SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 5, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

14199 In re Sean O'Brien, Index 103824/12
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

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Jeffrey L. Goldberg, P.C., Port Washington (Jeffrey L. Goldberg of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Meghan McKenna of counsel), for respondents.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered March 8, 2013, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78 to annul respondents' determination, dated June 19, 2012, which denied petitioner's application for accident disability retirement benefits (ADR), unanimously reversed, on the law, without costs, and the matter remanded to the Medical Board and respondent Board of Trustees of the Police Pension Fund for proceedings consistent with this opinion.

In April 2009, petitioner was involved in an incident in which a suspect elbowed him repeatedly in the left ear; during this altercation, a gun repeatedly discharged, also near petitioner's left ear. In his initial report, the audiologist who examined petitioner at the request of the New York City Police Department stated that the tinnitus in petitioner's left ear might have been "a possible consequence of the trauma to the left ear that he reported . . . took place at the time of its onset." Similarly, the otolaryngologist who examined petitioner stated that petitioner's tinnitus had been exacerbated by "repeated noise exposure and noise trauma in the line of duty" and that notwithstanding any other possible etiologies, "the noise trauma sustained in the described incidents of exposure to loud gunshots on several occasions are still causally related" to petitioner's hearing loss. Nonetheless, in rendering a decision that petitioner was entitled only to ordinary disability retirement, the Medical Board found that petitioner's hearing loss resulted from a congenital cause that was not trauma induced, stating, "[T]he Medical Board . . . finds no objective evidence that the most recent line of duty incident in 2009 resulted in the aggravation of [petitioner's] hearing deficits."

The Medical Board's statement that it found "no objective

evidence" of exacerbation is puzzling in light of the record, especially because the audiologist who examined petitioner at the NYPD's behest initially concluded that petitioner's hearing loss may have resulted from the April 2009 incident. The Medical Board did not, however, discuss why it rejected its own audiologist's initial conclusion. Nor did it discuss why it rejected the conclusion of petitioner's otolaryngologist — the only medical doctor who actually examined petitioner in connection with his application for ADR — stating that the April 2009 incident did, in fact, exacerbate petitioner's tinnitus and hearing loss. The Medical Board's finding is also incongruous in light of the fact that only after the April 2009 incident did petitioner's hearing loss become severe enough that he was unable to return to duty (*see Matter of Baranowski v Kelly*, 95 AD3d 746 [1st Dept 2012]; *see also Matter of Kiess v Kelly*, 75 AD3d 416, 417 [1st Dept 2010]).

Accordingly, the matter should be remanded for a new report by the Medical Board and a new determination by the Board of Trustees.

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

ENTERED: MARCH 5, 2015

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, Clark, JJ.

14264-
14265 Index 300947/09

Santia Figueroa,
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

2465 Grand Concourse Property, Inc.,
Defendant-Respondent,

Fordham Road Business Improvement District,
Defendant-Appellant.

- - - - -

Santia Figueroa,
Plaintiff-Respondent,

-against-

The City of New York, et al.,
Defendants,

2465 Grand Concourse Property, Inc.,
Defendant-Appellant.

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Law Office of Edward M. Eustace, White Plains (Heath A. Bender of counsel), for Fordham Road Business Improvement District, appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for 2465 Grand Concourse Property, Inc., respondent/appellant.

Sobo & Sobo, LLP, Middletown (Brett P. Linn of counsel), for Santia Figueroa, respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.),

entered September 14, 2012, which, to the extent appealed from, denied defendant Fordham Road Business Improvement District's (BID) motion for summary judgment dismissing the complaint as against it with leave to renew after the EBT of defendant BID, unanimously affirmed, without costs. Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about August 6, 2014, which denied defendant 2465 Grand Concourse Property, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

We affirm the motion court's denial of BID's motion for summary judgment with leave to renew after the EBT of a BID representative. CPLR 3212(f) provides that "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion." In accordance with the statute, this Court has held that a motion for summary judgment should be denied as premature where the movant has yet to be deposed (*see e.g. 241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 472 [1st Dept 2013]); *Brooks v Somerset Surgical Assoc.*, 106 AD3d 624, 624-625 [1st Dept 2013] ["(a)lthough Dr. Sohn submitted an affidavit stating that he was not present at the moment of plaintiff's fall (from the operating table), his motion for

summary judgment was properly denied as premature, because essential facts concerning the cause of plaintiff's accident and the relationship between Dr. Sohn (and another doctor defendant) are exclusively within the possession of defendants and might well be disclosed by (EBT) or through cross-examination"]; *Cannon v New York City Police Dept*, 104 AD3d 454, 454 [1st Dept 2013] ["It was premature to consider defendants' cross motion for summary judgment before plaintiff deposed (defendants). Those examinations might have led to additional information and discovery, none of which plaintiff had been able to obtain or compel prior to the court's decision on the cross motion"]).

Although the deputy executive director of the BID submitted an affidavit in support of the motion, he does not attest how long he has been in the position, whether he performed any document or other searches to confirm his information, or whether he has any personal knowledge of the operative events, namely, the placement of the paving stones in the sidewalk area. He denies that the BID has responsibility for "sidewalk construction and/or sidewalk structural maintenance," "physical repair work," "structural work," and "install[ation] [of] tree wells and metal grates," but does not include within this explicit denial responsibility for the paving stone/blocks or for maintenance of

the tree wells and metal grates. His silence leaves open the possibility that the paving stones constitute "capital improvements," which are expressly included within the scope of BID's contract with the City, as opposed to "structural work."

Further, the building property manager of defendant 2465 Grand Concourse Property, Inc., testified that it was his understanding that the BID was responsible for the paving stones throughout the neighborhood, including in the area where plaintiff fell.

On its motion, 2465 Grand Concourse failed to establish prima facie that the alleged defect on the sidewalk abutting its property was not the cause of plaintiff's fall (*see Bivins v Zeckendorf Realty*, 289 AD2d 123 [1st Dept 2001]). In contrast to the cases it relies on, in which the plaintiffs could not identify the defects that caused their accidents, plaintiff testified consistently that she tripped on a raised portion of the sidewalk abutting 2465 Grand Concourse's premises, felt the raised portion and instantly realized the cause of her fall, and that she identified the location as near a metal grate and tree well depicted in photographs (*see e.g. Siegel v City of New York*, 86 AD3d 452 [1st Dept 2011]; *Rudner v New York Presbyt. Hosp.*, 42 AD3d 357 [1st Dept 2007]). That plaintiff could not pinpoint the

exact location of her fall in the photographs, that she clarified her testimony upon further questioning, and that her pleadings and her grandson's testimony identify another possible cause of her fall do not render her testimony speculative.

