SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 8, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

13433- Index 190096/12
13434 Malgorzata Wiacek, etc.,
Plaintiff-Respondent,

-against-

3M Company, etc., et al.,
Defendants,

North Safety Products,
Defendant-Appellant.

- - - - -

Malgorzata Wiacek, etc.,
Plaintiff-Respondent,

-against-

3M Company, etc., et al.,
Defendants,

Bacou-Dalloz Safety, Inc., et al.,
Defendants-Appellants.

_____

Goldberg Segalla LLP, White Plains (Michael D. Shalhoub of counsel), for North Safety, appellant.

Jones Day, Boston, MA (Dana Baiocco of the bar of the State of Massachusetts and the State of Pennsylvania, admitted pro hac vice, of counsel), for Bacou-Dalloz Safety, Inc., Bacou-Dalloz Dalloz USA Safety, Inc., Dalloz Safety, Inc., and Willson Safety Products, appellants.

Belluck & Fox, L.L.P., New York (Seth A. Dymond of counsel), for respondent.

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Orders, Supreme Court, New York County (Sherry Klein Heitler, J.), entered January 27, 2014, which, to the extent appealed from, denied defendants North Safety Products' and defendants Bacou-Dalloz Safety Inc., Bacou-Dalloz USA Safety, Inc., Dalloz Safety, Inc. and Willson Safety Products' (collectively, Willson Safety) motions for summary judgment dismissing the cause of action for failure to warn as against them, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment dismissing the complaint as against said defendants.

Plaintiff failed to plead a cause of action against either North Safety or Willson Safety alleging defects in the efficacy of their respirators and masks or a failure to warn of any such defects (*see Meola v Metro Demolition Contr. Corp.*, 309 AD2d 653, 654 [1st Dept 2003], *lv denied* 2 NY3d 706 [2004]). "Liberality in pleading is stretched too far when it is deemed permissible to plead one claim and then substitute for it an entirely different one" (*New York Auction Co. Div. of Std. Prudential Corp. v Belt*, 53 AD2d 540 [1st Dept 1976] [internal quotation marks omitted], *appeal dismissed*, 40 NY2d 1079 [1976]; *see Poley v Sony Music*

Entertainment, 222 AD2d 308 [1st Dept 1995]).

In any event, the claims of failure to warn of a defect must be dismissed because, as the motion court found in dismissing the claims of design or manufacturing defect, plaintiff failed to identify any defect in defendants' masks or respirators that caused her decedent to develop asbestos-related disease. Defendants established prima facie that their respirators and masks were in compliance with the applicable standards set by the National Institute for Occupational Safety and Health and thus were safe, and plaintiff failed to raise an inference that there was a defect in these products of which her decedent should have been warned.

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

ENTERED: JANUARY 8, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Manzanet-Daniels, JJ.

13614 Patmos Fifth Real Estate Inc., et al.,
Plaintiffs-Respondents,

-against-

Mazl Building, LLC, et al.,
Defendants-Appellants,

Raba Haim Abramov, et al.,
Defendants.

Index 108421/11

Ganfer & Shore, LLP, New York (Ira Brad Matetsky of counsel), for appellants.

De Lotto & Fajardo LLP, New York (Eduardo Fajardo of counsel), for respondents.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered July 30, 2013, which, to the extent appealed from, denied the motion of defendants Mazl Building, LLC (Mazl), NYA Building Construction Corp. (NYA) and High Line Holdings, LLC (collectively, defendants) to dismiss the complaint of plaintiffs, Patmos Fifth Real Estate Inc. (Patmos Fifth) and Patmos Westbury, LLC (Patmos Westbury) (together, Patmos) asserting, among other things, causes of action for violation of Real Property Law § 320 and unjust enrichment, unanimously affirmed, without costs.

On June 21, 2006, Patmos Fifth bought from Mazl an apartment

building located at 214-216 East 52nd Street in Manhattan. In connection with the purchase, Patmos Fifth contracted with Mazl and NYA to renovate the building to make luxury condominium residential units and a restaurant. Patmos Fifth and Mazl executed a mortgage note, secured by the property, whereby Patmos Fifth promised to pay $9,350,000 by December 21, 2007 (the June mortgage). On December 6, 2006, Patmos Fifth borrowed from NYA $1,000,000, also secured by the property, to be paid by December 6, 2007 (the December mortgage).

By agreement dated January 21, 2008, Mazl loaned Patmos an additional $5,650,000, secured by the mortgages on both properties, due to be paid in full by December 21, 2008 (the January mortgage), and extended the time for payment of the June and December mortgages. In another agreement dated the same day, NYA assigned to Mazl the December mortgage. Finally, in yet another agreement also dated the same day, Patmos and Mazl consolidated the June, December, and January mortgages into a single $16,000,000 mortgage, due to be paid in full by December 31, 2008 (the consolidated mortgage).[1]

[1] Defendants maintain that plaintiffs' principal personally executed the January 2008 note in the amount of $5,650,000 and personally agreed to guarantee payment.

By a February 27, 2009 agreement between Mazl and Patmos Fifth, Mazl extended the maturity date of the consolidated mortgage until October 1, 2009, with an option for an additional nine-month extension to June 30, 2010 if Patmos Fifth paid $2,500,000 on or before October 1, 2009. The February 2009 agreement stated: "Simultaneous with the execution of this agreement, borrower [i.e. Patmos Fifth] shall deliver an executed deed to the premises to lender conveying the premises to [non-appealing defendant Shimon Wolkowicki] as to 62.5% interest and [Mazl] as to a 37.5% interest." The February 2009 agreement further provided that the "deed shall be delivered to lender[']s counsel [] to be held in escrow by [counsel] and not to be released for filing unless and until borrower shall fail to make any of the payments required hereunder on October 1, 2009 or June 30, 2010." Finally, the agreement provided that, beginning on October 1, 2009, Patmos Fifth would "begin to make monthly interest payments on the then outstanding principal balance of the consolidated mortgage."

