Acosta, P.J., Kapnick, Moulton, González, JJ.

11053 The People of the State of New York, Ind. 2344N/11
Respondent, 3493/11

-against-

Salvador Fernandez,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), entered on or about October 18, 2018, which denied defendant's CPL 440.10 motion to vacate a judgment rendered February 16, 2014, unanimously reversed, on the law, and the matter remanded for a hearing on defendant's claim of ineffective assistance of counsel and a decision de novo on the motion.

In our decision on defendant's direct appeal we held that the record before us was "insufficient to establish that any of counsel's alleged deficiencies in handling potential suppression issues was a product of his misunderstanding of the law. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal" (*People v Fernandez*, 158 AD3d 462, 463 [1st Dept 2018]).

Defendant thereafter filed a CPL 440.10 motion, which was supported by motion counsel's affirmation detailing his numerous attempts by phone and email to obtain a statement from trial

counsel regarding his efforts to obtain a hearing for the purpose of suppressing certain evidence. Trial counsel was unresponsive and ultimately did not submit an affidavit.

Under these circumstances, we find that the motion court should have granted a hearing to enable the court to have subpoenaed trial counsel to testify or otherwise present evidence as to whether there were strategic or other reasons for his

decisions with regard to the suppression proceedings (*see People v Martin*, 179 AD3d 428 [1st Dept 2020]; *People v Mebuin*, 158 AD3d 121 [1st Dept 2017]; *People v Stewart*, 151 AD3d 478 [1st Dept 2017]).

The Decision and Order of this Court entered herein on February 18, 2020 is hereby recalled and vacated (*see* M-1296 decided simultaneously herewith).

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

ENTERED: JULY 30, 2020

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Singh, JJ.

10649 Cinthia Alcantara-Pena, Index 302075/12
Plaintiff-Appellant,

-against-

Christine Shanahan,
Defendant,

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

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (John R. Higgitt, J.), entered on or about December 19, 2018,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 18, 2020,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JULY 30, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11130-
11130A International Asbestos Removal, Inc., Index 652494/12
Plaintiff-Respondent,

-against-

Beys Specialty, Inc., et al.,
Defendants-Appellants.

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Milber Makris Plousadis & Seiden, LLP, Woodbury (Joseph J. Cooke of counsel), for appellants.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (Michael E. Greene of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward H. Lehner, J.H.O.), entered January 15, 2019, awarding plaintiff the principal amount of $588,166.63, unanimously modified, on the law and the facts, to reduce the award for removing vinyl asbestos floor tiles from $257,741.26 to $134,501.84 and the award for removing contaminated brick from $29,947.27 to $19,858.66, and to award defendant Beys Specialty, Inc. $85,261.27 on its counterclaim for backcharges, and otherwise affirmed, without costs. Appeal from order, same court and J.H.O., entered January 10, 2019, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The J.H.O. erred in finding that plaintiff is entitled to be paid for the installation of 103 interior decontamination chambers (decons) based on mutual mistake. Plaintiff never pleaded mutual mistake. The J.H.O. raised the issue sua sponte nearly one year after the trial, effectively precluding

defendants from offering evidence at trial to demonstrate its absence. In any event, plaintiff did not establish the requisite elements of mutual mistake.

However, the parties fully litigated their interpretations of the subcontract's provisions. The contractual language, relevant trial testimony and documentary evidence support the J.H.O.'s conclusion that plaintiff is entitled to be paid for the installation of the 103 decons under Section 4.1 of the subcontract, which applies to an "increase or decrease in the number of units of work" for work within the scope of the contract, as well as under Section 2.1, upon which the J.H.O. did not rely.

Contrary to defendants' argument, the additional 103 decons do not constitute "Extra Work" under the subcontract because under Section 2.1 "[t]he Contractor may at any time order an increase or decrease in the number of units of work and Subcontractor shall perform said increase or decrease as though originally included in the Work hereunder."