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14424 The People of the State of New York, Ind. 3942/12
Respondent,

-against-

Adam Kaous,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Nicolas Schumann-Ortega of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Benjamin E. Rosenberg of counsel), for respondent.

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Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered May 23, 2013, as amended June 5, 2013, convicting defendant, after a jury trial, of criminal contempt in the second degree, and sentencing him to a term of one year, unanimously affirmed.

The court correctly concluded that criminal contempt in the second degree (Penal Law § 215.50) is a lesser included offense of criminal contempt in the first degree (Penal Law § 215.51), and it properly granted the People's request to submit second-degree contempt to the jury. Defendant's argument to the contrary is based on the "labor disputes" clause in Penal Law § 215.50, which does not appear in Penal Law § 215.51. Defendant argues that as a result, the statutory definition of a lesser

included offense is not satisfied, because it is possible for a person to commit first-degree criminal contempt but not "concomitantly commit[], by the same conduct," second-degree contempt (CPL 1.20[37]). This would be the case where, with the mental state required for first-degree criminal contempt, a person violates an order of protection arising out of a labor dispute.

Defendant's argument is contradicted by *People v Santana* (7 NY3d 234 [2006]), which held that "the reference to 'labor disputes' in the second-degree criminal contempt statute [does not] . . . create[] an exception that must be affirmatively pleaded as an element in the accusatory instrument, [but] rather [] a proviso that need not be pleaded but may be raised by the accused as a bar to prosecution or a defense at trial" (*id.* at 236). While *Santana* addressed the adequacy of an accusatory instrument charging second-degree contempt, and did not involve a lesser included offense issue, the premise underlying the Court's holding controls here. The *Santana* court determined that the labor disputes clause does not constitute a statutory element of the crime, and therefore that it did not have to be pleaded in the information. Here, the premise that the clause does not give rise to a statutory element undermines defendant's argument that

it is possible to commit first-degree contempt without committing second-degree (*see People v Mingo*, 66 AD3d 1043 [2d Dept 2009], *lv denied* 14 NY3d 843 [2010]).

The court properly exercised its discretion in denying defendant's CPL 210.40 motion to dismiss the indictment in furtherance of justice. There is no "compelling factor" (CPL 210.40[1]) that would warrant that "extraordinary remedy" (*People v Moye*, 302 AD2d 610, 611 [2d Dept 2003]). In particular, the offense was serious in that defendant disobeyed a court order designed to protect his wife from harm.

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14425 Dennis Parache, Index 100839/09
Plaintiff, 590638/10
590718/12

-against-

DD 11th Avenue LLC, et al.,
Defendants-Appellants,

Star Delta Electric LLC,
Defendant,

Mastercraft Masonry I, Inc.,
Defendant-Respondent.

- - - - -

DD 11th Avenue LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Mastercraft Masonry I, Inc.,
Third-Party Defendant-Respondent.

- - - - -

DD 11th Avenue LLC, et al.,
Second Third-Party
Plaintiffs-Appellants,

-against-

SMEG Corporation,
Second Third-Party
Defendant-Respondent,

Total Safety Consulting, L.L.C.,
Second Third-Party Defendant.

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Faust, Goetz, Schenker & Blee LLP, New York (Jeffrey Rubinstein of counsel), for appellants.

Cozen O'Connor, New York (Edward Hayum of counsel), for respondents.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 3, 2014, which, insofar as appealed from as limited by the briefs, granted the motion of defendant/third-party defendant Mastercraft Masonry I, Inc. (Mastercraft) and second third-party defendant SMEG Corporation (SMEG) for summary judgment dismissing all cross claims and third-party claims as against them, unanimously affirmed, with costs.

The record establishes that Mastercraft and SMEG were members of defendant-appellant J E Levine Builder Inc.'s Contractor Controlled Insurance Program. Accordingly, the antisubrogation rule bars the cross claims and third-party claims brought by defendants-appellants against Mastercraft and SMEG

(*see e.g. ELRAC, Inc. v Ward*, 96 NY2d 58, 76-77 [2001]; *Stranz v New York State Energy Research & Dev. Auth. [NYSERDA]*, 87 AD3d 1279, 1281-1282 [4th Dept 2011]).

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14426 In re Stephanie Lewis, Index 402418/12
Petitioner,

-against-

NYC Health and Hospitals
Corporation, et al.,
Respondents.

Law Office of Locksley O. Wade, LLC, New York (Locksley O. Wade of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondents.

Determination of respondent New York State Division of Human Rights (DHR), dated October 17, 2012, that there was no probable cause that respondent New York Health and Hospitals Corporation (HHC) engaged in unlawful discriminatory practices against petitioner, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Manuel J. Mendez, J.], entered May 8, 2013), dismissed, without costs.

Although this proceeding was improperly transferred to this Court because respondent's determination was not made pursuant to an administrative hearing and a question of substantial evidence is therefore not raised, we nevertheless address the merits of

the petition in the interest of judicial economy (*see Matter of Trustees of Columbia Univ. v City of New York*, 110 AD3d 467 [1st Dept. 2013]).

DHR's finding of no probable cause was rationally based and was not arbitrary and capricious (*see Matter of McFarland v New York State Div. of Human Rights*, 241 AD2d 108, 111 [1st Dept 1998]). Petitioner failed to demonstrate that her transfer from the Department of Medicine to the Department of Environmental Sciences, negative performance reviews or suspension were motivated by her medical disability or were in retaliation for her earlier complaint to DHR. Further, the record supports the negative performance reviews and suspension, and reveals that petitioner had requested the transfer.

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14427-
14427A Prince Oparaji, 100478/13
Plaintiff-Appellant,

-against-

Lawrence T. Yablon, et al.,
Defendants-Respondents.

_____

Prince Oparaji, appellant pro se.

Kaufman Borgeest & Ryan LLP, Valhalla (David Bloom of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Richard F. Braun, J.), entered December 12, 2013, which denied plaintiff's motion for default judgment, and granted defendants' motion to dismiss the amended complaint, unanimously affirmed, without costs.