On October 1, 2009, Patmos defaulted on the consolidated mortgage. Shortly thereafter, Mazl's attorney released the deed from escrow, and on December 23, 2009, defendants recorded it in the City Register. Defendants then completed construction on the

building and sold some of the condo units.

Patmos commenced this action in July 2011, alleging, among other things, that defendants' release and recording of the deed held in escrow, without commencing a foreclosure action, violated Real Property Law § 320. Specifically, Patmos alleged that in 2006, Mazl, the entity that controlled NYA and Highline, represented that it was a real estate developer. However, Patmos alleged, instead of developing the property, Mazl convinced Patmos Fifth to buy the property so that it could be renovated and developed into a luxury condominium. In connection with the development, Patmos Fifth signed the June, December, and January mortgages, which were to be satisfied by the proceeds of the sales of the completed condo units. Patmos further alleged that Mazl intentionally delayed development and actively discouraged prospective condo purchasers from buying so that additional interest would accrue on the mortgages. Additionally, Patmos alleged that Mazl's ultimate goal was to take over Patmos' interest in the property. Patmos also asserted an unjust enrichment claim for the $1 million in furnishings it provided for the condos.

In moving to dismiss the action, defendants argued, among other things, that the February 27, 2009 agreement constituted a

"deed in lieu of foreclosure," allowing them to proceed to release the deed from escrow and record it, making Mazl the owner of the property without having to commence a foreclosure action. Defendants argued that this arrangement benefited Patmos by protecting its principal from personal liability and settling all of the debt it owed on the property, without any concern that defendants would seek additional money through a deficiency judgment. Defendants also argued that Patmos failed to state a claim for unjust enrichment, since, in exchange for acquiring ownership of the building, defendants forgave all of Patmos's debts without credit for any contributions made to the building.

Further, in their reply papers, defendants argued that Patmos's challenge to the deed was barred by laches, since Patmos was fully aware of the recording of the deed in December 2009 but did not raise any objections until almost 19 months later, when it threatened litigation and then commenced this action.

The motion court denied defendants' motion to dismiss.[2] To begin, the court found that Patmos stated a claim for violation of RPL § 320. In so doing, the court found that the February

[2] The court did dismiss the case as against defendant Raba Haim Abramov, who Patmos alleged controlled and dominated defendants.

2009 agreement did not expressly provide that the parties intended the deed to function as a conveyance of the property, as opposed to security for Patmos's debt (that is, a mortgage). Rather, the court found, the agreement simply reflected defendants' agreement to extend the deadline for payment of the consolidated mortgage in exchange for Patmos's agreement to execute the deed.

Moreover, the court found that Patmos's obligation to pay interest commencing on October 1, 2009 was not expressly contingent on the extension of the payment deadline to June 30, 2010; thus, the court concluded, the parties may have contemplated Patmos's continued ownership of the building despite a default on October 1, 2009. Accordingly, it found that notwithstanding defendants' right to record it, the deed was not, as a matter of law, a conveyance of the property and defendants were required to proceed by foreclosure in the same manner as any other mortgagee. The court did not consider defendants' argument, raised for the first time in their reply, that Patmos's challenge to the deed was barred by laches.

The court also allowed the unjust enrichment claim to proceed. In so doing, the court found that the complaint adequately alleged that the furnishings and decorations it

provided for the property facilitated defendants' sale of the condos after defendants had divested Patmos of ownership.

Plaintiffs sufficiently stated a cause of action for violation of their rights under Real Property Law § 320 which provides that "[a] deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage." Further, the statute provides, the person "for whose benefit such deed is made, derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, is also recorded therewith, and at the same time" (*id.*).

Thus, Real Property Law § 320 codifies the well-settled common law principle "that the giving of a deed to secure a debt, in whatever form and however structured, creates nothing more than a mortgage" (*Leonia Bank v Kouri*, 3 AD3d 213, 216-217 [1st Dept 2004]). The statute does not require a conclusive showing that the transfer was intended as security; rather, it is sufficient that the conveyance appears to be intended only as "a security in the nature of a mortgage" (*id.* at 217).

Therefore, as the motion court properly found, "The holder of a deed given as security must proceed in the same manner as any other mortgagee — by foreclosure and sale — to extinguish the mortgagor's interest" (*id.*; *see also Gioia v Gioia*, 234 AD2d 588, 589 [2d Dept 1996], *lv denied* 89 NY2d 814 [1997]). This conclusion holds true because the mortgagor has the right of redemption, and that right cannot be waived or abandoned by any stipulation of the parties, even if the waiver is embodied in the mortgage (*see Basile v Erhal Holding Corp.*, 148 AD2d 484, 485-486 [2d Dept 1989], *lv denied* 75 NY2d 701 [1989]).

Here, Patmos sufficiently alleges that the deed was given as security for its debt, and defendants did not controvert that allegation as a matter of law (*see Leonia Bank*, 3 AD3d at 218; *see also Bouffard v Befese, LLC*, 111 AD3d 866, 868 [2d Dept 2013]). Similarly, defendants failed to establish that the February 2009 agreement was a "deed in lieu of foreclosure" – that is, an absolute conveyance or sale of the property – despite the language in the agreement stating that, should plaintiff breach, the deed may be released from escrow and recorded (see Vitvitsky v Heim, 52 AD3d 1103, 1105 [3d Dept 2008]). Rather, the agreement reflects that defendants agreed to extend the deadline for payment of the consolidated mortgage in exchange for

plaintiffs' agreement to execute the deed. Even if the agreement had been structured or titled as a "deed in lieu of foreclosure" – and it was not – Patmos gave defendants the deed as security for the debt to defendants (*see Basile*, 148 AD2d at 486).

