporting the crane and the fact that its support structure was partially integrated into the finished building. These facts, they contend, render the crane anything but "minor."

Plaintiffs, relying on Black's Law Dictionary, 5th Edition (1979), counter that "incidental" means "[d]epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose." This definition, they posit, does not require that the "incidental" thing be insignificant.

The critical flaw in defendants' position is that they give insufficient consideration to the phrase "all incidental to the project." This clause follows the list of items that are specifically enumerated as "temporary works" -- namely, "scaffolding (including scaffolding erection costs), formwork, falsework, shoring, fences" -- and immediately modifies the clause "temporary buildings or structures, including office and job site trailers." Defendants argue that the list of specific items excludes anything other than those things, and that, again, employing ejusdem generis, "temporary . . . structures" are limited to office and job site trailers. However, the phrase

"temporary buildings or structures" describes things that are, by their very name, incidental to a construction project. Thus, there would have been no reason for the policy to repeat that "temporary buildings or structures" are "all incidental to the project." It is a well established rule of interpretation that no contractual clause is to be construed as being superfluous (*see Travelers Indem. Co. of Am. v Royal Ins. Co. of Am.*, 22 AD3d 252, 253 [1st Dept 2005]). The only sensible way to avoid reading the phrase "all incidental to the project" as superfluous is to interpret it as a catch-all phrase capturing any "temporary . . . structures" not specifically enumerated in the definition. In other words, the "temporary works" definition should be construed as comprising all of the items that are specifically mentioned, in addition to any similar, unmentioned temporary structures that are "incidental to the project." Contrary to defendants' argument, there is no impediment to considering the crane a "structure." That term is broad enough, and the crane was sufficiently substantial, to conclude that it was a structure for purposes of the policy.

Of course, not every "structure" that is "incidental to the project" would be considered "temporary" for purposes of coverage under the policy. Defendants are correct that that the federal Court of Appeals cases cited by plaintiffs are not particularly

helpful, since what matters is only whether the crane is a temporary structure as that term is specifically defined in the policy at issue, and those cases did not address a policy with a definition for "temporary structure" that was precisely the same. Instead, to determine whether the crane is a *temporary* structure, it is necessary to turn to the express language of the definition in the policy, aided by the principle of ejusdem generis, on which, as stated, both parties rely. According to this rule of construction, "a series of specific words describing things or concepts of a particular sort are used to explain the meaning of a general one in the same series" (*242-44 E. 77th St. v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 104 [1st Dept 2006]). A close cousin of ejusdem generis is the principle known as noscitur a sociis. This means "it is known by its associates" (Black's Law Dictionary 1087 [10th ed 2014]), and requires the court to consider the context of terms in which another term in need of interpretation falls (*see National Football League v Vigilant Ins. Co.*, 36 AD3d 207, 213-214 [1st Dept 2006] [internal quotation marks omitted]).

Applying these concepts, one must look, in attempting to determine whether the crane falls into the general category of "temporary . . . structures," to the specifically enumerated items in the "temporary works" definition of the policy. These

things ("scaffolding [including scaffolding erection costs], formwork, falsework, shoring, fences") have one thing in common, which is that they are all put in place early in a construction project, remain for most or all of the duration of the project, and are significant features of the construction landscape. "[O]ffice and job site trailers" also fall into that category. The crane at issue here is of the same ilk as all of the other items in this category. The crane was, like those other things, a substantial and necessary element of the tower's construction, and, like those things, was intended to remain on the site for a significant portion of the project, and be dismantled at the project's end. Accordingly, it constituted a "temporary structure" within the specific context of the "temporary works" provision. Further, since this position is based on a strict interpretation of the policy language, it does not, as the majority concludes, view "every item assembled at the project that will not remain a permanent part of the building as a temporary structure incidental to the project."

The majority erroneously describes my position as concluding that the crane is a "temporary structure" because it has the same attributes as office and job site trailers. To be clear, my approach compares the crane to all of the other items listed in

the definition, because it views the term "all incidental to the project" as fleshing out the term "temporary . . . structures," without being limited to "office and job site trailers." Additionally, I disagree with the majority's fallback position, which posits that, even if this more expansive approach is correct, the crane can be differentiated by its "active" nature. The critical characteristic of the crane, as far as the policy is concerned, was its integration into the building as the building was constructed, making it a "temporary structure" and thus a covered "temporary work."