This case involves a pro se action against defendants, a lawyer and his law firm, arising from their purported conspiracy, fraud, and deceptive business practices while representing plaintiff in connection with personal injuries sustained in an automobile accident when he was a minor, nearly 15 years ago. Plaintiff alleges, inter alia, that defendants told plaintiff's father that they would file a personal injury action on plaintiff's behalf, that they failed to file such action, and that they then conspired with plaintiff's treating physician to

cover up his injuries. Plaintiff also alleges, through a separate affidavit, that defendants secretly filed a cause of action in Kings County on plaintiff's behalf and received a $25,000 settlement that they kept for themselves, without plaintiff's knowledge or consent.

Giving plaintiff the benefit of every inference, we find that he has failed to state causes of action for civil conspiracy, fraud, and deceptive business practices and false advertising pursuant to New York General Business Law §§ 349(h) and 350-e (*Leon v Martinez*, 84 NY2d 83 [1994]; *Thomas v Thomas*, 70 AD3d 588, 590 [1st Dept 2010]).

New York does not recognize a cause of action for civil conspiracy (*Bronx-Lebanon Hosp. Ctr. v Wiznia*, 284 AD2d 265, 266 [1st Dept 2001], *lv dismissed* 97 NY2d 653 [2001]). The IAS Court properly dismissed this claim with prejudice.

With respect to plaintiff's fraud claims, he has failed to allege any of the particulars surrounding the defendants' claimed subterfuge, and has failed to allege damages separate and apart from those he sustained in the 2001 automobile accident (*Graubard Mollen Dannett & Horowitz v Moskowitz*, 86 NY2d 112, 122 (1995); CPLR 3016[b]). Plaintiff admits that he timely commenced a separate personal injury action to recover for his personal

injuries. If plaintiff wishes to supplement his allegations he should apply for this relief from the motion court, which dismissed the fraud claim without prejudice.

Plaintiff has also failed to state a claim for deceptive business practices or false advertising pursuant to New York General Business Law §§ 349(h) and 350-e, as plaintiff has failed to make any allegations whatsoever relating to conduct that is consumer oriented, or that defendants have engaged in false advertising (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 n 1 [2002]; *Cruz v NYNEX Info. Resources*, 263 AD2d 285, 289-290 [1st Dept 2000]). This claim, too, was properly dismissed.

It is beyond dispute that plaintiff's motion for default judgment, made nineteen days after he amended his pleading, was premature (*see* CPLR 3025[d], 2103[b], [c]) and as such, properly denied.

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

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14428 The People of the State of New York, Ind. 4176/06
Respondent,

-against-

Robert Moore,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about July 23, 2013, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure to level three. Initially, we note that, contrary to defendant's assertion, the court did not actually assess any points other than the 100 points that were uncontested.

Clear and convincing evidence established aggravating factors that were not otherwise adequately taken into account by the risk assessment instrument (*see People v Gillotti*, 23 NY3d 841, 861-862 [2014]). "[T]he level suggested by the [risk

assessment instrument (RAI)] is merely presumptive and a SORA court possesses the discretion to impose a lower or higher risk level if it concludes that the factors in the RAI do not result in an appropriate designation" (*People v Mingo*, 12 NY3d 563, 568 n 2 [2009]). The egregiousness of defendant's conduct toward his 13-year-old daughter was an aggravating factor that was indicative of defendant's inability to control his behavior and that was not adequately accounted for in the RAI (*see People v Mantilla*, 70 AD3d 477, 478 [1st Dept 2010], *lv denied* 15 NY3d 706 [2010]; *People v Ferrer*, 35 AD3d 297 [1st Dept 2006], *lv denied* 8 NY3d 807 [2007]).

Assuming, without deciding, that the state and federal standards for effective assistance of counsel at a criminal trial apply to this civil proceeding (*see People v Reid*, 59 AD3d 158 [1st Dept 2009], *lv denied* 12 NY3d 708 [2009]), we find that defendant received effective assistance (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see Strickland v Washington*, 466 US 668 [1984]). Defendant's counsel made appropriate arguments at the hearing, and there was no basis upon which to seek a downward

departure. In addition, there is no reasonable likelihood that additional steps by counsel, such as requesting an opportunity for further investigation, would have changed the result.

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14430 The People of the State of New York, Ind. 2346/12
Respondent,

-against-

Anonymous,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Brian R. Pouliot 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 (Lewis Bart Stone, J. at plea; Jill Konviser, J. at sentencing), rendered on or about March 13, 2013,

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: MARCH 5, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14431 In re Jesus R.C.,
Petitioner-Appellant,

-against-

Karen J.O.,
Respondent-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Jo Ann Douglas, New York, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Susan M. Cordaro of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about September 19, 2013, which, after a hearing, granted respondent mother's motion to dismiss the petition seeking to vacate an acknowledgment of paternity, unanimously affirmed, without costs.

Although petitioner testified that he had questioned whether he was the father shortly after the child's birth, and again approximately six months later when he learned that the child's mother had sexual relations with another man, petitioner continued to treat the child as his own and developed a parent-child relationship. Petitioner held himself out to be the father of the child, provided the child with support, and gave him gifts

(*see Matter of Griffin v Marshall*, 294 AD2d 438, 439 [2d Dept 2002]). It was not until the child was four years old, and a younger sibling had been born, that petitioner commenced this proceeding seeking to vacate his acknowledgment of paternity, while at the same time recognizing the younger sibling as his own child. Under the circumstances, the court properly determined that it was in the child's best interests to equitably estop petitioner from denying paternity of the four-year-old child (*see Matter of Shondel J. v Mark D.*, 7 NY3d 320, 324 [2006]*; Matter of Andre Asim M. v Madeline N.*, 103 AD3d 500, 501 [1st Dept 2013]).

The record also supports the court's finding that petitioner failed to make a prima facie showing of fraud, duress or material mistake of fact that would warrant vacating his acknowledgment of paternity after the statutory deadline for rescinding the acknowledgment had passed (*see* Family Court Act § 516-a [b] [iv]; *Ng v Calderon*, 6 AD3d 255 [1st Dept 2004]).

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14432 Mamadou Fall, Index 309989/10
Plaintiff-Appellant,

-against-

Luiza Guseynov, M.D., et al.,
Defendants-Respondents.

_____

Landers & Cernigliaro, P.C., Carle Place (Frank Cernigliaro of counsel), for appellant.

Ellenberg & Partners, LLP, New York (Arseniy Trakht of counsel), for Luiza Guseynov, M.D., respondent.

Aaronson Rappaport Feinstein & Deutsch, New York (Steven C. Mandell of counsel), for Ernst Ducena, M.D., respondent.