Similarly, there is no merit to defendants' claim that the statute of frauds and the parol evidence rule bar Patmos's challenges to the recorded deed. Even disregarding Patmos's allegations that Mazl intentionally delayed development in order to accrue interest and cause Patmos's default, the February 2009 agreement alone supports Patmos's claim that the deed was intended as security, and thus is sufficient to defeat defendants' motion to dismiss the RPL § 320 cause of action. Assuming that issues remain at the summary judgment or trial stage as to whether the deed was intended as a security, parol evidence will be admissible because "examination may be made not only of the deed and a written agreement executed at the same time, but also [of] oral testimony bearing on the intent of the parties and to a consideration [of] the surrounding circumstances and acts of the parties" (*see Henley v Foreclosure Sales, Inc.*, 39 AD3d 470 [2d Dept 2007] [internal quotation marks and citation omitted]).

Further, the motion court properly rejected defendants'

claim that because Patmos waited more than 1½ years from the recording of the deed to bring this action, laches serves to bar Patmos's challenge to the deed. As defendants concede, they raised that issue only in passing for the first time in their reply, and did not fully brief it. Nor are there sufficient facts in the record establishing that Patmos intentionally delayed bringing the action, or that any delay caused defendants prejudice so as to demonstrate laches as a matter of law.

Finally, as to Patmos's unjust enrichment claim, defendants did not establish that they took title under the February 2009 agreement. Therefore, we need not consider whether Patmos's entitlement to credits for furnishings supplied to the property was somehow cancelled. In any event, defendants point to no support in the record for their claim that Patmos agreed to forego reimbursement for those furnishings.

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

ENTERED: JANUARY 8, 2015

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13720 Fama Ndiaye, Index 110530/11
Plaintiff-Appellant,

-against-

NEP West 119th Street LP,
Defendant-Respondent.

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Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellant.

Rosenbaum & Taylor, P.C., White Plains (Scott Taylor of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 9, 2013, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff seeks damages for injuries she allegedly suffered when she slipped and fell on ice on the front steps of defendant's building. Defendant contends that it is not liable for failing to remedy the dangerous condition because there was a storm in progress at the time of the accident (*see Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]). Upon our review of the record, issues of fact exist as to the applicability of the storm in progress rule.

In support of its motion, defendant submitted an affidavit by a certified meteorologist who stated, based on weather data annexed to the affidavit, that on the day of plaintiff's accident, from midnight until approximately 2 p.m., a winter storm was occurring. Plaintiff's accident happened at approximately 11:30 a.m. However, the weather data from one of the three location sources on which the meteorologist based his analysis also shows that the last (light) snow fall ceased at 6:25 a.m. on the day of the accident and that freezing rain fell until 8:27 a.m. and did not start falling again until 11:35 a.m. A surveillance video shows that there was no precipitation at the time of plaintiff's fall.

Although "a temporary lull or break in the storm at the time of the accident would not necessarily establish a reasonable opportunity to clear away the hazard[,] .... if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and [common sense] would dictate that the [storm in progress] rule not be applied" (*Powell v MLG Hillside Assoc.*, 290 AD2d 345, 345-346 [1st Dept 2002]). Here, triable issues of fact exist as to whether plaintiff's accident occurred while the storm was still in progress or

whether there was a significant lull in the storm, and whether the three hours that elapsed between the last freezing rain and plaintiff's accident afforded defendant a reasonable opportunity to clear the steps (*see Vosper v Fives 160th, LLC*, 110 AD3d 544, 544-545 [1st Dept 2013]*; Pipero v New York City Tr. Auth.*, 69 AD3d 493 [1st Dept 2010]).

Moreover, the record presents triable issues of fact as to whether the icy condition that caused plaintiff's fall existed prior to the storm, and whether defendants lacked notice of the preexisting condition (see *Penn v 57-63 Wadsworth Terrace Holding, LLC*, 112 AD3d 426 [1st Dept 2013]). The affidavit of defendant's expert states that at the start of the day on which the accident occurred "approximately 17 inches of snow and ice cover was present on untreated, undisturbed and exposed outdoor surfaces in the vicinity of the subject area." While the expert states that frozen precipitation fell intermittently during the day of the accident, he did not state that the alleged icy condition on the steps resulted from that precipitation and not from remnants of ice that may have remained on the steps from the prior snowfalls.

Furthermore, plaintiff and her son testified that the steps had been icy for some days before the accident. Defendant

submitted no evidence as to when the steps had last been inspected or cleaned of snow and ice or as to the condition of the steps on the day of the accident or the days immediately preceding it. Its superintendent's testimony about its general cleaning procedures alone is insufficient to establish that defendant lacked notice of the alleged condition before the accident (*Mike v 91 Payson Owners Corp.*, 114 AD3d 420 [1st Dept 2014]).

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

ENTERED: JANUARY 8, 2015

CLERK

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13899 The People of the State of New York, Ind. 99036/06
Respondent,

-against-

Alexander Irizarry, also known as
Alex Irizarry De Leon.
Defendant-Appellant.

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Scott A. Rosenberg, The Legal Aid Society, New York (Bonnie C. Brennan of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

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Order, Supreme Court, New York County (Megan Tallmer, J.), entered on or about August 4, 2006, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

All of defendant's challenges to his level three adjudication are unpreserved, and we decline to review any of them in the interest of justice. As an alternative holding, we reject them on the merits. The case summary constituted reliable hearsay, and the court properly relied on it (*see* Corrections Law § 168-n[3]; *People v Epstein*, 89 AD3d 570 [1st Dept 2011]). Moreover, since defendant did not challenge any of the facts

contained in the case summary, it sufficed, standing alone, to support the court's determination (*see People v Vaillancourt*, 112 AD3d 1375 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]).