Defendants' own effort to apply ejusdem generis is unavailing. Again, in attempting to characterize the language "including office and job site trailers," as narrowing the category of "temporary buildings or stuctures" to office space, defendants fail to account for the clause that states "all incidental to the project." Further, contrary to defendants' argument, the crane was "incidental" to the project, notwithstanding its critical role in erecting the structure. I accept plaintiffs' definition of the term "incidental," meaning appurtenant to something else that is primary, but still necessary to that primary thing. Here, the primary thing is the project itself (essentially the "property under construction" that is specifically insured under the policy), and the crane is

an ancillary yet substantial element of the construction, much as scaffolding, shoring and the other items enumerated in the "temporary works" definition are not intended to be part of the finished building, but are critical to its completion. Defendants' favored definition of "incidental" is not apt. As stated above, in the context of a 74-story building construction in the middle of Midtown Manhattan, none of the items listed in the temporary works definition, such as scaffolding and shoring, ensues "as a chance or minor consequence." To the contrary, they are crucial and no doubt exceedingly complex elements, but can still be described as "incidental" since they will never be a part of the building itself.

The majority relies heavily on the definition of "incidental" provided by defendants, and supplies other definitions as well, all in an effort to equate the term with things that are minor and arise by chance. However, this is no less "strained" an approach than the majority attributes to me. Indeed, the majority's position ignores the maxim that, in interpreting a contract, "[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties manifested thereby" (*Kolbe v Tibbetts*, 22 NY3d 344, 353 [2013] [internal quotation marks omitted] [alteration in original]).

Dictionary definitions aside, the items chosen by defendants to illustrate the term "temporary works," such as scaffolding, shoring and formwork, are hardly minor, and the dissent makes no attempt to explain how such significant components of a construction project could be considered to be so. To be sure, these things may be subordinate to the project itself, but we note that two of the definitions advanced by the dissent offer "subordinate" as an alternative meaning for "incidental." "Subordinate" is a relative term, and is not synonymous with "minor." Regardless, and in any event, by including significant construction systems in the definition of "temporary works," defendants indicated that they intended to cover things that were not "minor."

It bears noting that the definition of "temporary works" employed in the policy is hardly a model of clarity, and one cannot state with total certainty that the crane is a "temporary structure." Nonetheless, the interpretation outlined above, which favors coverage, is eminently plausible. Accordingly, even if the definition can be said to be ambiguous, I am constrained to give the benefit of the doubt to plaintiffs, and to find that the crane is a "temporary structure" within the meaning of the definition of "temporary works" (*see Cragg v Allstate Indem. Corp.*, 17 NY3d at 122).

Plaintiffs' next principal argument is that, since the crane is a "temporary structure" pursuant to the policy, the exclusion for "contractor's tools" cannot apply, because it directly conflicts with the provision affording coverage for "temporary works" and effectively negates any possibility of coverage, rendering it illusory. Plaintiffs further contend that the exclusion does not apply on its face because the crane was too complex a piece of machinery to be considered a mere "contractor's tool." Additionally, they rely on the fact that at least a portion of the structure used to support the crane was to be integrated into the finished building, such that the crane was "destined to become a permanent part of the insured project."

Generally, an insurer has the burden of establishing that there is no reasonable interpretation of an exclusion other than its own (*see Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708 [2012]). Here, there is no genuine dispute over what the contractor's tools exclusion means; the parties only differ over whether the crane constitutes such a tool. I am not convinced that the crane does not fall within the exclusion merely by dint of its size or sophistication. After all, the terms "machinery, plant and equipment" suggest that major elements of the project could be excluded from coverage. Further, I disagree with plaintiffs that the crane was "destined to become a permanent

part of the insured project." To be sure, it was necessary, as a practical matter, for plaintiffs to incorporate certain elements of the crane structure into the building. However, this does not diminish the nature of the crane itself as a tool by which contractors were able to construct the building.