Patrick F. Adams, P.C., New York (Gregory M. Maurer of counsel), for Suresh Hemrajani, M.D., respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered May 13, 2014, which granted the motions of defendants for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Each defendant, through submissions of experts' affidavits and plaintiff's medical records, satisfied his or her burden as movant for summary judgment with a prima facie showing that the care rendered to plaintiff was within good and acceptable standards of medical care. In response, the opinions in plaintiff's expert affirmation are either conclusory or

contradicted by the record, and fail to raise a triable issue of fact (*see Fleming v Pedinol Pharmacal, Inc.*, 70 AD3d 422 [1st Dept 2010]).

Plaintiff's expert opined that defendant doctors deviated from good and accepted medical care by failing to confirm that plaintiff was HIV positive prior to prescribing him anti-retroviral medications, failing to conduct an HIV test within two to eight weeks of beginning his regimen, failing to order annual follow up testing, and by not being board certified in infectious disease. Plaintiff however, did not deny advising his doctors at his intake that he was HIV positive, nor did he deny the veracity of the laboratory report indicating he was HIV positive. To the contrary, all evidence submitted by plaintiff indicated that prior to treating with any of the defendant doctors, he was tested and told, apparently mistakenly, that he was HIV positive. Plaintiff's claim that defendants committed malpractice by treating plaintiff although they were not specialists in infectious diseases has been rejected by this court (*see Thomas v Solon*, 121 AD2d 165 [1st Dept 1986]).

We have considered and rejected plaintiff's remaining arguments.

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14433 128 Hester LLC, Index 651523/11
Plaintiff-Respondent,

-against-

New York Marine and General
Insurance Company,
Defendant-Respondent-Appellant,

Tower Insurance Company of New York,
Defendant-Appellant-Respondent,

Calabrese Associates, Inc., et al.,
Defendants.

- - - - -

New York Marine and General
Insurance Company,
Third-Party Plaintiff-Appellant,

-against-

93 Bowery Holdings LLC,
Third-Party Defendant.

- - - - -

93 Bowery Holdings LLC,
Third-Party Plaintiff,

-against-

Tower Insurance Company of New York,
Third-Party Defendant-Appellant,

Calabrese Associates, Inc.,
Third-Party Defendant.

_____

Mound Cotton Wollan & Greengrass, New York (Kevin F. Buckley of counsel), for Tower Insurance Company of New York, appellant-respondent/appellant.

Speyer & Perlberg, LLP, Melville (Gina M. Fortunato of counsel), for New York Marine and General Insurance Company, respondent-appellant/appellant.

Lerner, Arnold & Winston, LLP, New York (Johnathan C. Lerner of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered May 21, 2014, which denied defendant insurers' motions for summary judgment dismissing the complaint, unanimously modified, on the law, to grant defendant Tower Insurance Company of New York summary judgment dismissing the complaint, the third-party complaint and all cross claims as against it, and otherwise affirmed, without costs.

Even if issues of fact exist as to whether the subject loss occurred during the Tower policy period, a material misrepresentation made at the time an insurance policy is being procured may lead to a policy being rescinded and/or avoided (*see Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD3d 412 [1st Dept 2009]; Insurance Law § 3105). Even innocent misrepresentations are sufficient to allow an insurer to "avoid the contract of insurance or defeat recovery thereunder" (*Process Plants Corp. v Beneficial Natl. Life Ins. Co.*, 53 AD2d 214, 216-217 [1976], *affd* 42 NY2d 928 [1977]; *East 115th St. Realty Corp. v Focus & Struga Bldg. Devs. LLC*, 27 Misc 3d 1206[A] [Sup

Ct, NY County 2010], *affd* 85 AD3d 511 [1st Dept 2011]), and where, such as here, an affidavit from Tower's underwriter and excerpts from its underwriting guidelines establish that the insurer would not have issued the policy if it had known the true nature of the risk, a material misrepresentation warranting policy rescission can be determined as a matter of law (*see Chester v Mutual Life Ins. Co. of N.Y.*, 290 AD2d 317, 317 [1st Dept 2002]).

On May 27, 2009, the New York City Department of Buildings (DOB) engineer observed the "unsafe/collapse prone" condition of the subject premises, and on June 2, 2009, the DOB issued its first Emergency Declaration in regard to that inspection. Plaintiff nonetheless submitted an insurance application to Tower that failed to mention this loss on June 17, 2009, and then remained silent until the Tower policy was issued on July 12, 2009. At a minimum, plaintiff was aware of this damage no later than July 2, 2009, when it submitted the property loss notice to New York Marine (its former insurer). Tower's insurance application unequivocally asked for loss history; thus, plaintiff was under a duty to notify Tower as to this loss (*Millar v New Amsterdam Cas. Co.*, 248 AD 272, 277 [4th Dept 1936]), and it failed to do so.

Summary judgment was properly denied as to New York Marine, as the affidavit of its own expert attested to the fact that additional information must be obtained through discovery to determine the exact time at which the loss occurred.

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14434 S. Timothy Ball, Index 101535/12
Plaintiff-Respondent,

-against-

Richard L. Brodsky, Esq.,
Defendant-Respondent,

Law Office of Peter Wessel,
PLLC, et al.,
Defendants-Appellants,

Gary B. Pillersdorf and Associates
P.C., et al.,
Defendants.

_____

Citak & Citak, New York (Donald L. Citak of counsel), for appellants.

S. Timothy Ball, New York, respondent pro se.

Richard L. Brodsky, White Plains, respondent pro se.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered February 27, 2014, which denied defendants Law Office of Peter Wessel, PLLC and Peter Wessel, Esq.'s motion for partial summary judgment, unanimously affirmed, without costs.

The Wessel defendants are correct that the May 1, 2002 letter agreement that defendant Richard L. Brodsky, Esq. sent to Peter Wessel, Esq. (Mr. Wessel) is a valid contract, although Mr.

Wessel did not sign it (*see e.g. Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 368 [2005]). However, there is an issue of fact whether Brodsky and Mr. Wessel modified that agreement by their conduct (*see Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]). While the document states, "This letter covers all matters between us, both existing and in the future, unless modified by written agreement," Mr. Wessel admitted that there were instances when he and Brodsky departed from the terms of the letter agreement, although the agreement was never modified in writing.

The Wessel defendants contend that, even if they and Brodsky occasionally departed from the May 2002 letter agreement in that Brodsky sometimes received *less* than 21.25% of what they received, there was never an instance when he received *more* than 21.25%. However, they made this argument for the first time in their reply; Brodsky should have an opportunity to give examples (if any) of receiving more than 21.25% (*see generally Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]). Moreover, there is a dispute as to the amount on which the Wessel defendants calculate 21.25%.