In any event, contrary to defendant's contentions on appeal, the record demonstrates the basis for the factual conclusions in the case summary. Defendant cites no basis on which to reject the case summary or statements contained therein as speculative or inaccurate, nor was their accuracy undermined by other more compelling evidence (*see People v Mingo*, 12 NY3d 563, 573 [2009]). The case summary provided clear and convincing evidence supporting each of the point assessments challenged on appeal, including commission of an offense against a stranger, forcible compulsion, the victim's age, and defendant's parole violations.

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

ENTERED: JANUARY 8, 2015

CLERK

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13900 The People of the State of New York Ind. 1046/09
Respondent,

-against-

Lenox Sanchez,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Susan Epstein of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Luis Alejandro Morales of counsel), for respondent.

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Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered May 27, 2010, as amended June 16, 2010, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 20 years to life, unanimously affirmed.

The court properly exercised its discretion (*see generally People v Foy*, 32 NY2d 473 [1973]) in denying defendant's request for a midtrial adjournment to obtain the presence of a witness (defendant's mother) who would have allegedly corroborated a part of defendant's testimony (*see e.g. People v Fayton*, 4 AD3d 143 [1st Dept 2004], *lv denied* 2 NY3d 799 [2004]). In any event, any error in denying the adjournment was harmless because the proposed testimony was of little significance and there is no

reasonable possibility that it would have changed the outcome, given that the mother could not have explained defendant's possession of the victim's cell phone. Defendant did not preserve his claim that he was constitutionally entitled to the adjournment (*see People v Lane*, 7 NY3d 888, 889 [2006]; *see also Smith v Duncan*, 411 F3d 340, 348-349 [2d Cir 2005]), or his claim that, when the witness ultimately arrived, the court should have interrupted summations to permit her to testify, and we decline to review these claims in the interest of justice. As an alternative holding, we reject them on the merits, and find, for the reasons already stated, that any error was harmless.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 8, 2015

CLERK

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13901- Index 115035/09
13902-
13903

Bank of America National Association, as successor by merger to LaSalle Bank National Association, as trustee, for Morgan Stanley Loan Trust 2006, etc.,
Plaintiff,

-against-

Chau T. Lam, et al.,
Defendants-Appellants,

Yah Rong Ting, et al.,
Defendants-Respondents,

HSBC Bank USA, et al.,
Defendants.

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Mark L. Cortegiano, Middle Village, for appellants.

Rubin & Licatesi, P.C., Garden City (Richard H. Rubin of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered August 12, 2013, which denied defendants-appellants' motion to declare the parties' December 1, 2010 stipulation expired and unenforceable, unanimously reversed, on the law, without costs, the motion granted, and it is declared that the stipulation is unenforceable. Appeals from orders, same court and Justice, entered September 17, 2013, and January 22, 2014,

which, respectively, directed the parties to use a court-selected real estate broker to secure a buyer for the subject property, and granted defendant Yah Rong Ting's motion to compel appellants' compliance with the stipulation, unanimously dismissed, without costs, as academic.

Stipulations are judicially favored and not lightly cast aside (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]). Defendants-appellants were entitled to a declaration that the parties' December 1, 2010 stipulation had expired and was unenforceable. In the stipulation, the parties agreed that the closing date of the sale of the property should take place no later than May 31, 2011. However, the court found that the intent of the parties was not to close by the date set forth in the stipulation; rather the "intent" was to move the sale forward to a closing "within a reasonable time." The intent of the parties should have been determined from the unambiguous language of the stipulation, as it is a well recognized precept of contract construction that "[t]he best evidence of what parties to a written agreement intend is what they say in their writing" *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Where, as here, the term in a stipulation is not ambiguous, it is error for the court to consider extrinsic evidence such as the conduct

of the parties (*see South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]; *Regal Realty Servs., LLC v 2590 Frisby, LLC*, 62 AD3d 498, 501 [1st Dept 2009]).

Respondent may not rely on the doctrine of laches to support the denial of appellants' motion. Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816 [2003], *cert denied* 540 US 1017 [2003]; *see also Moreschi v DiPasquale*, 58 AD3d 545 [1st Dept 2009]). It is undisputed that appellants did not raise the issue of the expiration of the closing date agreed upon in the stipulation until more than two years after its expiration, despite having had ample opportunity to do so, and even while litigating in this Court on the prior appeal. However, "mere delay alone, without actual prejudice, does not constitute

laches" (*Premier Capital, LLC v Best Traders, Inc.*, 88 AD3d 677, 678 [2d Dept 2011]), and respondent has failed to make any actual and nonspeculative showing of prejudice.

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

ENTERED: JANUARY 8, 2015

CLERK

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13905-
13905A Great Northern Insurance Company Index 105470/08
as subrogee of Aby Rosen, 600910/08
Plaintiff-Respondent, 590368/10

-against-

Estelle Irrigation Corp., et al.,
Defendants-Appellants.

Town & Gardens, Ltd.,
Defendant.

- - - - -

5 East 80th St. LLC,
Plaintiff-Respondent,

-against-

The Window Box MG Ltd., et al.,
Defendants-Appellants.

- - - - -

The Window Box MG Ltd.
Third-Party Plaintiff-Appellant,

-against-

Tri-Star Construction LLC,
Third-Party Defendant-Respondent.

_____

Law Office Of James J. Toomey, New York (Eric P. Tosca of counsel for Estelle Irrigation Corp., appellant.

Lester Schwab Katz & Dwyer, New York (John Sandercock of counsel), for The Window Box MG Ltd., appellant.

Mischel & Horn, P.C., New York (Naomi M. Taub of counsel), for Great Northern Insurance Company, respondent.

Katsky Korins LLP, New York (Elan R. Dobbs of counsel), for 5 East 80th St. LLC, respondent.

Raven & Kolbe, LLP, New York (Michael T. Gleason of counsel), for Tri-Star Construction LLC, respondent.