Nevertheless, I agree with plaintiffs that to enforce the exclusion would be to render coverage for temporary works illusory. The exclusion is so broad that a plausible argument could be made that any of the items listed in the definition of temporary works constitutes a "contractor's tool[], machinery, plant [or] equipment." This approach does not, as defendants characterize it, ignore that policy exclusions by their very nature take away what affirmative coverage provisions otherwise afford. Nor is the exclusion, as the majority states, merely "potentially wide" (quoting *Associated Community Bancorp, Inc. v St. Paul Mercury Ins. Co.*, 118 AD3d 608, 608 [1st Dept 2014] [internal quotation marks omitted]). Rather, to enforce the exclusion would be to "have the exclusion swallow the policy," a result which is to be avoided (*Reliance Ins. Co. v National Union Fire Ins. Co. of Pittsburgh, Pa*, 262 AD2d 64, 64 [1st Dept 1999] [internal quotation marks omitted]). Further, the items enumerated in the "temporary works" definition are of a narrower and more precise scope than the broad category of items described

in the "contractor's tools" exclusion. Accordingly, the doctrine that, in interpreting a contract, a clause addressing specific matters should be given greater weight than one addressing general matters that possibly implicates the specific clause, applies (*see Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v Kvaerner a.s.*, 243 AD2d 1, 8 [1st Dept 1998]; *see also Rocon Mfg. v Ferraro*, 199 AD2d 999, 1000 [4th Dept 1993]).

I disagree with the majority that the final clause in the exclusion, which saves items from the exclusion if they are "specifically endorsed to the policy," is of any moment. That language merely clarifies that if the item is otherwise embraced by the exclusion, it is still covered if plaintiffs purchased an endorsement for it. Certainly the crane "could have been endorsed onto the policy," as the majority states. But it was not, so the language is irrelevant. Reading the exclusion as it applies to the facts in the record, we find that it unfairly deprives plaintiffs of the benefit of their bargain.

Despite my view that the crane is a "temporary structure" and that the "contractor's tools" exclusion does not apply, I would not have granted summary judgment to plaintiffs, since there is an issue of fact whether the value of the crane was "included in the estimated total project value of the insured project declared by the named insured." This is because the

plain language of the policy provides that for an item to be covered as a "temporary work," the "value" *of the thing itself* must be included in the total project value. Plaintiffs argue that the value of the crane was included in the total project value, since the line-item of hard costs for the project provided by Extell included a specific item for "superstructure concrete" in the amount of $89,000,000, and that this included all of the work to be performed by Pinnacle in connection with its contract, including provision of the crane. They rely on the affidavit of a senior Lend Lease executive who states that, based on his extensive experience in the industry, the actual market value of equipment such as scaffolding and trailers is never expressly stated in the contract price paid to the subcontractor furnishing those items. He added, however, that the cost of the crane rental was included in the contract price, and that the requirement in the policy that the value be included was thus satisfied. Defendants counter that it is not possible to determine whether the value of the crane was factored into the $89 million contract price. They note that, while the Pinnacle contract clearly provides that Pinnacle was to perform the design, furnishing, erection and disassembly of the crane, Pinnacle did not own the crane, but instead rented it from a separate entity, Pinnacle Industries III, which owned the crane

and subleased it to non party Post Road Iron Works for the price of $77,000 per month.

The proponent of a motion for summary judgment is required to eliminate all material issues of fact and establish that it is entitled to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Summary judgment cannot be awarded on the basis of speculation (*see Porteous v J-Tek Group, Inc.*, 125 AD3d 411, 412 [1st Dept 2015]). Plaintiffs have provided insufficient evidence that the value of the crane itself was included in the total project value. Further, I am not persuaded from their submissions that industry custom dictates that the actual value of equipment itself is never included in a particular line item of a project budget.

In summary, in my view the crane was a "temporary structure" within the meaning of the "temporary works" definition in the policy, and the "contractor's tools" exclusion does not apply. However, a question remains as to whether the "value" of the crane was included in the total project value as required by the

"temporary works" provision. To that extent, I agree with the court's denial of summary judgment to both parties.

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

ENTERED: DECEMBER 22, 2015

CLERK