Brodsky asserted a cross claim against the Wessel defendants, alleging that he and they agreed to split certain

legal fees 50-50. In a prior order, the court struck this cross claim due to Brodsky's failure to provide discovery. The Wessel defendants contend that law of the case means that Brodsky may not argue in opposition to their summary judgment motion that he and they agreed to split the fees 50-50. This argument is unavailing, because the merits of Brodsky's cross claim were never litigated (*see Roddy v Nederlander Producing Co. of Am., Inc.*, 73 AD3d 583, 585 [1st Dept 2010], *revd on other grounds* 15 NY3d 944 [2010]).

We have considered Brodsky's requests to transfer this case to Westchester County and to dismiss the Wessel defendants' alleged cross claim against him and find them unavailing.

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14435 The People of the State of New York, Ind. 2051/12
Respondent,

-against-

Curtis Jones,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Denis Boyle, J.), rendered on or about November 20, 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: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14436 Efren Meralla, Index 24347/98
Plaintiff-Respondent,

-against-

Stephen M. Goldenberg,
Defendant-Appellant.

_____

Stephen M. Goldenberg, Hewlett, appellant pro se.

Friedman & Moses, LLP, New York (Steven B. Dorfman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered September 12, 2013, which, to the extent appealed from as limited by the briefs, denied defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this legal malpractice action, plaintiff alleges that defendant attorney's failure to move to sever plaintiff's criminal trial from that of a codefendant, and to move to exclude certain evidence based on the collateral estoppel effect of a prior trial in which plaintiff was acquitted of a related crime, caused him to be convicted and incarcerated. Plaintiff served more than six years in prison before this Court overturned his conviction based on defendant's ineffective assistance of counsel

(*People v Meralla*, 228 AD2d 160 [1st Dept 1996], *lv denied* 88 NY2d 989 [1996]). After the prosecution determined that plaintiff could not be retried, he commenced this action to recover damages against defendant.

The motion court correctly concluded that plaintiff did not waive his claim for pecuniary damages, as the ambiguous colloquy during plaintiff's deposition did not amount to "an intentional relinquishment" of his right to assert such damages (*EchoStar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 617 [1st Dept 2010] [internal quotation marks omitted]). After the deposition, plaintiff continued to respond to discovery requests related to his employment history, and the parties did not execute a stipulation evidencing plaintiff's withdrawal of his claim for pecuniary damages. Further, plaintiff should not be equitably estopped from asserting a claim for pecuniary damages, since defendant failed to demonstrate that he detrimentally relied on plaintiff's purported waiver (*see generally River Seafoods, Inc. v JPMorgan Chase Bank*, 19 AD3d 120, 122 [1st Dept 2005]).

As this Court held on the appeal overturning plaintiff's conviction, defendant's delay in moving to exclude evidence based on collateral estoppel, and failure to seek a severance before the second trial, "amounted to fundamentally flawed, less than

meaningful representation" and "substantially impaired the defense" (*Meralla*, 228 AD2d at 161). Accordingly, drawing all inferences in favor of plaintiff as the nonmoving party (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 545 [1st Dept 2011]), an issue of fact exists as to whether defendant's alleged negligence was the proximate cause of plaintiff's alleged injuries (*see Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 9 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009]). It cannot be said, as a matter of law, that the outcome of the matter would have been substantially the same even if defendant had made the motions before trial and in writing (*see id.*).

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14437-
14438-
14439-
14440-
14441 Index 382040/110

71 Clinton Street Apartments LLC,
as assignee of People's United Bank,
as successor by merger to Bank of
Smithtown,
Plaintiff-Respondent,

-against-

Ilana Industrial LLC, et al.,
Defendants-Appellants,

Park Avenue Funding, LLC, et al.,
Defendants.

_____

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for appellants.

Pryor Cashman LLP, New York (Todd E. Soloway of counsel), for respondent.

_____

Amended judgment of foreclosure, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered July 15, 2013, in favor of plaintiff, unanimously affirmed, without costs. Appeal from the prior judgment of foreclosure, entered March 1, 2013, and from orders, entered on or about January 19, 2012, July 13, 2012, September 20, 2012, and July 15, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the amended judgment.

Plaintiff presented a prima facie right to foreclosure by producing the mortgage documents and undisputed evidence of defendant's nonpayment, and, in opposition, defendants failed to establish the existence of a triable issue regarding their affirmative defenses (*see e.g. Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]). Nothing in the record casts doubt on whether the note and mortgage were validly assigned to plaintiff (*see 71 Clinton St. Apts. LLC v 71 Clinton Inc.*, 114 AD3d 583 [1st Dept 2014]).

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

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14442 Helena Wong, Index 104404/09
Plaintiff-Appellant, 590758/09

-against-

2669 Owners Ltd.,
Defendant,

Hsia Chao Yu,
Defendant-Respondent.

[And a Third-Party Action]

_____

Bedford Mantia, LLP, New York (Cyril K. Bedford of counsel), for appellant.

Law Office of Amy Y. Chen, PLLC, Flushing (Amy Y. Chen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol Edmead, J.), entered June 11, 2013, which granted defendant/third-party plaintiff's CPLR 4404(b) posttrial motion to the extent of vacating an order and judgment (one paper), same court and Justice, entered March 14, 2013, ordering a new trial, and directing the reassignment of the matter to a different IAS Part, unanimously affirmed, without costs.

The motion court properly exercised its discretion in setting aside the order and judgment (*see* CPLR 4404[b]; *see also Stinton v Robin's Wood, Inc.*, 45 AD3d 203, 207 [2d Dept 2007], *lv*

denied 10 NY3d 708 [2008]). The court's evaluation of the parties' credibility was based on a mischaracterization of their testimony at trial, and therefore its decision to order a new trial will not be disturbed (*see Saperstein v Lewenberg*, 11 AD3d 289 [1st Dept 2004] [judgment rendered after a bench trial may be disturbed if the court's conclusions, including its credibility determinations, cannot be supported by any fair interpretation of the evidence]).

To the extent plaintiff challenges Justice Edmead's decision to recuse herself, the Justice's decision was a provident exercise of her discretion (*see Matter of Murphy*, 82 NY2d 491, 495 [1993]; *see also People v Grasso*, 49 AD3d 303, 306-307 [1st Dept 2008]).