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Orders, Supreme Court, New York County (Jeffrey K. Oing, J.), entered August 30, 2013, which, to the extent appealed from, denied defendants Estelle Irrigation Corp.'s and The Window Box MG Ltd.'s motions for summary judgment dismissing the complaint as against them, and granted third-party defendant Tri-Star Construction LLC's motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to grant Estelle's motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

There is no evidence of a written or oral contract that required Estelle to maintain, and thus winterize, plaintiffs' garden irrigation system. Nor is there evidence that Estelle, an "on call" irrigation company, assumed a duty to maintain the system (*see Heard v City of New York*, 82 NY2d 66, 72 [1993]).

Window Box failed to show that plaintiffs lost or destroyed key evidence (*see Mohammed v Command Sec. Corp.*, 83 AD3d 605 [1st Dept 2011], *lv denied* 17 NY3d 708 [2011]). All the parties had access to the property, and there is no evidence as to who disposed of the cracked component of the irrigation system.

Window Box's argument that it is entitled to contribution from Tri-Star because the latter's insufficient plastering or insulation contributed to the damage to the property is unpreserved for our review (*see Stryker v Stelmak*, 69 AD3d 454 [1st Dept 2010]).

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

ENTERED: JANUARY 8, 2015

CLERK

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13906 The People of the State of New York, Ind. 338N/12
Respondent,

-against-

Shane Santiago,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered on or about November 19, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JANUARY 8, 2015

CLERK

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13907 The People of the State of New York, Ind. 36362C/08
Respondent,

-against-

Pedro Lizaldo,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Seth L. Marvin, J. at suppression hearing; Barbara F. Newman, J. at jury trial and sentencing), rendered May 1, 2009, convicting defendant of driving while ability impaired, and imposing a fine of $500, unanimously affirmed.

The hearing court properly denied defendant's motion to preclude evidence of his refusal to take a breathalyzer test. The record supports the court's finding that defendant effectively refused the test by knowingly and wilfully failing to follow instructions (*see People v Smith*, 18 NY3d 544, 550 [2012]).

The court properly exercised its discretion in declining to expand upon the Criminal Jury Instructions regarding defendant's

refusal to take the test. The standard instruction sufficiently instructed the jury to consider all the surrounding facts and circumstances, and the additional language proposed by defendant concerning consciousness of guilt was unnecessary (*see generally People v Samuels*, 99 NY2d 20, 25-26 [2002]).

In any event, any error was harmless in view of the overwhelming evidence, independent of the refusal, that defendant drove while his ability was at least impaired by alcohol (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: JANUARY 8, 2015

CLERK

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13908 The People of the State of New York, Ind. 531/08
Respondent,

-against-

Woodrow McNeely,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

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Order, Supreme Court, New York County (Renee A. White, J.), entered on or about September 13, 2011, 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 properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant's successful completion of sex offender treatment while in prison was adequately taken into account by the risk assessment instrument. Defendant's assertion that he poses a diminished risk of reoffense, and thus should receive a downward departure, is without merit (*see People v Rodriguez*, 67 AD3d 596 [1st Dept 2009], *lv denied* 14 NY3d 706 [2010]).

Moreover, neither defendant's age nor his purportedly "stable lifestyle" prior to the underlying conviction warranted a downward departure, given his abhorrent crime of repeatedly raping his own daughter over a period of years.

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

ENTERED: JANUARY 8, 2015

CLERK

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13909 In re Antoine C.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newberry of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J. at fact-finding hearing; Peter J. Passidomo, J. at disposition), entered on or about May 2, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the second degree and criminal possession of a weapon in the fourth degree, and placed him on probation for a period of 15 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility.

The victim's testimony, including his account of appellant's close proximity to the other participants and the victim throughout the incident, established that appellant's conduct before, during, and after the assault supported the inference of accessorial liability and was inconsistent with the conduct of a mere onlooker (*see e.g. Matter of Justice G.*, 22 AD3d 368 [1st Dept [2005]).

Appellant's missing witness argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that a missing witness inference would not affect the result.

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

ENTERED: JANUARY 8, 2015

CLERK

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13911 The People of the State of New York, Ind. 544/12
Respondent,

-against-

Amira Rivera,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber 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 (Bonnie G. Wittner, J.), rendered on or about October 16, 2012,

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: JANUARY 8, 2015

CLERK

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

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13912 The People of the State of New York, Ind. 6655/06
Respondent,

-against-

Kenny Campos,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Thomas M. Nosewicz of counsel), and Jenner & Block, LLP, New York (Anthony Barkow of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J., at suppression hearing and application to reopen; Maxwell Wiley, J. at speedy trial motions; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered September 24, 2010, convicting defendant of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 12 years, unanimously affirmed.

The court properly denied defendant's speedy trial motions. The August 15, 2007 adjournment, the excludability of which is dispositive, was excludable as a reasonable period of delay resulting from motion practice (*see* CPL 30.30[4][a]; *People v Brown*, 99 NY2d 488, 492 [2003]). The September 9, 2009

adjournment was excludable because the delay was primarily caused by defense counsel's absence, and not by the late production of defendant. With regard to other adjournments, defendant makes arguments for the first time on appeal, and the motion court did not "expressly decide[]" these specific issues (CPL 470.05[2]; *see People v Turriago*, 90 NY2d 77, 83-84 [1997]). We decline to review these unpreserved arguments in the interest of justice. As an alternative holding, we reject them on the merits.

There is no basis for reopening the suppression proceedings based on trial testimony, or for reaching a different result. On an appeal by the People from an order granting suppression of evidence in this case (56 AD3d 342 [1st Dept 2008]), this Court concluded that the police actions were entirely lawful. We find nothing in the trial testimony that undermines that conclusion, or would warrant a further hearing. Neither the number of officers present nor the manner in which defendant was handcuffed was material, under the facts presented, to the suppression issues, and the victim's testimony, read as a whole, supported rather than contradicted the police account of defendant's arrest.