Sections 2.1 and 4.1 do not permit anyone other than the Contractor to order the increase in the number of units of work. The trial evidence establishes that Beys exercised this authority to order the additional 103 decons. While it is true that it was STV Construction, Inc. (STV), on behalf of the owner, the New York City Housing Authority (NYCHA), that first ordered plaintiff to revise its Asbestos Abatement Work Plans to incorporate

NYCHA's 504 Variance procedures, Beys then repeatedly directed plaintiff, explicitly and implicitly, to construct the decons.[1]

The trial evidence demonstrates that Beys engaged in conduct establishing that it ordered the additional decons under Sections 2.1 and 4.1 of the subcontract. Knowing that NYCHA required the additional decons in connection with the 504 Variance, Beys ordered plaintiff to "proceed with all filings without delay"; never directed plaintiff to stop providing the decons; and specifically ordered plaintiff, in writing, to install a number of them.

Unlike Section 8.1 of the subcontract (entitled "Change Orders"), neither Sections 2.1 nor 4.1 require Beys's written order to increase the number of units of work. Defendants unpersuasively argue that Section 8.1(h)'s requirement, that plaintiff receive a directive "signed by George Kougentakis or Anna Kougentakis" before performing extra work, applies to Sections 2.1 and 4.1. To the contrary, Sections 2.1 and 4.1 do not refer to any part of Article 8 and address quantity overruns while Article 8 addresses "Extra Work." Moreover, plaintiff's Estimate, which states that the plaintiff would obtain "THE WRITTEN APPROVAL OF THE CUSTOMER" is not a document that is incorporated into the subcontract under Section 1.1 and in any event is limited to situations involving "Extra Work."

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[1]The parties use the undefined term "504 Variance" to refer to NYCHA's plan to make its apartments handicapped accessible under Section 504 of the Rehabilitation Act of 1973.

The record shows that the award for removing multiple layers of vinyl asbestos floor tiles should be limited to the STV-approved amount, in view of the subcontract's "Unit Price" that is based on square feet and not cubic feet and plaintiff's refusal to submit a change order proposal, as STV requested. It shows further that the award for removing contaminated brick should be calculated as per the quantity on the August 12, 2012 sign-off sheet, rather than a 2013 change order between Beys and STV that reflected separate extra work performed directly by Beys. The record supports the counterclaim for an award of various backcharges to Beys resulting from defects or omissions in plaintiff's work. However, the record does not support Beys's counterclaim for delays in connection with plaintiff's exterior asbestos abatement work. Beys failed to demonstrate that any such delays were attributable to plaintiff's incompetence. We modify the judgment accordingly.

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

ENTERED: JULY 30, 2020

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

11684 Jairo Mazo, Index 161671/13
Plaintiff-Respondent, 595366/14

-against-

DCBE Contracting, Inc.,
Defendant-Respondent-Appellant,

Iconic Mechanical LLC,
Defendant-Appellant-Respondent.

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DCBE Contracting, Inc.,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Iconic Mechanical LLC,
Third-Party Defendant-Appellant-Respondent,

Harleysville Insurance Company of New York, et al.,
Third-Party Defendants-Respondents-Appellants.

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Milber Makris Plousadis & Seiden LLP, Woodbury (Sarah M. Ziolkowski of counsel), for appellant-respondent.

Kaufman Dolowich Voluck, LLP, Woodbury (Andrew Lipkowitz of counsel), for DCBE Contracting, Inc., respondent-appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Michael Guttman of counsel), for Harleysville Insurance Company of New York and Harleysville Worcester Insurance Company, respondents-appellants.

Law Office of Judah Z. Cohen, PLLC, Woodmere (Judah Z. Cohen of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered October 16, 2019, which, insofar as appealed from as limited by the briefs, denied defendant Iconic Mechanical LLC's motion for summary judgment dismissing the common-law negligence claim and all cross and third-party claims against it, denied

defendant DCBE Contracting, Inc.'s motions for summary judgment dismissing the common-law negligence claim as against it and on its common-law and contractual indemnification claims against Iconic and for summary judgment declaring that third-party defendants Harleysville Insurance Company of New York and Harleysville Worcester Insurance Company (together, Harleysville) have a duty to defend and indemnify it, denied Harleysville's cross motion to the extent it sought declarations that the primary policy Harleysville issued is excess to a policy issued by DCBE's insurer and that it has no duty to defend DCBE and granted the motion to the extent of declaring that Harleysville's duty to indemnify DCBE has not been triggered, unanimously modified, on the law, to grant Iconic's motion as to DCBE's common-law indemnification and contractual indemnification claims against it and deny DCBE's motion against Harleysville and grant Harleysville's cross motion to the extent of declaring that the Harleysville primary policy is excess to the primary coverage afforded to DCBE under its ProSight policy and thus, Harleysville has no duty to defend DCBE, and otherwise affirmed, without costs.