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

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14446 Glenda Stoller, Index 114510/10
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Fay Ng of counsel), for appellant.

Alexander J. Wulwick, New York, for respondent.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered June 24, 2013, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint based on lack of prior written notice of a defect, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The City met its prima facie burden of demonstrating that it did not receive prior written notice of the crosswalk defect that plaintiff identified as the cause of her fall, and that there was no written acknowledgment of that defect (see Administrative Code of City of NY § 7-201[c][2]). The City's records of citizen reports of two potholes in the area and FITS reports of repairs

made to potholes in front of a building on Canal Street did not provide the City with prior written notice of the particular defect in the crosswalk where plaintiff fell (*see Haulsey v City of New York*, 123 AD3d 606 [1st Dept 2014]; *Boniello v City of New York*, 106 AD3d 612 [1st Dept 2013]). Nor did the FITS reports, which indicate that seven potholes in the area were made safe, constitute written acknowledgment of another defective condition that needed repair. "The awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident" (*Roldan v City of New York*, 36 AD3d 484, 484 [1st Dept 2007]).

In opposition, plaintiff did not demonstrate that any exception to the statutory notice requirement applies (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). The opinion of plaintiff's expert that the City's repair crew should have seen and repaired the pothole that caused her accident is

insufficient to raise an issue of fact because actual or constructive notice of a defect does not satisfy the statutory notice requirement (*Amabile v City of Buffalo*, 93 NY2d 471, 475-476 [1999]).

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14447 The People of the State of New York, Ind. 1623/09
Respondent,

-against-

Jeffrey Fernandez,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Laura A. Ward, J.), entered on or about October 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 People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level two adjudication. Defendant's course of conduct supports the inference that he established a relationship with a child for the purpose of victimization (*see People v Katz*, 121 AD3d 593 [1st Dept 2014]). The risk factor for a history of drug abuse was established by a combination of

defendant's admissions and criminal history (*see People v Harden*, 60 AD3d 486 [1st Dept 2009], *lv denied and dismissed* 12 NY3d 899 [2009]).

We also find no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). We do not find that there were any overassessments of points, and the mitigating factors cited by defendant are outweighed by the seriousness of the underlying crime.

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14448N Amir M.C. W., an Infant Index 16849/07
by his Mother and Natural Guardian,
Carlene C. F., et al.,
Plaintiffs-Respondents,

-against-

2343, Inc.,
Defendant-Appellant.

_____

Marshall Conway & Bradley, P.C., New York (Robert J. Conway of counsel), for appellant.

Fitzgerald Law Firm, P.C., Yonkers (John M. Daly of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Faviola A. Soto, J.), entered on or about October 3, 2013, which denied defendant's motion to vacate the default judgment entered against it, unanimously affirmed, without costs.

Defendant failed to set forth a reasonable excuse for its default in appearance at the inquest. The record shows, with a valid affidavit of service, that defendant and its property manager were served with an order dated October 28, 2011, which adjourned the inquest to December 14, 2011. On that date the inquest went forward, and defendant's conclusory assertion that its failure to appear was due to non-receipt of the October 2011 order fails to rebut the presumption that plaintiff's attorney

properly served the order, and that it was received (*see Matter of Ariel Servs., Inc. v New York City Envtl. Control Bd.*, 89 AD3d 415 [1st Dept 2011]).

Since defendant failed to set forth a reasonable excuse for its default, a necessary precondition to relief under CPLR 5015(a)(1), its motion to vacate the judgment must be denied, regardless of whether it presented a potentially meritorious defense (*see M.R. v 2526 Valentine LLC*, 58 AD3d 530, 532 [1st Dept 2009]).

We have considered defendant's remaining arguments, including its reliance on CPLR 317, and find them unavailing.

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

ENTERED: MARCH 5, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Clark, Kapnick, JJ.

14449 In re Titus McBride, Ind. 1811/14
[M-93] Petitioner,

-against-

Hon. Jill Konviser,
Respondent.

_____

Titus McBride, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Angel M. Guardiola II of counsel), for respondent.

_____

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

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

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

ENTERED: MARCH 5, 2015

CLERK

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

13527 In re The Bank of New York Mellon, etc., et al.,
Petitioners.
- - - - -
The Bank of New York Mellon, etc.,
Petitioner-Appellant-Respondent,

Blackrock Financial Management Inc., et al.,
Intervenors-Petitioners-Appellants-Respondents,

-against-

The Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago, et al.,
Respondents-Respondents-Appellants,

Triax Prime CDO 2006-1, Ltd., et al.,
Respondents,

The Knights of Columbus,
Intervenor-Respondent.
- - - - -
The American Bankers Association and the New York Bankers Association,
Amici Curiae.

Index 651786/11

_____

Mayer Brown LLP, New York (Matthew D. Ingber of counsel), for The Bank of New York Mellon, appellant-respondent.

Gibbs & Bruns LLP, Houston, TX (Kathy D. Patrick of the bar of the State of Texas, admitted pro hac vice, of counsel), for intervenors-appellants-respondents.

Scott+Scott, LLP, New York (Beth A. Kaswan and William C. Fredericks of counsel), for The Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago, City

of Grand Rapids General Retirement System, City of Grand Rapids Police and Fire Retirement System and The Westmoreland County Employee Retirement System, respondents-appellants.

Halperin Battaglia Raicht, LLP, New York (Donna H. Lieberman of counsel), for United States Debt Recovery VIII, LP and United States Debt Recovery X, LP, respondents-appellants.

Federman & Sherwood, New York (William B. Federman of counsel), for American Fidelity Assurance Company, respondent-appellant.

Alston & Bird LLP, New York (Michael E. Johnson of counsel), for amici curiae.

_____

Order and judgment (one paper), Supreme Court, New York County (Barbara R. Kapnick, J.), entered February 21, 2014, modified, on the law and the facts, to approve the settlement in all respects, including the aspect releasing the loan modification claims, and otherwise affirmed, 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.

13527
Index 651786/11

_____x

In re The Bank of New York Mellon, etc., et al.,
Petitioners.

- - - - -

The Bank of New York Mellon, etc.,
Petitioner-Appellant-Respondent,

Blackrock Financial Management Inc., et al.,
Intervenors-Petitioners-Appellants-Respondents,

-against-

The Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago, et al.,
Respondents-Respondents-Appellants,

Triax Prime CDO 2006-1, Ltd., et al.,
Respondents,

The Knights of Columbus,
Intervenor-Respondent.