We perceive no basis for reducing the sentence or directing that it run concurrently with defendant's sentence on another conviction.

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

ENTERED: JANUARY 8, 2015

CLERK

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13914 The People of the State of New York, Index 450879/09
Plaintiff,

-against-

J. Ezra Merkin, et al.,
Defendants,

Ariel Fund Limited, et al.,
Relief Defendants.
- - - - -
Joshua M. Berman,
Petitioner-Appellant,

-against-

David B. Pitofsky,
Respondent-Respondent.

Ralph C. Dawson,
Relief Respondent-Respondent.

_____

Joshua M. Berman, New York, appellant pro se.

Goodwin Procter LLP, New York (Daniel M. Glosband of counsel), for David B. Pitofsky, respondent.

Fulbright & Jaworski LLP, New York (Judith A. Archer of counsel), for Ralph C. Dawson, respondent.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered January 23, 2014, which denied petitioner's application for leave to bring suit against the court-appointed receiver of a hedge fund, unanimously affirmed, without costs.

Consistent with the receiver's limited immunity pursuant to

the court's appointment order, petitioner seeks to bring claims against the receiver for gross negligence and material breach of fiduciary duty (*see Mosher-Simons v County of Allegany*, 99 NY2d 214, 219-220 [2002]). However, the receiver owed no fiduciary duty to petitioner; his fiduciary duty was to the fund as a whole, not to any particular investor (*see Matter of Kane [Freedman-Tenenbaum]*, 75 NY2d 511, 515 [1990]). Nor did petitioner allege facts sufficient to make out a claim for gross negligence (*see Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821 [1993]). Petitioner cannot show that respondent, who acted at all times to maximize the benefit to the fund, was reckless with regard to petitioner's rights. In particular, respondent was obligated in negotiating the settlement with defendant Merkin to protect the fund, not petitioner.

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

ENTERED: JANUARY 8, 2015

CLERK

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13917 The People of the State of New York, Ind. 1926/12
Respondent,

-against-

Travis Matthews,
Defendant-Appellant.

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Scott A. Rosenberg, The Legal Aid Society, New York (Heidi Bota 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 (Edward J. McLaughlin, J.), rendered on or about July 13, 2012,

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: JANUARY 8, 2015

CLERK

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

Sweeny, J.P., Andrias, Richter, Clark, JJ.

13918-
13919-
13920-
13921-
13922-
13923

Index 603601/02

The Travelers Indemnity Company,
Plaintiff-Respondent,

-against-

Orange and Rockland Utilities, Inc., et al.,
Defendant-Appellant,

John Doe Corporations 1-100,
Defendants.

_____

Proskauer Rose LLP, New York (John E. Failla of counsel), for appellant.

Steptoe & Johnson LLP, Washington, DC (Roger E. Warin of the bar of the District of Colombia, admitted pro hac vice, of counsel), for respondent.

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Orders, Supreme Court, New York County (Eileen Bransten, J.), entered July 18, 2013, which granted plaintiff Travelers Indemnity Company's (Travelers) motion for summary judgment seeking a declaration that it is not required to provide coverage to defendant Orange and Rockland Utilities (ORU), based on ORU's failure to provide timely notice of the occurrences for which it sought coverage, and denied ORU's motions for partial summary judgment seeking a declaration that Travelers breached its duty

to defend ORU with respect to the clean up of hazardous waste sites, unanimously modified, on the law, to declare that Travelers is not required to provide coverage to ORU and has no duty to defend ORU with respect to the hazardous waste sites at issue, and otherwise affirmed, without costs.

As this Court has already noted in connection with another site owned by defendant, defendant did not give timely notice under the policies, which was a requirement for coverage (*see* 73 AD3d 576 [1st Dept 2010], *lv dismissed* 15 NY3d 834 [2010]). Defendant's argument that it never had actual notice of any pollution was insufficient. The record abounds with documents demonstrating that pollution likely existed at each of the sites considered herein. These documents, along with repeated interactions with both state and federal regulators, were sufficient to place defendant on notice. Moreover, defendant's willful failure to investigate, i.e., its apparent strategy of waiting to be directed by the appropriate regulatory agencies to investigate the sites and remediate pollution, despite the overwhelming evidence of potential contamination, negates its

contention of a lack of awareness of the pollution (*id.* at 576-577).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JANUARY 8, 2015

CLERK

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13924 The People of the State of New York, Ind. 4526/11
Respondent,

-against-

Dennis Melendez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran 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 (Carol Berkman, J.), rendered on or about October 3, 2012,

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: JANUARY 8, 2015

CLERK

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

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13992N New GPC Inc., Index 155301/12
Plaintiff-Appellant,

-against-

Kaieteur Newspaper Inc.,
Defendant-Respondent.

_____

Ray Beckerman, P.C., Forest Hills (Ray Beckerman of counsel), for appellant.

Law Offices of James F. Sullivan, P.C., New York (James F. Sullivan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 7, 2014, which, inter alia, denied plaintiff's motion to compel certain deposition testimony, unanimously affirmed, without costs.

Plaintiff failed to show that the editor of a "sister" newspaper of defendant, which has no common ownership, but which appears to dictate content for defendant paper, is under the control of defendant so as to require defendant to produce him (*compare Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 118 AD3d 428, 430-431 [1st Dept 2014]). Nevertheless, as recognized by the motion court, plaintiff may seek the editor's deposition through a properly issued deposition subpoena. Plaintiff also makes no substantive argument as to why it should not be

required to designate deponents of defendant corporation, rather than simply demand depositions of "any" employees, directors or officers with knowledge of the facts (*see* CPLR 3106[d]).