Neither Iconic nor DCBE are entitled to summary judgment dismissing plaintiff's common-law negligence claim or on DCBE's contribution claim against Iconic. Insofar as building staff retained the keys and controlled access to the mechanical room where plaintiff's accident occurred, any failure to lock the door

was not a dangerous condition created by Iconic or a proximate cause of the accident. Rather, the dangerous condition that caused the accident was the unsecured plywood left unattended without warnings (*see Farrugia v 1440 Broadway Assoc.*, 163 AD3d 452, 455-456 [1st Dept 2018], *appeal withdrawn* 32 NY3d 1168 [2019]). Contrary to Iconic's and DCBE's contentions that they owed no duty to plaintiff because they did not launch a force of harm (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]), issues of fact exist as to their roles in creating the dangerous condition, including whether the plywood was unfastened at Iconic's behest.

However, because any liability DCBE incurs will be based on its own negligence, Iconic is entitled to dismissal of DCBE's common-law indemnification claims, *(Chunn v New York City Hous. Auth.*, 83 AD3d 416, 417-418 [1st Dept 2011]), and DCBE's contractual indemnification claim.

Although DCBE is an additional insured under the Harleysville primary policy, Harleysville is entitled to a declaration that the Harleysville primary policy is excess to the primary coverage available to DCBE under DCBE's ProSight policy. The Harleysville primary policy provides that coverage under the additional insured endorsement shall be excess over any other available insurance unless the underlying written contract between DCBE and Iconic requires such additional insured coverage to be primary. The relevant subcontract between DCBE and Iconic

does not specifically require Iconic to procure *primary* insurance covering DCBE as an additional insured. Thus, by its plain terms, the Harleysville primary policy provides excess coverage to DCBE (*see Kel-Mar Designs, Inc. v Harleysville Ins. Co. of N.Y.*, 127 AD3d 662, 663 [1st Dept 2015]; *see also Endurance Am. Specialty Ins. Co. v Harleysville Worcester Ins. Co.*, 179 AD3d 625, 625-626 [1st Dept 2020]; accord *Poalacin v Mall Props., Inc.*, 155 AD3d 900, 911 [2d Dept 2017]). The ProSight policy issued to DCBE provides primary coverage except that such coverage shall be excess over any other *primary* insurance available to DCBE as an additional insured under another policy. Because the insurance available to DCBE as an additional insured under the Harleysville primary policy is excess, and DCBE has no other insurance available to it as an additional insured, the Harleysville primary policy is excess to the primary coverage available to DCBE under the ProSight policy. Accordingly, Harleysville has no duty to defend DCBE as an additional insured (*see Endurance Am. Spec. Ins.*, 179 AD3d at 626; *Poalacin*, 155 AD3d at 911). The facts in *Kel-Mar Designs* help illustrate this principle. In *Kel-Mar Designs*, the additional insured's own policy purported to be excess, and thus the excess insurance provisions in the two policies cancelled each other out and the insurers were required to share the defense costs as primary co-insurers (*see Kel-Mar Designs, Inc.*, 127 AD3d at 663). Here, however, DCBE's own insurance policy with ProSight purports to be

primary, not excess.

Based on the foregoing, Harleysville is entitled to a declaration that it has no duty to defend DCBE as an additional insured under the Harleysville primary policy. Harleysville

remains potentially liable to indemnify DCBE as an excess insurer, depending on the resolution of plaintiff's claims below.

M-1252 - *Jairo Mazo v. DCBE Contracting Inc., et al. [and a third-party action]*

Motion to stay trial pending determination of the appeal denied as academic.

M-1252-A - *Jairo Mazo v. DCBE Contracting Inc., et al. [and a third-party action*]

Motion to file a "replacement" or supplemental brief denied.

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

ENTERED: JULY 30, 2020

CLERK