- - - - -

The American Bankers Association and the New York Bankers Association,
Amici Curiae.

_____x

Cross appeals from the order and judgment (one paper), of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered February 21, 2014, in this special proceeding brought pursuant to CPLR article 77, approving the settlement agreement except to the extent it releases the loan modification repurchase claims.

Mayer Brown LLP, New York (Matthew D. Ingber, Christopher J. Houpt, Hannah Y.S. Chanoine, Michael Kimberly and Michael Rafield of counsel), and Dechert LLP, New York (James M. McGuire, Hector Gonzalez and Mauricio A. España, of counsel), for The Bank of New York Mellon, appellant-respondent.

Gibbs & Bruns LLP, Houston, TX (Kathy D. Patrick of the bar of the State of Texas, admitted pro hac vice, of counsel), and Warner Partners, P.C., New York (Kenneth E. Warner of counsel), for intervenors-appellants-respondents.

Scott+Scott, LLP, New York (Beth A. Kaswan, William C. Fredericks and Max R. Schwartz of counsel), for The Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago, City of Grand Rapids General Retirement System, City of Grand Rapids Police and Fire Retirement System and The Westmoreland County Employee Retirement System, respondents-appellants.

Halperin Battaglia Raicht, LLP, New York (Donna H. Lieberman and Scott A. Ziluck of counsel), for United States Debt Recovery VIII, LP and United States Debt Recovery X, LP, respondents-appellants.

Federman & Sherwood, New York (William B. Federman of counsel), for American Fidelity Assurance Company, respondent-appellant.

Alston & Bird LLP, New York (Michael E. Johnson and Alexander S. Lorenzo of counsel), for amici curiae.

SAXE, J.

This appeal requires us to consider the nature and extent of the scrutiny the court may properly apply to a trustee's settlement of claims of misconduct on the part of the originator and servicer of residential mortgage backed securities. Petitioner Bank of New York Mellon (BNYM), as trustee, commenced this proceeding pursuant to CPLR Article 77, seeking court approval for a settlement of claims brought on behalf of a large group of certificateholders against the originator and servicer of the residential mortgage backed securitization trusts for which BNYM serves as trustee. Some other certificateholders opposed the settlement, asserting a number of failures with regard to the Trustee's handling of the negotiation and with regard to the proposed settlement. We conclude that the Trustee properly exercised its discretion in its settlement of all the claims.

Background

Between 2004 and 2008, approximately 1.6 million residential mortgage loans were bundled together into securities pursuant to Pooling and Servicing Agreements (PSAs) or Sale and Servicing Agreements (collectively, Governing Agreements), and held in 530 residential mortgage-securitization trusts, with BNYM serving as Trustee. These mortgage-backed securities were originated and

sold by Countrywide Home Loans, then underwritten and sold to investor-certificateholders. Countrywide serviced the loans until it was acquired by Bank of America (BofA) in July 2008.

On October 18, 2010, following the collapse in the housing market and the decline in the value of mortgage-backed securities, a Notice of Non-Performance was issued to Countrywide and Bank of New York by a large group of the certificateholders, referred to here as the Institutional Investors,[1] who collectively hold more than $34 billion in certificates in the Trusts, representing 24% of the face value of all such certificates.

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[1] The Institutional Investors, intervenors-petitioners here, consist of: BlackRock Financial Management Inc.; Kore Advisors, L.P.; Maiden Lane, LLC; Metropolitan Life Insurance Company; Trust Company of the West and affiliated companies controlled by The TCW Group, Inc.; Neuberger Berman Europe Limited; Pacific Investment Management Company LLC; Goldman Sachs Asset Management, L.P.; Teachers Insurance and Annuity Association of America; Invesco Advisors, Inc.; Thrivent Financial for Lutherans; Landesbank Baden-Wuerttemberg; LBBW Asset Management (Ireland) plc, Dublin; ING Bank fsb; ING Capital LLC; ING Investment Management LLC; Nationwide Mutual Insurance Company and its affiliated companies; AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio; Federal Home Loan Bank of Atlanta; Bayerische Landesbank, Prudential Investment Management, Inc.; and Western Asset Management Company.

The Settlement

Beginning in November 2010, the Institutional Investors, with the participation of the Trustee and its retained counsel, engaged in negotiations with Countrywide and BofA to reach a settlement of the claims raised in their Notice of Non-Performance for the benefit of the Trusts. Ultimately, with the assistance and participation of the Trustee, the Institutional Investors arrived at a proposed settlement agreement with BofA and Countrywide, dated June 28, 2011. Under the settlement, BofA and Countrywide agreed to: (1) pay $8.5 billion into the Trusts, allocated pursuant to an agreed-upon methodology that accounts for past and expected future losses associated with the loans in each Trust; (2) implement improvements in mortgage servicing procedures, including transfer of high-risk loans to specialty subservicers, which improvements could not have been achieved in litigation, and were valued at $3 billion; and (3) indemnify the Trusts against certain losses caused by an alleged failure by the seller to deliver mortgage loan files in the proper form.

The Trustee then commenced this special proceeding under CPLR Article 77, for court approval of the settlement agreement, and the Institutional Investors made a motion to intervene as co-petitioners. Following a worldwide notice program, the

Objectors,[2] a group of certificateholders who opposed the settlement, were permitted to intervene. A lengthy hearing was then held.

In opposition to the settlement, the Objectors argued that the Trustee had acted unreasonably, in bad faith, and outside its discretion by (1) failing to represent Certificateholders' interests during settlement negotiations and placing its own interests above those of Certificateholders, focusing on its own liability exposure; (2) retaining conflicted counsel who immediately focused on a settlement without properly investigating the loans or evaluating the strengths and weaknesses of the various claims; (3) relying on faulty assumptions to estimate a low settlement range for the claims; and (4) failing to insist on a loan file review. Additionally, some of the Objectors specifically argued that the seller or servicer of the Trusts' loans had breached their obligation under the PSAs to repurchase modified loans from the Trusts, and that

[2] The Objectors consist of the Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago, the City of Grand Rapids General Retirement System, and the City of Grand Rapids Police and Fire Retirement System [the "Public Pension Funds"], United States Debt Recovery VIII, LP and United States Debt Recovery X, LP [the "US Debt Recovery Entities"], and American Fidelity Assurance Company ["American Fidelity"]. The AIG Entities and the Triaxx Entities that appear as respondents in the caption have withdrawn their appeals.

the settlement improperly releases those claims without the necessary scrutiny or assessment of their value.