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

ENTERED: JANUARY 8, 2015

CLERK

Friedman, J.P., Acosta, Saxe, Manzanet-Daniels, Gische, JJ.

13517-
13518

Index 650410/13
654075/13

Matthew R. Mayers,
Plaintiff-Respondent,

-against-

Stone Castle Partners, LLC, et al.,
Defendants-Appellants.

Action #1

- - - - -

Stone Castle Partners, LLC,
Plaintiff-Appellant,

-against-

Matthew R. Mayers, et al.,
Defendants-Respondents.

Action #2

_____

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Sanford I. Weisburst of counsel), for appellants.

Jaffe & Asher, LLP, New York (Marshall T. Potashner of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 28, 2014, reversed, on the law and the facts, without costs, and the motion denied. Appeal from order, same court and Justice, entered on or about April 24, 2014, dismissed, without costs.

Opinion by Saxe J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rolando T. Acosta
David B. Saxe
Sallie Manzanet-Daniels
Judith J. Gische, JJ.

13517-13518
Index 650410/10
654075/13

_____x

Matthew R. Mayers, Action #1
Plaintiff-Respondent,

-against-

Stone Castle Partners, LLC, et al.,
Defendants-Appellants.

- - - - -

Stone Castle Partners, LLC, Action #2
Plaintiff-Appellant,

-against-

Matthew R. Mayers, et al.,
Defendants-Respondents.

_____x

Defendants in Action #1 and plaintiff in Action #2 appeal from an order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 28, 2014, which granted plaintiff in Action #1/defendant in Action #2 Matthew R. Mayers's motion to disqualify Quinn Emanuel Urquhart & Sullivan, LLP as their counsel, and from an order, same court and Justice, entered on or about April 24, 2012, which denied their motion for reargument.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Sanford I. Weisburst, Kevin S. Reed and David M. Cooper of counsel), and Morrison Cohen LLP, New York (Danielle C. Lesser of counsel), for appellants.

Jaffe & Asher, LLP, New York (Marshall T. Potashner and Michael L. Ihrig, II of counsel), for respondents.

SAXE, J.

Stone Castle Partners, LLC (SCP) and its affiliates challenge a ruling disqualifying their chosen counsel. We hold that counsel's disqualification was not required under these circumstances.

SCP, defendant in Action #1 and plaintiff in Action #2, manages more than $5 billion in assets. Matthew R. Mayers, plaintiff in Action #1 and defendant in Action #2, as well as George Shilowitz and Joshua S. Siegel, defendants in Action #1, were members and "Management Investors" with SCP; their rights and obligations were defined under SCP's Fifth Amended and Restated Limited Liability Company Agreement (LLC Agreement). In 2009, through a subsidiary, SCP acquired a supermajority position in the preferred shares of Tropic CDO IV (Tropic IV), a collateralized debt obligation investment. Under Tropic IV's governing documents, the owner of a supermajority of its preferred shares was entitled to direct the CDO's trustee to sell the underlying collateral. Relying on that authority, SCP attempted to bring about the sale of Tropic IV's collateral at deeply discounted prices in exchange for a "consent payment," so called because it is paid to holders of the preferred shares by the collateral buyers in exchange for their consenting to the collateral's sale. However, Tropic IV's other investors,

including Hildene Capital Management, a holder of Tropic IV notes and a client of SCP, protested that SCP's actions constituted a scheme to defraud them by stripping Tropic IV's collateral in exchange for a bribe. The trustee, Wells Fargo, when presented with SCP's directive to sell and the other investors' objections to the sale, commenced a federal interpleader action on November 2, 2009 to resolve the issue. SCP caused its subsidiaries to withdraw their consent to the buyer's offer for the Tropic IV collateral, and the prospective buyer eventually withdrew its offer.

By the fall of 2010, SCP had decided to avoid the expressed concerns of antagonized investors and important clients by arranging for its subsidiaries to divest themselves of their holdings of Tropic IV preferred shares, which totaled 2 million preferred shares. In an auction conducted by the SCP subsidiaries in November 2010, Mayers, through his wholly owned entity RRWT, purchased those 2 million preferred shares of Tropic IV.

While it is Mayers's position that SCP must have known that he was the shares' purchaser, it is SCP's position that the purchase was made secretly and without its knowledge, that, having given up its involvement with Tropic IV equity in the interest of maintaining its investors' trust, it would not

knowingly have permitted one of its managers to engage in the very conduct that had undermined the investors' trust.

Thereafter, Mayers continued to purchase Tropic IV preferred shares in order to acquire a supermajority. In early 2011 he formed TP Investments LLC to hold those Tropic IV preferred shares, and by June 2012 he had acquired control of a supermajority of Tropic IV preferred shares, allowing him to carry out the plan that SCP had attempted and then abandoned.

In November 2012, through RRWT and TP Investments and under the assumed name "Kricket Hound," Mayers solicited a $750,000 consent payment from a prospective purchaser of certain securities held by Tropic IV as collateral, and sent a "Direction to Sell" letter to the trustee. Although this communication did not contain Mayers's name, it included his personal telephone number. The Direction to Sell was provided by the trustee to interested parties, including holders of Tropic IV notes, one of whom forwarded it to Joshua Siegel of SCP, with an inquiry regarding whether SCP was connected to the Direction to Sell.

By December 5, 2012, having learned of Mayers's attempt to arrange the sale of Tropic IV collateral in exchange for a $750,000 consent payment, SCP retained Quinn Emanuel Urquhart & Sullivan, LLP, which it had used in other legal matters, to represent SCP against Mayers.

By letter dated January 22, 2013, SCP demanded that Mayers sell his interests in Tropic IV preferred shares, and Mayers complied within three weeks, allegedly without gain. Nevertheless, on January 29, 2013, SCP terminated Mayers for cause on the grounds that he had personally engaged in transactions adverse to SCP's interests, had concealed those activities from SCP, and had failed to answer honestly SCP's questions about his disputed activities.