While Supreme Court approved the bulk of the settlement, and rejected the claims faulting the Trustee's conduct, it agreed with those Objectors who took issue with the settlement's release of claims arising out of the alleged failure to repurchase modified loans. The court held that the Trustee had acted "unreasonably or beyond the bounds of reasonable judgment" by failing to investigate the potential worth or strength of those claims before releasing them. Specifically, the court asserted that the Trustee's attorney, Jason Kravitt, had not shown that a factual assessment had been made of the value of those claims. It disapproved of Kravitt's reliance on the reasoning that (1) BofA had a strong argument that the language in the PSAs did not require the repurchase of loans modified for loss mitigation purposes; (2) since loss mitigation modifications were favored by both state and federal governments, it did not think BofA would agree to repurchase the loans that were modified on that basis; and (3) the claim for compensation based on the failure to repurchase the modified loans was a weak one for negotiation purposes, and it was a better negotiation strategy to focus on the strong contentions. In rejecting the Trustee's foregoing reasoning, the court explained that the submissions lacked

evidentiary material supporting the Trustee's interpretation of the language in the PSAs regarding the repurchase obligation for modified loans, particularly noting that the Trustee had not retained an expert for this issue.

Discussion

The ultimate issue for determination here is whether the trustee's discretionary power was exercised reasonably and in good faith (*see Haynes v Haynes*, 72 AD3d 535, 536 [1st Dept 2010]). It is not the task of the court to decide whether we agree with the Trustee's judgment; rather, our task is limited to ensuring that the trustee has not acted in bad faith such that his conduct constituted an abuse of discretion (*id.*).

We agree with Supreme Court that the Trustee did not abuse its discretion or act unreasonably or in bad faith in embarking on the settlement here. The Trustee acted within its authority throughout the process, and there is no indication that it was acting in self-interest or in the interests of BofA rather than those of the certificateholders.

Importantly, "if a trustee has selected trust counsel prudently and in good faith, and has relied on plausible advice on a matter within counsel's expertise, the trustee's conduct is significantly probative of prudence" (Restatement [Third] of Trusts § 77, Comment b[2]). While reliance on the advice of

counsel may not always be the end of the analysis regarding a claimed breach of trust -- it is possible for a trustee to specifically seek out legal advice that would support the trustee's desired course of conduct, or there may be other circumstances establishing that it was unreasonable to follow the legal advice (*id.*) -- a party challenging the decisions of a trustee who followed the advice of a highly-regarded specialist in the relevant area of law can prevail only upon a showing that, based on the particular circumstances, the reliance on such counsel's assessment was unreasonable and in bad faith. Court approval of the settlement does not require that the court agree with counsel's judgment or assessment; all that is required is a determination that it was reasonable for the Trustee to rely on counsel's expert judgment.

Supreme Court correctly rejected the arguments that the Trustee's retained law firm, Mayer Brown, suffered from a disabling conflict of interest such that the firm could not render valid legal analysis and advice. The nature of the asserted conflict was disclosed and waived, and had no impact on the propriety of the advice on which the Trustee relied.

Indeed, reliance on the advice of lead counsel, Jason Kravitt, was eminently reasonable. Kravitt was a leading expert in the field of securitization, and he and his team of

experienced securitization lawyers thoroughly reviewed the relevant governing agreements. Ultimately, they reasonably embraced a negotiating strategy that did not specifically seek recovery for the claimed failure to repurchase modified loans for any of the 530 Trusts. Viable legal reasoning led to the conclusion that the PSAs did not appear to require repurchase by the seller of loans that the seller or servicer modified for loss mitigation purposes -- the only type of modification actually performed on the mortgage loans in the Trust. Moreover, it was reasonable to suggest that BofA was unlikely to agree to repurchase such loans because that type of modification was being encouraged by government policy in the foreclosure crisis. Nor was it unreasonable for Kravitt to recommend against pressing what he perceived to be a weak argument regarding the claimed repurchase obligation for loan modifications, since doing so could detract from efforts to press the stronger claims for breach of warranty and servicing obligations. Indeed, the release of weak claims in the context of comprehensive settlements may be a viable and reasonable negotiation strategy (*see e.g. In re Triac Cos., Inc.*, 791 A2d 872, 876, 878 [Del Ch 2001]; *Manacher v Reynolds*, 165 A2d 741, 747 [Del Ch 1960]); here, there was reason to suggest that declining to press the weak claims would not reduce the total amount of money the

Trustee would ultimately achieve in pressing the stronger claims.

In evaluating the elements of the settlement, the Trustee properly obtained and considered the opinions of several highly respected outside experts, including not only the assessment of the money value of the claims, but assessments of Countrywide's ability to pay -- estimated by experts as a maximum of $4.5 billion -- and the likelihood of success of BofA's defense against a claim of successor liability, a claim which experts warned had never been successfully applied in such a situation. Kravitt's decision not to have an outside expert evaluate the legal merits of the loan modification claims does not undermine his assessment. Retained legal counsel can properly assess legal issues and nothing in the Trustee's retention, or non-retention, of experts warrants the rejection of counsel's assessment and advice or the Trustee's ultimate decision to accept the terms of the negotiated settlement. It is also worth noting that it would have been unreasonable to decline to enter into the settlement with the expectation of obtaining a much greater judgment after years of litigation, while knowing that attempts to enforce such a judgment would likely result in the actual collection of a lesser sum than that offered in the proposed settlement.

In rejecting the portion of the settlement that released the loan modification repurchase claims, and in finding that the

Trustee lacked the necessary basis for its assessment that the loan modification claims were too weak to warrant pursuing in negotiating the global settlement, Supreme Court disregarded the standard of deference due to a trustee's exercise of discretionary judgment. Indeed, in doing so the court was, in effect, improperly imposing a stricter and far less deferential standard, one that allows a court to micromanage and second guess the reasoned, and reasonable, decisions of a Trustee. We therefore find that the Trustee did not abuse its discretion in deciding to release the claims based on the failure to repurchase the modified mortgages, and we approve the settlement in its entirety.

Accordingly, the order and judgment (one paper), of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered February 21, 2014, in this special proceeding brought pursuant to CPLR article 77, approving the settlement agreement except to the extent it releases the loan modification repurchase claims, should be modified, on the law and the facts, to approve the

settlement in all respects, including the aspect releasing the loan modification claims, and otherwise affirmed, without costs.

All concur.

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

ENTERED: MARCH 5, 2015

CLERK