Mayers commenced an action on February 6, 2013, alleging that he was wrongfully terminated without cause, and seeking injunctive and declaratory relief, as well as damages. On November 25, 2013, SCP, represented by Quinn Emanuel, commenced an action against Mayers, claiming that Mayers engaged in illegal schemes while employed at SCP.

Mayers's motion to disqualify Quinn Emanuel as counsel for SCP arose out of a telephone call Mayers made to Quinn Emanuel attorney Jonathan Pickhardt in May 2011, after SCP's prospective sale of Tropic IV collateral had fallen through, in which Mayers allegedly informed Pickhardt that he was calling in his personal capacity and not in connection with his employment or association with SCP. According to Mayers's complaint, he informed Pickhardt of his company's present ownership of Tropic IV preferred shares and his future plans regarding the CDO's preferred shares, and

asked if Pickhardt would represent RRWT against Wells Fargo based on the trustee's failure to follow the instructions in the Direction to Sell.

It is undisputed that Pickhardt declined the representation. However, Pickhardt admittedly discussed the Mayers telephone call with Quinn Emanuel attorney Kevin S. Reed, who was lead counsel for SCP.

In seeking Quinn Emanuel's disqualification, Mayers claimed that Pickhardt had received confidential information from him during their consultation and that, after SCP retained the firm, the firm used that information in SCP's action against him. Mayers argued that the disclosure of his communications to Pickhardt regarding his purpose in the Tropic IV investment went to the heart of the SCP's counter-suit asserting that Mayers had breached his duties under the LLC Agreement, since the communication divulged a scenario that Mayers "was trying to go around the back of [SCP]." Mayers also contended that without the information in his communications to Pickhardt, Quinn Emanuel might not have come up with the strategy, in SCP's action against him, of subpoenaing for deposition certain people that he dealt with.

A movant seeking disqualification of an opponent's counsel bears a heavy burden (*Ullmann-Schneider v Lacher & Lovell-Taylor*

PC, 110 AD3d 469 [1st Dept 2013]). A party has a right to be represented by counsel of its choice, and any restrictions on that right "must be carefully scrutinized" (*id.* at 469-470, *quoting S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 [1987]). This right is to be balanced against a potential client's right to have confidential disclosures made to a prospective attorney subject to the protections afforded by an attorney's fiduciary obligation to keep confidential information secret (*see* New York Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.18; *see also Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 637 [1998]; *Sullivan v Cangelosi*, 84 AD3d 1486 [3d Dept 2011]). Courts should also examine whether a motion to disqualify, made during ongoing litigation, is made for tactical purposes, such as to delay litigation and deprive an opponent of quality representation (*see e.g. Solow v Grace & Co.*, 83 NY2d 303, 310 [1994]). The decision of whether to grant a motion to disqualify rests in the discretion of the motion court (*see Macy's Inc. v J.C. Penny Corp., Inc.*, 107 AD3d 616 [1st Dept 2013]).

Issues relating to the prospective client relationship based on events that occurred after April 2009 are governed by Rule 1.18 of the Rules of Professional Conduct (22 NYCRR 1200.0), rather than the repealed DR 5-108 (22 NYCRR 1200.27). Cases from

this Court addressing conduct that occurred prior to the April 2009 enactment of the new rules are not controlling here (*see e.g. Justinian Capital SPC v WestLB AG, N.Y. Branch*, 90 AD3d 585 [1st Dept 2011]; *Bank Hapoalim B.M. v WestLB AG*, 82 AD3d 433 [1st Dept 2011]).

The former Code of Professional Responsibility did not have a specific rule that governed disclosures during a prospective client consultation. Rule 1.18 of the Rules of Professional Conduct fills that void. It provides:

> "(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a 'prospective client.'
>
> "(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
>
> "(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or substantially related matter *if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter*, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)" (emphasis added).

Thus, where a prospective client consults an attorney who ultimately represents a party adverse to the prospective client

in matters that are substantially related to the consultation, the prospective client is entitled to obtain the attorney's disqualification only if it is shown that the information related in the consultation "could be significantly harmful" to him or her in the same or substantially related matter (*id.*, Rule 1.18[c]).

Initially, we reject the contention of SCP and its affiliates that the May 2011 telephone interview did not involve confidential information. Rule 1.6(a) of the new Rules of Professional Conduct (22 NYCRR 1200.0) defines "[c]onfidential information" as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." Notwithstanding SCP's observation that Mayers ultimately disclosed the same information in his June 2013 complaint, the telephone communication between Mayers and Pickhardt at least fits within subdivision (b), since the information imparted was likely to be detrimental to Mayers.

Nevertheless, disqualification is not warranted because the conveyed information did not have the potential to be significantly harmful to Mayers in the matter from which he seeks

to disqualify counsel. The affidavits and the parties' respective pleadings establish that Mayers's plans with regard to the Tropic IV investment had been made generally known, and Mayers even attests that SCP, Siegel and Shilowitz were cognizant of his Tropic IV investment purchase via his wholly owned entity (at the SCP auction of Tropic IV preferred shares), that they knew of his investment strategy, and that he had offered them an opportunity to participate in the investment. Mayers did not meet the heavy burden he bore as a prospective client seeking to disqualify Quinn Emanuel, a year into the litigation, from representing the SCP parties.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 28, 2014, which granted Matthew R. Mayers's motion to disqualify Quinn Emanuel Urquhart & Sullivan, LLP as counsel for the SCP parties should be reversed, on the law and the facts, without

costs, and the motion denied. The appeal from the order, same court and Justice, entered on or about April 24, 2014, which denied the motion of the SCP parties for reargument, should be dismissed, without costs, as taken from a nonappealable order.

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

ENTERED: JANUARY 8, 2015

CLERK